

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

(willing to accept service by e-mail)

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I. INTRODUCTION

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II. ARGUMENT

OCC filed an initial brief to explain why the PUCO should reject the settlement and adopt OCC's recommendations. Duke, the PUCO Staff, and certain settling and non-opposing parties filed initial briefs arguing that the settlement satisfies the PUCO's three-part settlement test.¹ They are wrong. These parties essentially argue that the PUCO should approve the settlement because: (1) Duke held settlement meetings where OCC was invited to participate;² (2) the settlement gives Duke a lower rate increase than what was initially requested in its application;³ and (3) OCC is the only party to oppose the settlement.⁴ These arguments fall short of the PUCO's standards for approving settlements.

A. The settlement lacked the serious bargaining needed to meet the PUCO's test, including a lack of serious bargaining with OCC, the only party that represents the broad consumer interests of *all* residential consumers who are allocated 92.4% of Duke's rate increase under the settlement.

The parties argue that the settlement satisfies the first prong of the PUCO's three-part test to evaluate settlements. It doesn't. The settlement lacked the serious bargaining needed to meet the PUCO's test, including a lack of serious bargaining with OCC (the only party that represents the broad consumer interests of *all* residential consumers who are allocated 92.4% of Duke's rate increase under the settlement). Note that this

¹ Parties filing initial briefs include Duke, the PUCO Staff, the Ohio Manufacturers Association Energy Group ("OMA-EG") and the Kroger Co. ("Kroger") (filing jointly), Ohio Energy Group ("OEG"), Interstate Gas Supply ("IGS") and Retail Energy Supply Association ("RESA") (filing jointly), Walmart, Inc. ("Walmart"), and the City of Cincinnati. OMA-EG and Kroger did not sign in support of the settlement but agreed not to oppose.

² See Duke Brief at 11.

³ See Duke Brief at 13-16; OMA-EG/Kroger Brief at 6-7, 10, 14-15.

⁴ See e.g., Duke Brief at 3-4; OMA-EG/Kroger Brief at 10.

allocation issue (that disfavored residential consumers) was not a heavy lift for bargaining by Duke, because the allocations do not cost shareholders any money.

And the major issue of allocations for increased charges to residential consumers was not a priority (or even an issue) for other interests claimed by Duke to be residential. For example, CUB Ohio's objections to the Staff Report were focused on environmental interests and not consumer interests in ratemaking. And PWC did not file objections to the Staff Report at all.

The settlement fails the first prong of the PUCO's three-part settlement test.

- 1. Duke leveraged its superior and unfair bargaining power to get various settling parties to agree to allocate 92.4% of Duke's rate increase to residential consumers while refusing to include OCC's proposals to protect all residential consumers in Duke's service territory.**

Duke, the PUCO Staff, industrial and manufacturing business parties, and other settling (and non-opposing) parties agreed to allocate 92.4% of Duke's \$23.1 million rate increase to residential consumers (and to spare business customers). That was without serious bargaining on OCC's position and on other OCC proposed consumer protections for adequate reliability of service, bill-payment assistance for at-risk people, protections regarding electricity marketing, etc. Duke leveraged its superior bargaining power to accomplish this result. As a result, the settlement is not the product of serious bargaining.

The settling parties argue that the first prong of settlement test has been satisfied simply because OCC participated in settlement negotiations. However, the fact that OCC attended and participated in settlement negotiations is not (and cannot be) an automatic indicator that serious bargaining occurred.

Duke, the PUCO Staff, and parties representing business customers like Ohio Manufacturers' Association Energy Group, Ohio Energy Group, Kroger and Walmart

(that are allocated *less than 8%* of Duke's rate increase under the settlement) rejected OCC's proposals to help protect residential consumers who are allocated the bulk of Duke's agreed-to and excessive rate increase.

As explained in OCC's brief⁵ and below, OCC advocated for a rate *decrease*.⁶ *No other settling party with a residential consumer interest (or claimed residential interest) appeared to even have a prepared litigation case on the rate decrease and the allocations ratemaking issues – i.e., revenue requirement and rate design issues.*

For example, CUB Ohio's objections to the Staff Report, which frame a party's issues, were essentially *environmental* advocacy issues *and not consumer advocacy issues like the ratemaking and reliability issues* that OCC was prepared to litigate for consumers. Per R.C. 4928.02(L), OCC also advocated for bill payment assistance for all the at-risk consumers in Duke's service territory (and not just those for Cincinnati as Cincinnati bargained for under the settlement). And OCC advocated for a convenient opt-out feature on Duke's website enabling all consumers to easily opt-out of having their personal information shared with marketers. Also, OCC advocated for aggregate (shadow) billing data to provide consumers with information about how much Duke's consumers have saved when they take electric service through Duke's standard service offer. The result is a glaring absence of anything in the settlement related to OCC's bona fide consumer recommendations.

Duke's lack of serious consideration of OCC's proposals illustrates the unequal bargaining power inherent in the PUCO's settlement process. With its superior

⁵ OCC Brief at 3, 28.

⁶ OCC Brief at 11-16.

bargaining power, Duke had the advantage to bargain with narrow interests and environmental interests that Duke heralds as residential consumer interests. But those parties were not positioned to advocate for broad protections for all Duke consumers.

Note that serious bargaining with broad-interest consumer advocacy (through OCC) would have cost Duke's shareholders more money than bargaining with narrow interests. That further explains the result.

The PUCO should reject claims of serious bargaining that are based on OCC having a "seat at the table"⁷ during settlement negotiations. That seat means little where the utility is empowered in the settlement process to leverage its superior bargaining power to the detriment of its residential consumers.

In this regard, there are virtually no settlements submitted to the PUCO (unfortunately) where the utility is not a party. So Duke can bargain basically as an essential party for a settlement – which undercuts serious bargaining.

And, as noted, Duke's ability to obtain a settlement through limited bargaining with parties having narrow residential interests (and not even necessarily having consumer ratemaking interests as distinguished from *environmental* interests) works for Duke. The result is much less costly to Duke's shareholders. (As stated, the allocations issue that Duke settled is not a steep climb for Duke as it does not cost Duke any money.)

For the benefit of all residential consumers in a utility's service area, the PUCO needs to put more teeth into its existing standards. Or it needs to improve the standards such as with the first test in the standards.

⁷ IGS/RESA Brief at 4.

Notably, former PUCO Commissioner Cheryl Roberto previously wrote in a separate opinion about the fallacy of relying on the PUCO's settlement process when a utility has superior bargaining power. With regard to a settlement of a FirstEnergy electric security plan ("ESP"), Commissioner Roberto wrote:

In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission.⁸

The instant case regarding Duke's rate increase, while not involving an electric security plan that Commissioner Roberto wrote about, has a similar unfair dynamic. OCC described above how there virtually are no settlements at the PUCO unless the utility (here, Duke), is willing to be a signatory. Given its virtually indispensable status for a Settlement, Duke is empowered above other bargaining parties. That is even though it lacks the right to withdraw its application that was the focus of Commissioner Roberto's separate opinion in a FirstEnergy ESP case.

The PUCO should protect consumers from Duke's superior bargaining power by equalizing the power among parties or improving the results in such a settlement. This is especially true in this case where Duke, the PUCO Staff, business parties, and others agreed to allocate \$21.3 million of Duke's \$23.1 million increase to residential consumers. And they did not adopt any of OCC's other recommendations, such as for adequate service reliability, bill-payment assistance for people in need etc.

⁸ *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.

The settlement should be rejected or modified to overcome the lack of serious bargaining.

2. **The settlement included only narrow-interested residential consumer parties (with some interests being more environmental than consumer), as distinguished from the detriment to the broad interests of the residential consumer class in charges and reliable service, etc. The settling business parties benefit from a lower allocation or are not uniquely affected (as with Duke and others) by the 92.4% allocation.**

The settlement unfairly pushes the bulk of the rate increase on residential consumers. Other than with Cincinnati within its city limits, the settling parties agreeing to the residential consumer allocation *don't have to pay it*. Even Cincinnati can benefit in its business-service capacity. The settling parties do not represent the broad interests of Duke's residential consumers. The result of the 92.4% allocation to residential consumers and lack of adoption of OCC's other consumer protection proposals reflects a lack of serious bargaining.

Settling parties Ohio Energy Group (which includes some of the larger corporations in the state) and national retailer Walmart agreed to allocate 92.4% of the unreasonably high rate increase to residential consumers, sparing their businesses. The Ohio Manufacturers' Association Energy Group and Kroger agreed to not oppose it. But OEG, Walmart, OMA-EG, and Kroger obviously are not residential interests. And, as representatives of non-residential interests, they benefit from being allocated less than 8% of the rate increase.

OMA-EG/Kroger claim that the Signatory Parties to the Stipulation include numerous groups that represent residential customers.⁹ OMA-EG/Kroger would elevate

⁹ OMA-EG/Kroger Brief at 11.

CUB Ohio as a residential interest. But OMA-EG/Kroger's characterization to prop up CUB Ohio is overstated. It's not borne out by the facts.

OMA-EG/Kroger claim that OCC's witness Williams "acknowledged" the following: "[f]or decades, the Citizens Utility Board has fought for cheaper bills, reliable service, transparency, consumer rights and clean healthy energy, helping consumers to save billions of dollars."¹⁰

But OCC witness Williams was not acknowledging that the information Duke's counsel showed him is true. He simply acknowledged that the quote was in a record that Duke's counsel handed him on cross-examination regarding CUB Ohio.

During Duke's cross-examination, Mr. Williams correctly noted that CUB Ohio had only started-up in the last few years.¹¹ Mr. Williams noted that there is a difference between "CUB Ohio" and the "Citizens Utility Board," testifying that "CUB has existed in many forms and in many different states for many decades."¹² CUB Ohio has only been in existence since 2020.¹³

OMA-EG/Kroger's characterization of information about "decades" of consumer advocacy and "billions" saved by CUB Ohio should not be mistaken by the PUCO as reality for CUB Ohio's consumer credentials. Again, CUB Ohio has only operated in Ohio for a couple years. Mr. Williams would have been glad to describe the Ohio Consumers' Counsel's record of consumer advocacy and savings, had Duke's counsel asked him.

¹⁰ *Id.*

¹¹ Tr. Vol. II (Williams Cross by Duke) at 259.

¹² Tr. Vol. II (Williams Cross by Duke) at 258-259.

¹³ CUB Ohio Motion to Intervene at 4.

CUB Ohio, OPAE, PWC, and Cincinnati represent certain narrow residential consumer interests. They do not represent the broad interests of the residential consumer class that is impacted to its detriment by the settlement in this case – and that needed but did not get serious bargaining from Duke.

And the interests of those entities for advancing serious bargaining are not only limited interests. They also include some multi-customer interests as OCC Witness Williams testified.¹⁴

The City of Cincinnati is both a purchaser of electricity (*a non-residential customer*) and a representative of residents (but only within its city limits).¹⁵ OPAE states that it is “a rare organization that serves as an advocate and service provider for low income customers *as well as being a non-residential customer*.”¹⁶ CUB Ohio, only recently founded in 2020, states that it is a “non-profit consumer watchdog that advocates for residential and *small business utility customers* in Ohio” with members in Duke’s service territory.¹⁷ PWC serves low-income residential consumers in Ohio by providing weatherization and energy management services to low-income residential consumers. PWC acknowledges that it depends on funding from utility companies like Duke.¹⁸

All of these intervenors, as explained in their Motions to Intervene, have limited interests. Those interests are not the same as the broad interests of all the residential consumers that OCC represents.

¹⁴ OCC Ex. 3 (Williams Supplemental) at 7-8.

¹⁵ City of Cincinnati Motion to Intervene at 3 (Nov. 17, 2021).

¹⁶ OPAE Motion to Intervene at 4 (Mar. 16, 2022) (emphasis added).

¹⁷ CUB Ohio Motion to Intervene (Apr. 4, 2022) (emphasis added).

¹⁸ PWC Motion to Intervene at 4 (Mar. 18, 2022).

Having limited interests is not to the discredit of what organizations such as PWC do for the public. But the fact that interests are narrow is a matter to be critiqued under the PUCO's settlement standards that are being used here by Duke and others to justify rate increases for all residential consumers and justify the rejection of OCC's consumer protection recommendations on reliability, bill-payment assistance etc.

In fact, each of these intervenors claimed that their interests are unique and not adequately represented by other parties – a factor under O.A.C. 4901-1-11((B)(5) that the PUCO considers in granting intervention. And the PUCO did grant their interventions, considering the arguments each party raised in their motion to intervene.

OEG, OMA-EG, and Kroger argue in briefs that OCC agreed that these parties represent residential customers.¹⁹ But OEG, OMA-EG, and Kroger mischaracterize the evidence. OCC witness Williams never testified that the City of Cincinnati, OP&E, CUB Ohio, and PWC represented *all* consumer interests. Indeed, *none of the settlement parties represent the broad interests of all residential consumers throughout Duke's service territory, as does OCC under the law.*²⁰

The City of Cincinnati does not represent residential consumers outside its geographical limits, which is graphically illustrated by Duke catering to Cincinnati in the settlement and not to the other local governments in its service territory. Of course, Duke's service territory has lots more local governments than just Cincinnati.

R.C. 4928.02(A) requires the PUCO to “ensure”...nondiscriminatory” service. To comply with the law against discrimination, the settlement should be rejected or at least

¹⁹ OEG Brief at 3; OMA-EG/Kroger Brief at 12-13.

²⁰ OCC Ex. 3 (Williams Supplemental) at 7-8.

modified to order Duke to make available, *at Duke shareholder expense*, similar benefits for the other local governments in its territory as it agreed for Cincinnati. *That result should especially require making bill-payment assistance available at shareholder expense to all the at-risk Ohioans in all the other localities in Duke's service territory, similar to Duke's agreement for Cincinnati.* That result would be consistent with OCC's position, not adopted in the settlement, for at-risk Ohioans to have more bill-payment assistance available.

Interestingly for other localities and their consumers, Duke confirmed in its brief that funding for these Cincinnati programs will be paid for by *all* consumers in Duke's service territory.²¹ So the settlement denies other Ohioans the benefits of, for example, bill-payment assistance in Cincinnati. But it makes the Ohioans in other Duke localities pay for the program that they aren't getting under the settlement.

We don't begrudge bill-payment assistance for Cincinnati residents. Indeed, they should have it, as per OCC's general position for all consumers. *We just want the PUCO to perform its duty under R.C. 4928.02(A) and (L) to nondiscriminatorily give all the other Duke at-risk consumers the same or similar benefits – because those people matter too.*

Further, we note that funds to help with weatherization for low-income consumers reach relatively few consumers given the high cost of weatherization per property. As said, there should be such funding. But the greatest good for the greatest number (per utilitarianism) should also be incorporated into the settlement, with OCC's proposals.

²¹ Duke Brief at 22.

Moreover, the City's interest includes that it represents its own *commercial* interests in settlement negotiations as a customer of Duke. That's in addition to the City having the interests of other *business* customers (not just residential customers) in Cincinnati (that will benefit from the less than 8% allocation of the rate increase at residential consumers' expense).

The PUCO Staff has an important role, but it is not a residential consumer advocate. The PUCO Staff balances the interests of utilities, business customers, residential consumers, and others.

OMA-EG and Kroger note that OPAE provides weatherization and energy efficiency services to low-income residential consumers.²² OPAE is an association of providers engaged in the business of weatherization. PWC also provides weatherization services.²³ OPAE and PWC depend on funding from utilities (and their consumers) to implement their programs.²⁴ That funding arrangement gives the utility leverage in bargaining with OPAE and PWC. That leverage should be considered under the PUCO's settlement standard (first prong).

As OCC has argued, there should be funding for their services to at-risk Ohioans. But that funding should be arranged to help people in a separate PUCO process without the utilities and the PUCO involving that funding in the PUCO's settlement approval process.²⁵ And it should be done without such organizations having to be dependent on bargaining with utilities for utility/consumer funding. Alternatively, the PUCO should

²² OMA-EG/Kroger Brief at 11.

²³ OCC Ex. 3 (Williams Supplemental) at 7-8.

²⁴ See Joint Ex. 1 (Settlement) at 16; OCC Ex. 3 (Williams Supplemental) at 6.

²⁵ OCC Ex. 3 at 7.

award PWC and OPAE the funds at issue in this case without that being part of the settlement approval package.

Similarly, CUB Ohio has a focus on energy efficiency programs for residential and small business consumers.²⁶ Energy efficiency programs are often subsidized by all consumers through utility rates. Again, for bargaining that is not a broad interest in the ratemaking and service reliability issues for Duke's residential consumers in this case.²⁷

IGS and RESA are marketers that sell electric supply service to residential consumers for profit. They do not represent residential consumers' interests. Far from it. As further explained below, IGS and RESA vigorously oppose OCC's proposed consumer protections like shadow billing and bill format changes that would empower consumers and shine a light on how much consumers pay marketers for electric service.

In sum, despite settling parties' claims to the contrary, no party to the settlement fully represents or is seriously bargaining for the broad interests of all of Duke's residential consumers. And where, as here, the settling parties agree to force the bulk of Duke's rate increase onto residential consumers and reject other appropriate consumer protections, there is no serious bargaining. The settlement should be rejected.

²⁶ OMA-EG/Kroger Brief at 11.

²⁷ OCC Ex. 3 (Williams Supplemental) at 7.

3. **OCC does not seek “veto power” over the settlement. If there is any party with veto power, it would be the utility Duke because virtually no settlement is submitted to the PUCO Commissioners unless the utility has agreed to it. OCC seeks a fair, just, and reasonable settlement process and resolution for 640,000 residential consumers.**

Duke and other settling parties claim that by opposing the settlement, OCC improperly seeks “veto power” over the settlement.²⁸ That is mistaken.

OCC is concerned with a bargaining process that is not “serious,” as the PUCO requires. OCC’s opposition to the settlement, on behalf of 640,000 residential consumers, is for good reason.

As explained in OCC’s initial brief and here, the settlement violates all three prongs of the PUCO’s settlement test in numerous ways. The settlement imposes most of Duke’s rate increase on residential consumers. And it does not include important consumer protection recommendations proposed by OCC, such as adequate service reliability standards and bill-payment assistance.

In addition, the settlement does not give consumers throughout Duke’s service territory the bill-payment assistance and other benefits that Duke is giving to Cincinnati consumers. As addressed earlier, we are not proposing to deny benefits to City of Cincinnati consumers.

But we are seeking nondiscriminatory treatment (at Duke shareholders’ expense) for all the other consumers in Duke’s service territory – *because people in Duke’s service area outside the Cincinnati city limits also matter*. Avoiding discrimination is required by R.C. 4929.02(A) and protecting at-risk consumer is required by R.C. 4928.02(L).

²⁸ Duke Brief at 25; OMA-EG/Kroger Brief at 9; Walmart Brief at 3; OEG Brief at 3; IGS/RESA Brief at 5-6.

The fact that OCC, the lone party to represent *all* residential consumer interests, was outnumbered by limited-interest parties signing the settlement does not mean the settlement should be approved. The settling parties' "veto" argument is an attempt to distract the PUCO from the fact that the *evidence* OCC presented demonstrates that the settlement violates all three prongs of the PUCO's settlement test. The PUCO should reject the settlement.

- 4. A false equivalency with OCC's broad consumer interest is created by Duke's argument that limited-interest, multi-customer and/or environmental-interest signatories (such as CUB Ohio, OPAE and others) satisfy the PUCO's first-prong settlement test as a residential consumer interest. It is mistaken.**

OCC was the only party prepared to present a broad case for residential consumer protection with expert witnesses on ratemaking, service reliability, and consumer electric choice issues. Instead, other parties with limited, multi-customer, and/or environmental interests are simplistically presented by Duke as having a residential consumer interest that shows serious bargaining and justifies the settlement. It doesn't. Duke's approach suffers from its creating a false equivalency of these interests with that of the broad, dedicated consumer interest of a party like OCC.

One need only look at the objections filed in this case to see how truly limited the interests of Duke's claimed residential parties were. For instance, CUB Ohio filed a total of just *three* objections to the Staff's Report to set forth its positions under R.C. 4909.19. CUB's three objections related to promoting energy efficiency, a community-driven

electric vehicle charging program, and time of use rates.²⁹ Those are largely environmental issues.

The City of Cincinnati objected to the *non-residential* rates, the use of federal infrastructure funds, outdoor lighting, demand charges for *non-residential* rates, electric vehicle funding projects, poor reliability related to *non-residential* service, and a 25% increase in the energy (not distribution) component of Duke's rates (an issue arguably outside this distribution rate case).³⁰ PWC did not file objections. OPAE objected to the rate of return, the increased residential and low-income customer charges, and the collection of convenience fees.³¹

Additionally, when it came down to presenting a case to advocate for their limited interests, these parties did *not* file testimony supporting their objections. OPAE presented no testimony in this case to advocate for residential consumer interests. Neither did the City of Cincinnati, CUB Ohio, or PWC.

As a group, as well as individually, these settlement parties were not on track to present a broad hearing case with direct evidence for residential consumer protection on ratemaking, service reliability, etc. And that lack of a case would undermine leverage for effective serious bargaining.

Of all the significant consumer issues in the case, CUB Ohio's bargaining is most identifiable in the settlement where it obtains a commitment to be added to a Duke energy-efficiency collaborative and an agreement to a future energy-efficiency collaborative meeting. That does not reflect the serious bargaining that could be expected

²⁹ CUB Ohio Objections (June 21, 2022).

³⁰ City of Cincinnati Objections (June 21, 2022).

³¹ OPAE Objections (June 21, 2022).

from the “consumer watchdog” role for CUB Ohio that OMA-EG and Kroger wrote in their brief.³²

Duke claims that the commitments made in the settlement to the City of Cincinnati “demonstrate[] the seriousness of bargaining that occurred.”³³ The opposite is true. That Duke’s commitments end at the Cincinnati city line only demonstrates that Duke was *unwilling* to seriously bargain for the bill payment and consumer protection provisions proposed by OCC to benefit residential consumers in need throughout *all* of Duke’s service territory.

We have already discussed how the settlement, with Duke’s provisions for Cincinnati including low-income bill-payment assistance, fails to be *nondiscriminatory* for other at-risk Ohioans in other localities in Duke’s service area, under R.C. 4928.02(A). And we discussed how it fails to *protect other at-risk populations* in other localities in Duke’s service area, under R.C. 4928.02(L). Those people in Duke’s service area outside Cincinnati city limits also matter.

The PUCO should reject Duke’s use of its false equivalencies to gain approval of its settlement.

B. Settling parties’ claims that the settlement benefits consumers because it gives Duke less than what Duke initially requested in its rate increase application do not mean the settlement benefits consumers or the public interest.

The recurring theme in Duke’s and settling parties’ briefs is that the settlement should be approved because Duke settled for less than what it asked for in its initial

³² OMA-EG/Kroger Brief at 11.

³³ Duke Brief at 20.

application.³⁴ However, that does not necessarily demonstrate that the settlement benefits customers or the public interest.

As OCC witness Mr. Defever testified, “if a Company’s request was \$20 million too high, and the settlement only reduced the company’s request by \$5 million, customers would still be responsible for \$15 million more than would be reasonable.”³⁵ Regardless of what Duke asked for in its application, the evidence presented by OCC demonstrates that the settlement terms are unreasonable and harmful to consumers.

OCC presented evidence to demonstrate that a rate *decrease* for Duke’s consumers is appropriate.³⁶ 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.³⁷ Moreover, the PUCO Staff initially recommended that Duke be allowed an increase between \$1.86 million and \$15.27 million.³⁸ The \$23.1 million increase in the settlement, while less than what Duke initially requested in its application, is still unreasonable and harmful to consumers. Paying \$7.8 million over the high end of PUCO Staff’s range is not a benefit for consumers, unless you are allocating 92.4% of it to someone that is not signing onto the settlement.

The settlement adopts a return on equity (“ROE” or profit) of 9.5%.³⁹ While this is less than the ROE Duke initially requested, OCC presented evidence through Dr.

³⁴ See e.g., PUCO Staff Brief at 12; Duke Brief at 11-17, 26-27; OMA-EG/Kroger Brief at 6-7, 10, 13, 17; and OEG Brief at 4.

³⁵ OCC Ex. 4 (Defever Supplemental) at 8.

³⁶ OCC Brief at 11-20.

³⁷ OCC Ex. 5 (Defever Direct) at 7, OCC-JD-2.

³⁸ PUCO Staff Ex. 1 (Staff Report) at 6.

³⁹ Joint Ex. 1 (Settlement) at 3.

Woolridge that the settlement's ROE (and capital structure) will result in excessive and unreasonable charges to Duke's consumers. Instead, for consumer protection, OCC presented evidence to support a more reasonable 8.84% ROE and capital structure of 50% equity.⁴⁰

The settlement calls for a Residential Customer charge of \$8.00, which is an increase from the current Residential consumer charge of \$6.00.⁴¹ The \$8.00 Residential Customer charge in the settlement is less than what Duke initially requested. But OCC presented the testimony of expert witness Robert Fortney that an increase of 33.33% to the customer charge does not benefit consumers or the public interest.⁴² The \$8.00 Residential Customer charge is also higher than what the PUCO Staff initially recommended (\$7.32).⁴³ OCC instead presented evidence to support a Residential Customer charge of \$5.66.⁴⁴

Duke, OMA-EG, and Kroger also claim that settlement allows Duke to charge consumers less under the Distribution Capital Investment ("DCI") Rider than what Duke initially requested.⁴⁵ However, OCC witness Mr. Williams testified that the settlement harms consumers and the public interest because it allows Duke to charge consumers up to \$159 million total under the DCI Rider without requiring Duke to provide more

⁴⁰ OCC Ex. 2 (Woolridge Direct) at 18-23; OCC Ex. 1 (Woolridge Supplemental) at 3.

⁴¹ OCC Ex. 7 (Supplemental Testimony of Robert B. Fortney) at 8.

⁴² *Id.* at 8.

⁴³ *Id.*

⁴⁴ *Id.* at 9.

⁴⁵ *See* Duke Brief at 13-14, 26, and OMA-EG/Kroger Brief at 15-16.

reliable service in exchange.⁴⁶ Thus, the settlement is still harmful to consumers and the public interest.

The settlement's provisions regarding the DCI Rider allow Duke to continue charging consumers even if Duke fails to meet two performance standards – SAIFI⁴⁷ and CAIDI⁴⁸ -- under the PUCO's rules. The settlement instead uses⁴⁹ a third standard – SAIDI⁵⁰ – that the PUCO has not approved as a distribution reliability standard. Duke's witness Mr. Hesse conceded during the evidentiary hearing that the settlement will allow Duke to charge consumers under the DCI Rider even if Duke fails the SAIFI and CAIDI standards.⁵¹ That is unreasonable.

Under the settlement, consumers will be required to pay more for Duke's distribution investments even if they get no quantifiable reliability benefit improvements.⁵² This is yet another example of why the settlement does not benefit customers or the public interest, even though it provides Duke with less than what Duke initially proposed in its application. The PUCO should reject the settlement.

C. The settlement violates Ohio law and numerous important regulatory principles and practices. The settling parties fail to demonstrate that the settlement satisfies prong three of the three-part settlement test.

The settling parties have failed to meet their burden to demonstrate that the settlement satisfies prong three of the three-part settlement test. The PUCO Staff

⁴⁶ OCC Ex. 3 (Williams Supplemental) at 13.

⁴⁷ System Average Interruption Frequency Index.

⁴⁸ Customer Average Interruption Duration Index.

⁴⁹ Joint Ex. 1 (Settlement) at 10(c)(1)(a).

⁵⁰ System Average Interruption Duration Index.

⁵¹ Tr. Vol. I (Hesse Cross) at 134:3-9.

⁵² *Id.* at 16: 1-2.

proclaims in its brief (with no argument at all) that “[t]he Stipulation does not violate any important regulatory principle or practice.”⁵³ Contrary to the PUCO Staff’s bald assertion, OCC presented ample evidence demonstrating *specifically* how the settlement violates Ohio law and regulatory principles.⁵⁴ The settlement should be rejected.

OCC’s witnesses, who are regulatory and financial experts with decades of professional experience, provided detailed evidence as to how the settlement:

- Violates Ohio law and policy requiring utilities to pay just and reasonable rates (R.C. 4905.22, R.C. 4928.02(A));⁵⁵
- Sets a return on equity that is based on outdated information, contrary the PUCO’s past decisions that ROEs be based on current market conditions;⁵⁶
- Violates Ohio law and policy that requires utilities to provide nondiscriminatory electric service (R.C. 4905.33, R.C. 4928.02(A)) and the PUCO to protect at-risk populations (R.C. 4928.02(L));⁵⁷
- Violates the rate-making principles of gradualism and practicality, which prevents “rate-shock” to consumers;⁵⁸

⁵³ PUCO Staff Brief at 13.

⁵⁴ OCC Brief at 30-42.

⁵⁵ OCC Brief at 30-33.

⁵⁶ OCC Brief at 34-36.

⁵⁷ OCC Brief at 36-37.

⁵⁸ OCC Brief at 37-40.

- Violates the regulatory principles of equity and utilitarianism, by providing specific benefits to settling parties that agreed to pass the bulk of Duke's rate increase on to residential consumers;⁵⁹ and
- Violates regulatory principles and PUCO precedent because it permits Duke to "double leverage" the agreed-upon capital structure, which results in excessive rates in violation of R.C. 4905.22 and R.C. 4909.15.⁶⁰

OCC will not repeat the arguments from its initial brief on these points. But it is important to reiterate the unfair and discriminatory nature of the settlement. As OCC has argued, the settling parties have agreed to assign residential consumers with 92.4% of the agreed upon rate increase and did not adopt other consumer protections. The few protections Duke has agreed to provide apply only to certain consumers within the City of Cincinnati. That simply is not reasonable. In fact, it is discriminatory because similar benefits are not provided to other consumers and local governments outside Cincinnati. It is a fundamental regulatory principle that the PUCO has a duty to protect *all consumers*, not just a select few that sign onto a settlement.

Duke, the PUCO Staff, and other parties make no attempt whatsoever (because they can't) to explain how consumers in the many localities outside Cincinnati are not given the benefits (such as bill-payment assistance) that Duke is providing within Cincinnati.⁶¹ That is not reasonable, lawful, or consistent with regulatory principles and practices. At-risk people in Duke's service area outside Cincinnati also matter. As we

⁵⁹ OCC Brief at 40-41.

⁶⁰ OCC Brief at 41-42.

⁶¹ We are not agreeing that the relatively low level of bill-payment assistance that Duke agreed to for Cincinnati is adequate given people's needs.

recommend above, Duke should provide bill-payment assistance to all at-risk Duke electric consumers (including but not limited to Cincinnati) at the level recommended by OCC.

Certainly, other local governments and consumers within Duke's service territory would benefit from increased reliability of electric service to water treatment plants.⁶² Duke's residential consumers outside the City of Cincinnati would benefit from weatherization and bill payment assistance.⁶³ Other local governments and consumers would benefit from streetlight replacements and Smart-City technology.⁶⁴ But consumers outside the City of Cincinnati are largely ignored in the settlement.

Duke's special concessions and limited bill payment assistance only to the City of Cincinnati violate state policy codified in R.C. 4928.02(A) and R.C. 4905.33 that electric service be nondiscriminatory. The concessions made in the settlement to the City of Cincinnati should be made broadly available to others by Duke (at shareholder expense). The settlement should be rejected.

Finally, IGS/RESA claim that OCC's proposal for Duke to provide aggregated billing information (shadow billing) for its electric consumers would violate regulatory principles and practices.⁶⁵ IGS/RESA also criticize OCC's proposal for an easy on-line opt-out function on Duke's website so that consumers can opt-out of Duke providing

⁶² Joint Ex. 1 (Settlement) at 23-24.

⁶³ *Id.* at 24-25.

⁶⁴ *Id.* at 21-23.

⁶⁵ IGS/RESA Brief at 8-11.

customer information to marketers.⁶⁶ IGS/RESA's anti-consumer arguments should be rejected.

Shadow billing data has been ordered to date for a number of utilities (and their consumers), but not enough utilities for consumer protection.

IGS/RESA also wrongly claim that the PUCO has refused to adopt OCC's shadow billing recommendations. While the PUCO has declined to require utilities to provide shadow billing data on an industry-wide basis, nothing prevents a utility from agreeing in a settlement to provide that information.

In fact, the PUCO rejected similar claims by IGS and other marketers in a case involving AEP. There, the marketers litigated against the settlement to try to prevent the use of shadow billing data for consumers and for related bill format changes.⁶⁷ The PUCO approved that settlement, over IGS's and other marketers' objections. There, the PUCO stated:

The Commission finds that no valid reason has been presented to justify elimination of the shadow-billing provisions from the Stipulation pursuant to part two of the test to evaluate stipulations. We emphasize that the Commission must evaluate the benefits of the Stipulation as a package and each provision of the Stipulation need not provide a direct and immediate benefit to ratepayers and the public interest. Nonetheless, in this instance, we find that, while OCC indicates that it has no current plans for the shadow-billing report, ***the report may serve to confirm information otherwise available about the competitive market or highlight issues for further review and analysis.*** The Commission reiterates, however, that customers may choose an energy provider for various reasons. Price is only one attribute of any offer available in the competitive market; there may be other features of the offer that are of

⁶⁶ IGS/RESA Brief at 8-11.

⁶⁷ *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., Opinion and Order (Nov. 17, 2021) at ¶¶ 72, 131.

value to customers. *In re Commission's Review of the Minimum Gas Service Standards in Chapter 4901:1-13 of the Ohio Administrative Code*, Case No. 19-1429-GA-ORD, Finding and Order (Feb. 24, 2021) at ¶ 69. As for the commitment of AEP Ohio and OCC to work on a proposal to submit for comment and review in the pending bill format case, the Commission finds this aspect of the Stipulation to be of no adverse consequence to the opposing parties or the retail market. The intervenors in that case will be afforded an opportunity for input and comment on the amended application. The Commission will, at that point, fully consider the amended application and the comments before any decision is reached in that case. We, therefore, decline to eliminate either of the shadow-billing provisions from the Stipulation. Our decision should not be construed as a predetermination regarding the relevancy of the shadow-billing report in any future proceeding or as to the outcome in the bill format case.⁶⁸

Moreover, OCC's proposals are also consistent with Ohio law (R.C. 4928.02(A)), which requires that consumers have access to reasonably priced electric service.

OCC's proposals are necessary to protect consumers with information that can actually help them in their decisions about electricity options involving marketers. Marketers know much more about how their contracts work than consumers unfortunately do.

As explained in OCC's brief and the testimony of Jim Williams, consumers are losing significant amounts of money to marketers as compared to the utilities' standard service offers.⁶⁹ Reasons include that marketers often charge consumers high monthly variable rates following introductory fixed "teaser" rates or charge more for "green energy" products.

⁶⁸ *Id.* at ¶ 131 (emphasis added).

⁶⁹ OCC Brief at 3, 28-29; OCC Ex. 3 (Williams Supplemental) at 4.

Within the past few years, the PUCO has opened a number of investigations into marketers for alleged deceptive and misleading marketing practices to enroll consumers in programs that charge excessive rates.⁷⁰ Most recently, the PUCO Staff has alleged that Direct Energy, XOOM, and RPA Energy d/b/a Green Choice, have engaged in misleading and deceptive marketing and enrollment of consumers.⁷¹

It is clear from the number of PUCO investigations into marketers' sales and enrollment practices – and just from the basic difficulty in making wise electricity choices on marketer offers – that residential consumers need more, not less, consumer protection. OCC's proposals for shadow billing, bill format changes, and an opt-out function on Duke's website are consistent with regulatory policies and practices and would help protect consumers from paying unnecessary charges for essential electric utility service.

⁷⁰ See e.g. *In the Matter of the Commission's Investigation of PALMco Power OH, LLC, d/b/a Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-957-GE-COI; *In the Matter of the Commission's Investigation into Verde Energy USA Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-958-GE-COI; *In the Matter of the Commission's Investigation of PALMco Power OH, LLC, d/b/a Indra Energy and PALMco Energy OH, LLC, d/b/a Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI; *In the Matter of the Commission's Investigation into SFE Energy Ohio, Inc. and Statewise Energy Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 20-1216-GE-COI; *In the Matter of the Commission's Investigation into XOOM Energy Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI; and *In the Matter of the Commission's Investigation into RPA Energy Inc.'s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-441-GE-COI.

⁷¹ See *In the Matter of Direct Energy Services, LLC*, Case No. 22-583-GE-UNC, Exhibit A to the Joint Stipulation and Recommendation (Letter from PUCO Staff to Direct Energy regarding consumer complaints that Direct Energy sales agents provided misleading and deceptive market information); and *In the Matter of the Commission's Investigation into XOOM Energy Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI, Entry (Apr. 20, 2022); *In the Matter of the Commission's Investigation into RPA Energy Inc.'s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-441-GE-COI, Entry (Apr. 20, 2022).

III. CONCLUSION

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.

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply Brief for Consumer Protection was served by electronic transmission upon the parties below this 14th day of November 2022.

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