

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Natural Gas Rates.	)	Case No. 22-507-GA-AIR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Form of Regulation.	)	Case No. 22-508-GA-ALT
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 22-509-GA-ATA
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 22-510-GA-AAM
	)	

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

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**I. INTRODUCTION**

At a time of soaring energy prices, inflation and a potential recession, Duke, the Staff of the Public Utilities Commission of Ohio (“PUCO”), and others have signed a settlement<sup>1</sup> to increase consumers’ natural gas rates. The Settlement provides Duke with a \$31.7 million base distribution revenue increase,<sup>2</sup> costly add-on charges (riders), and a generous profit. All without important consumer protections for Duke’s 411,000 Cincinnati-area consumers.

The Settlement permits Duke to charge consumers \$29 million for deferred costs related to propane caverns that were replaced by the Central Corridor Pipeline, which

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<sup>1</sup> Stipulation and Recommendation (April 28, 2023) referred to in OCC’s Initial Brief as the “Settlement.”

<sup>2</sup> Settlement at 3.

began commercial operation on March 14, 2022.<sup>3</sup> This circumvents and violates R.C. 4909.15, which provides that property may only be included in rate base if it is “used and useful” at date certain. The date certain in this case is March 31, 2022.<sup>4</sup> The Ohio Supreme Court just recently affirmed the importance of the “used and useful” standard, and that there is no substitute for it. It *must* be followed.<sup>5</sup>

Further, the Settlement increases the amount Duke can charge consumers under the Capital Expenditure Program (“CEP”) Rider beyond the \$1.00 limit established in the Settlement in Case No. 19-791-GA-ALT.<sup>6</sup> This despite Duke’s history of massive capital investment, which CEP Rider caps are designed to limit.<sup>7</sup> Further, the CEP does not include an operations and maintenance (“O&M”) savings offset for consumers.

The Settlement allows Duke to charge consumers for an additional \$2.3 million in property taxes.<sup>8</sup> This lets Duke overcharge consumers for property taxes not payable during the test year.<sup>9</sup>

The Settlement also lacks OCC’s recommendations<sup>10</sup> regarding Duke’s low-income weatherization program. The program should be addressed in a stand-alone rider proceeding, with an independent, annual audit, and include shareholder funding.<sup>11</sup>

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<sup>3</sup> OCC Ex. 9 (Adkins) at 5.

<sup>4</sup> Entry (June 29, 2022) at 1.

<sup>5</sup> *In re Suburban Nat. Gas Co.*, 166 Ohio St.3d 176 (2021).

<sup>6</sup> Case No. 19-791-GA-ALT, Opinion and Order (April 21, 2021).

<sup>7</sup> OCC Ex. 9 at 42-43.

<sup>8</sup> *See* Item 5a in the Settlement, which adds \$2,124 to the amount shown in the PUCO Staff Report, on page 17, for adjustment C-38 in the amount of \$2,291,571. All together this represents a total addition to expense of \$2,293,695 for property tax.

<sup>9</sup> OCC Ex. 11 (Meyer) at 3.

<sup>10</sup> OCC Ex. 3 (Shutrum) at 4.

<sup>11</sup> *Id.*

The Ohio Consumers' Counsel ("OCC") also recommended permitting Duke to collect \$3,069,120 less in revenue from residential consumers than what the Settlement provides.<sup>12</sup> The settling parties are allowing Duke a sizeable profit (return on equity or "ROE") of 9.6%.<sup>13</sup> OCC is proposing to limit Duke's profit to a more reasonable 9.52%.<sup>14</sup>

Lastly, as is unfortunately typical of settlements at the PUCO, some signatory parties have narrow interests and receive benefits under the Settlement. OCC, the only exclusive representative of all 411,000 residential natural gas consumers of Duke, did not sign the Settlement. OCC advocated for various settlement terms that represent the broad interests of residential consumers in moderating or eliminating rate increases and in other consumer protections. Many of these terms are not present in the Settlement, which fails to represent the interests of residential consumers as a whole.

OCC recommends that the PUCO adopt a fair, just, and reasonable resolution of Duke's application *instead of the Settlement*. The PUCO should reject the Settlement, for reasons 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

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<sup>12</sup> OCC Ex. 5 (Fortney) at Exhibit RBF-1.

<sup>13</sup> Settlement at 4.

<sup>14</sup> OCC Ex. 7 (Buckley) at JPB-02, *see also* Tr. I at 130 (correcting placement of ROE value in JPB-02).

settlement package violates any important regulatory principle or practice.<sup>15</sup> In addition, the PUCO routinely considers whether the parties to the settlement represent diverse interests.<sup>16</sup>

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 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.

In a proceeding about an electric security plan ("ESP"), Commissioner Cheryl Roberto wrote that "[i]n 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."<sup>17</sup> 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.

One reason for the utility's outsized role in the unfair PUCO settlement process, (as described by OCC witness Colleen Shutrump),<sup>18</sup> is money and how a utility can use it. OCC witness Shutrump, with years of experience in utility regulation, warned that

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<sup>15</sup> *Consumers' Counsel v. Pub. Util. Comm'n.* (1992), 64 Ohio St.3d 123, 126.

<sup>16</sup> OCC Ex. 3 (Williams Supplemental) at 5.

<sup>17</sup> Case No. 08-935-EL-SSO, et al., Concurring and Dissenting Opinion of Cheryl Roberto, at 2.

<sup>18</sup> OCC Ex. 3 at 6.



“low-income programs should not be made utility bargaining chips to garner support for utility rate increase settlements.”<sup>19</sup> When this happens, the utility, here Duke, uses the outcome of outsized negotiating leverage, rather than serious bargaining, to convince the PUCO that the settlement meets the three standards.

The PUCO is right to allow reasonable funding to organizations that aid Ohioans in need. But these parties should not depend on utilities to bestow funds in exchange for settlement signatures when utilities like Duke happen to have rate-increase cases pending. The current process advantages utilities and disadvantages at-risk Ohioans and organizations serving them. The PUCO’s settlement process needs to be reformed for the public interest.

In addition, the PUCO sometimes considers “diversity of interests” as part of the first part of the settlement assessment.<sup>20</sup> The broad interests of all residential consumers (including *both* non-low-income and low-income) are not represented in the settlement. OCC, the only exclusive representative of all 411,000 Duke natural gas consumers, advocated for various settlement terms that moderated the rate increase and protected consumers. The Settlement does not include those terms. The PUCO must consider how *all* consumers are impacted by a settlement as a *whole*. This includes the many non-low-income consumers of the utility, here Duke, who no signatory party represents.

Consistent with Commissioner Roberto’s analysis, the PUCO should give little weight, if any, to the fact that numerous parties (all but OCC) signed the Settlement. The PUCO should carefully review all terms and conditions of the Settlement and place

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<sup>19</sup> *Id.*

<sup>20</sup> Case No. 10-388-EL-SSO, Opinion and Order at 48 (August 25, 2010).

greater emphasis on whether the Settlement can be shown to be in the public interest and not violate regulatory practices and principles. After doing this analysis, the PUCO should conclude that the Settlement should be rejected.

**B. The PUCO should reject the Settlement because the benefits to consumers and the public interest do not outweigh the harm to consumers and the public interest.**

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

**1. Duke's attempt to charge consumers for deferred costs related to propane caverns harms consumers and the public interest because the caverns were not used and useful at the March 31, 2022 date certain in this case.**

The PUCO should find the Settlement harms consumers and the public interest. That's because it would require charges to consumers of approximately \$2.9 million per year for amortization of approximately \$29 million in deferred costs for propane inventory, the net book value of the remaining propane assets ("propane facilities" or "propane caverns"), and decommissioning costs.<sup>21</sup>

OCC witness Kerry Adkins testified against allowing charges to consumers. He testified that under the second and third settlement standards the charges recommended in the Settlement should be denied.<sup>22</sup>

The Supreme Court of Ohio has prohibited the PUCO from using an accounting mechanism to circumvent the law's "used and useful" standard for consumer protection. The Court ruled that an accounting mechanism (such as the deferral in the Settlement)

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<sup>21</sup> OCC Ex. 9 at 5.

<sup>22</sup> *Id.* at 6-26.

cannot be used by “by commission fiat” to avoid scrutiny of a utility asset under the used and useful standard in R.C. 4909.15(A)(1).<sup>23</sup>

Yet that is just what Duke and the PUCO Staff have done, as an illegal work-around, to wrongly give Duke more of Ohioans’ hard-earned money. They have used a ratemaking gimmick of cost deferrals to circumvent Ohio ratemaking law. Even the PUCO, that unfortunately allowed Duke to defer costs associated with the propane caverns, wrote into its deferral order that Duke’s use of deferral accounting was not approval to charge consumers through ratemaking.<sup>24</sup>

R.C. 4905.15(A)(1) requires the utility to show that at date certain all property included in rate base is used and useful. Recently, the Ohio Supreme Court reemphasized in *In re Suburban Nat. Gas Co.* the importance of the used and useful test. The Court explained it succinctly:

The used-and-useful test allows a public utility to recover through rates the value of that portion of its property that is actually used and useful for the convenience of the public. Whether something is used and useful must be measured as of the date certain, not at some speculative unspecified point in time. Thus, a public utility is not entitled to include in the rate-base valuation property not actually used or useful in providing its public service, no matter how useful the property may have been in the past or may yet be in the future.<sup>25</sup>

Based on the PUCO’s misapplication of the used and useful test, the Court reversed and remanded the PUCO’s decision to allow a utility to include in rate base extra pipeline justified on the grounds of “reserve capacity.” “In evaluating such circumstances,” the

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<sup>23</sup> See *Office of Consumers’ Counsel v. Public Utilities Com.*, 67 Ohio St.2d 153, 164 (1981).

<sup>24</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Abandon Certain Propane-Air Facilities*, Case Nos. 21-1035-GA-ABN and 21-1035-GA-AAM, Opinion and Order (October 5, 2022) at para. 37.

<sup>25</sup> *Suburban*, 166 Ohio St.3d at 180 (internal quotations and citations omitted).

Court explained, “the question always must be whether the property is used and useful, not whether it was a prudent investment.”<sup>26</sup>

Upon commercial operation of Duke’s Central Corridor Pipeline Extension project (March 14, 2022), the propane facilities were not useful or used to provide utility service to consumers on the date certain in this case (March 31, 2022).

It is not in the public interest to charge consumers approximately \$1.6 million per year for propane facilities that are not used and useful in providing them utility service.<sup>27</sup>

Further, the Settlement effectively charges consumers *twice* for the same thing – once for the propane facilities that were no longer useful on date certain. And the Settlement would charge consumers *again* for the Central Corridor Pipeline that replaced the caverns, as the Settlement treats the new pipeline as used and useful at date certain. For this reason, the PUCO should reject the Settlement.

**a. Duke’s own public representations demonstrate that when the Central Corridor Pipeline went into service, the propane caverns were not used and useful.**

In the present case, on the date certain (March 31, 2022),<sup>28</sup> the propane caverns were not used and useful. The Central Corridor Pipeline went into commercial operation on March 14, 2022.<sup>29</sup> At this date, Duke was able to provide “adequate”<sup>30</sup> service to consumers without the propane caverns. Duke’s own public representations, including in multiple regulatory cases before the PUCO, Ohio Power Siting Board (“OPSB”), and the

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<sup>26</sup> *Id.* at 183.

<sup>27</sup> *Id.*

<sup>28</sup> Entry (June 29, 2022) at 1.

<sup>29</sup> *In re the Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA-BTX, Correspondence (March 15, 2022) (attached to OCC Ex. 9).

<sup>30</sup> R.C. 4905.22.

Securities and Exchange Commission (“SEC”), plus Duke’s own internal documents and actions before and after the Central Corridor Pipeline went into service, demonstrate this.

**i. Duke represents to the OPSB that the Central Corridor Pipeline’s purpose was to replace the propane caverns while maintaining safe and reliable service.**

When Duke sought authority to build the Central Corridor Pipeline in Case No. 16-0253-GA-BTX, it made clear the purpose of the project was to replace the propane caverns. Duke stated:

The Project is intended to allow for the retirement of the propane-air facilities that are based on old technology that is expensive to maintain and impractical to repair in a permanent fashion. It will also contribute to the improvement of the north/south balance of gas in the central Hamilton County area and will support the replacement of aging infrastructure.<sup>31</sup>

The OPSB agreed with Duke’s representation. It stated that “the need for the Project [Central Corridor Pipeline] has been demonstrated *based on the need to retire the aged and outdated propane-air facilities.*”<sup>32</sup>

The OPSB noted “that the additional gas supply from the north and added pressure from the central corridor facilities will enable Duke to maintain service to customers on peak days and more effectively balance the overall system at all times, *while obviating the need for the continued operation of the propane storage caverns.*”<sup>33</sup>

Clearly, the purpose of the Central Corridor Pipeline was to replace the propane caverns while maintaining safe and reliable service to consumers.

**ii. Duke represents to the PUCO in its deferral case that the propane caverns were not used and useful due to the Central Corridor Pipeline.**

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<sup>31</sup> OCC Ex. 9 at 7.

<sup>32</sup> *Id.*, Opinion & Order (November 21, 2019) at para. 58 (emphasis added).

<sup>33</sup> *Id.* (emphasis added).

Duke publicly represented that the Central Corridor Pipeline would make the propane caverns obsolete in its application to defer costs related to the caverns.<sup>34</sup> Duke affirmed that “[o]ne of the major purposes of the Central Corridor Pipeline is to enable the Company to retire the caverns and related propane-air peaking facilities, while maintaining safe and reliable service to customers.”<sup>35</sup> In fact, Duke said that “[n]o customer of Duke Energy Ohio will be negatively impacted by the abandonment of the propane caverns and related propane-air facilities, as *service during peak usage will be maintainable without such caverns and facilities as a result of the construction of the Central Corridor Pipeline.*”<sup>36</sup> This demonstrates that the Central Corridor Pipeline eliminated the need for the propane caverns, rendering them not used and useful after the Pipeline began commercial operation.

Indeed, the PUCO Staff earlier got it right for giving Cincinnati-area consumers the benefit of regulation that is supposed to serve the public interest. In contrast with the Settlement in this rate case, the PUCO Staff initially recommended (in Duke’s deferral case) “*denial of deferral authority for the NBV [net book value] of the remaining assets, which is primarily based on the fact this would amount to deferral of assets which are no longer used and useful.*”<sup>37</sup>

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<sup>34</sup> Case No. 21-1035-GA-AAM, Application (October 7, 2021).

<sup>35</sup> *Id.* at para. 4.

<sup>36</sup> *Id.* at para. 7 (italics added).

<sup>37</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Abandon Certain Propane-Air Facilities*, Case No. 21-1035-GA-AAM, Staff Review and Recommendation (January 6, 2022) (attached) at 5 (emphasis added).

In support of the settlement in the deferral case, Duke filed the testimony of Ms. Sarah Lawler. She reiterated and made clear Duke's above points about replacing the caverns with the pipeline. Ms. Lawler testified that "[o]ne of the major purposes of the Central Corridor Pipeline is to enable the Company to *retire* the caverns and propane-air peaking facilities, while maintaining safe and reliable service to customers. The Company has now completed construction of the CCP, officially placing it into service on March 14, 2022."<sup>38</sup> This makes clear that the operation of the Pipeline, which in Duke's own words obviated the need for the propane caverns, began before the March 31, 2022 date certain in this case.

**iii. Duke represents (conceded) to the public and the Securities and Exchange Commission that the propane caverns were not used and useful due to the Central Corridor Pipeline.**

Duke represented to the public and the Securities and Exchange Commission that it "uses propane stored in caverns to meet peak demand during winter. *Once the Central Corridor Project is complete, the propane peaking facilities will no longer be necessary and will be retired.*"<sup>39</sup> In Duke's own words, when the Central Corridor Pipeline began commercial operation, the propane caverns would no longer be necessary. As simply put by OCC witness Adkins during cross examination at the evidentiary hearing, "no longer necessary means no longer useful."<sup>40</sup>

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<sup>38</sup> *Id.*, Direct Testimony of Sarah Lawler (April 27, 2022) (attached to OCC Ex. 9) at 3-4 (emphasis added).

<sup>39</sup> *Id.* at 6 (italics added); *see also* Duke Energy Corporation Form 10-K for Fiscal Year Ended December 31, 2022 (attached) at 147.

<sup>40</sup> Tr. I at 169.

**iv. Duke represented (conceded) to the PUCO in this case that the propane caverns were not used and useful due to the Central Corridor Pipeline.**

In support of its application in this case, Duke filed the direct testimony of Brian R. Weisker.<sup>41</sup> Mr. Weisker reiterated Duke’s above points about the Central Corridor Pipeline. Mr. Weisker’s testimony further demonstrates that completion of the Pipeline eliminated the need for the propane caverns, testifying that “one of the major drivers of the Central Corridor Pipeline was to enable the Company to retire the East Works caverns and propane-air peaking facilities, while maintaining safe and reliable service to customers.”<sup>42</sup> Mr. Weisker also clarified the timing regarding operation of Central Corridor Pipeline, stating “[t]he Company has now completed construction of the Central Corridor Pipeline, officially placing it into service on March 14, 2022.”<sup>43</sup> Mr. Weisker then confirmed that the propane caverns “remained in service until the completion of the Central Corridor Pipeline[]”<sup>44</sup>– March 14, 2022. The propane caverns were not used and useful two weeks before the date certain in this case.

Significantly, Duke did not include the propane facilities in the proposed rate base in this case (when it previously had been).<sup>45</sup> This confirms that Duke itself did not consider the propane facilities a “used and useful” asset when it filed its application in this case.

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<sup>41</sup> Direct Testimony of Brian R. Weisker (July 14, 2022).

<sup>42</sup> *Id.* at 27.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 28.

<sup>45</sup> OCC Ex. 9 at 14.



- v. **Duke represented to the public and the OPSB that the Central Corridor Pipeline went into commercial operation before the date certain in this case, confirming that the propane caverns were not used and useful.**

A letter Duke filed in 16-253-GA-BTX, the case where the Central Corridor Pipeline was approved, demonstrates the propane caverns were no longer used and useful before this case's date certain. The letter gives public notice that the Central Corridor Pipeline "began commercial operation on March 14, 2022."<sup>46</sup> "Commercial operation" occurs when "gas is being transported through the pipeline in an attempt or offer to exchange the gas for money, barter, or anything of value."<sup>47</sup>

OCC witness Kerry Adkins summarized "commercial operation" as meaning "the facility at issue is ready to serve consumers for its intended use."<sup>48</sup> Mr. Adkins explained that "[i]f Duke had any doubt about the Central Corridor Pipeline's ability to serve consumers for its intended use, it could have (and no doubt would have) not filed the notification and instead have held off until any such doubts were resolved."<sup>49</sup> This is because "Duke had discretion when to notify the public and the PUCO that the Central Corridor Pipeline was in commercial operation."<sup>50</sup> The letter demonstrates that the Central Corridor Pipeline was ready to serve its intended purpose on March 14, 2022. Thus, the propane caverns were not used and useful as of the March 31, 2022 date certain.

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<sup>46</sup> Case No. 16-253-GA-BTX, Correspondence (March 15, 2022) (attached to OCC Ex. 9).

<sup>47</sup> O.A.C. 4906-1-01(M)(3).

<sup>48</sup> OCC Ex. 9 at 19.

<sup>49</sup> *Id.* at 19.

<sup>50</sup> *Id.* at 20.

All of Duke’s public representations – over a period of years – regarding the propane caverns demonstrate that the Central Corridor Pipeline would render them obsolete and no longer used and useful for utility service. This happened when the Pipeline began commercial operation on March 14, 2022, meaning the propane caverns were no longer used and useful at the March 31, 2022 date certain in this case. For this reason, the PUCO should not permit Duke to charge consumers for deferred costs related to the propane caverns.

**b. Duke’s deferral of propane cavern expenses does not guarantee it can collect those costs from consumers.**

As just explained, Duke *must* show that the propane caverns were used and useful on the date certain. It has not and cannot do so.

That Duke obtained a deferral of costs associated with the propane caverns is of no moment. Duke is not entitled to charge consumers for costs related to the propane caverns just because it booked a deferral for these costs. Booking a deferral does not authorize collecting costs from consumers.<sup>51</sup> Note the PUCO’s deferral ruling does not guarantee collection from consumers.<sup>52</sup>

Rather, “recovery of deferred amounts is not guaranteed” and “will be addressed in the subsequent proceeding.”<sup>53</sup> This means that a regulatory asset (such as the asset created in Duke’s Deferral Case) is not automatically chargeable to consumers in a rate case.<sup>54</sup>

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<sup>51</sup> *Elyria Foundry Co., v. Pub. Util Comm.*, 114 Ohio St.3d 305 (2007).

<sup>52</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Abandon Certain Propane-Air Facilities*, Case Nos. 21-1035-GA-ABN and 21-1035-GA-AAM, Opinion and Order (October 5, 2022) at para. 37.

<sup>53</sup> Case No. 15-222-GA-AAM, Finding & Order (July 29, 2015) at ¶18.

<sup>54</sup> *In re Duke*, 150 Ohio St.3d at 441.

The Ohio Supreme Court has instructed the PUCO that a utility may not use an accounting mechanism to evade the statutory used and useful test for determining if a utility asset is eligible for inclusion for collection in consumer rates.<sup>55</sup> Booking a deferral is an accounting mechanism, not ratemaking.<sup>56</sup> Duke’s deferral of propane cavern costs does not entitle it to collect those costs from consumers.

- 2. Duke’s proposal to calculate property tax by using the plant in service balance at date certain harms consumers, the public interest, and should be rejected.**
  - a. Duke’s proposal overstates property taxes actually payable during the test year and overcharges consumers.**

The Settlement proposes to increase property taxes by approximately \$2.3 million annually.<sup>57</sup> OCC witness Greg Meyer concluded this figure was calculated by a “flawed” methodology that will “consistently inflate property taxes when a utility is experiencing a growth in plant in service.”<sup>58</sup> This allows Duke to overcharge consumers for property taxes not payable during the test year.

Property taxes are calculated based on a property valuation at December 31 of a year, for payment of those property taxes at December 31 and June 30 of the following years.<sup>59</sup> This means that property taxes on a plant placed in service from January 1, 2022 until March 31, 2022 will not be payable until December 31, 2023 and June 30, 2024, a

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<sup>55</sup> See *Office of Consumers’ Counsel v. Public Utilities Com.*, 67 Ohio St.2d 153, 164 (1981).

<sup>56</sup> *Elyria Foundry Co.*

<sup>57</sup> See Item 5a in the Settlement, which adds \$2,124 to the amount shown in the PUCO Staff Report, on page 17, for adjustment C-38 in the amount of \$2,291,571. All together this represents a total addition to expense of \$2,293,695 for property tax.

<sup>58</sup> OCC Ex. 11 at 3.

<sup>59</sup> *Id.*

full 12-18 months beyond the test year in this rate case.<sup>60</sup> But the Settlement calculates property tax expense using the plant in service balance on the date certain, March 31, 2022. For this reason, Mr. Meyer concludes that, under the Settlement, “Duke will collect property tax expenses that will not be paid for several months beyond the test year.”<sup>61</sup>

Duke’s proposed methodology for calculating property tax includes expenses outside the test year. This raises consumers’ rates, harming consumers and the public interest.

**b. The Settlement allows for a post-test year adjustment that allows Duke to charge consumers for property taxes that are not known and measurable.**

The PUCO should reject Duke’s method for calculating property tax because it includes amounts that are not known and measurable. R.C. 4909.15(D) allows for just and reasonable post-test period adjustments to a utility’s expenses. Adjustments are authorized “when necessary to smooth out anomalies which would make the test year unrepresentative or misleading for ratemaking purposes.”<sup>62</sup> The PUCO has interpreted R.C. 4909.15(D) to require that the amount of any post-test year expense adjustment be “known and measurable.” A cost is “known and measurable” when it is “able to be calculated with certainty” and is “beyond the control of the Company.”<sup>63</sup> Lastly, the cost “must not be so remote as to violate the test year concept.”<sup>64</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> OCC Ex. 11 at 5.

<sup>62</sup> *Off. of Consumers' Couns. v. Pub. Utilities Comm'n of Ohio*, 67 Ohio St.2d 372, 376, 424 N.E.2d 300, 302–03 (1981).

<sup>63</sup> Case No. 80-376-EL-AIR, 1981 WL 703433, Opinion & Order (May 1, 1981), at 30.

<sup>64</sup> *Id.*

Real property is assessed by county auditors for the current tax year under R.C. 5713.01 and in accordance “with the rules and methods applicable to the auditor's county adopted, prescribed, and promulgated by the tax commissioner.”<sup>65</sup> Personal property owned or leased by public utilities on December 31 of the previous year is assessed by the tax commissioner for the current tax year under R.C. 5727.06. The tax commissioner certifies preliminary assessments of public utility personal property by the first Monday in October and public utility personal property is then taxed in the same manner and at the same rates as real property pursuant to R.C. 5727.23. Thus, a utility’s annual property tax bill includes a blend of charges for real property owned during the calendar year and personal property owned or leased on December 31 of the previous year.

Variables used in calculating property tax bills change from year to year. Variables that change annually include the tax rate imposed by the local taxing authority, the assessed value of property, and the application of reduction factors. Assessed values change dependent upon market conditions and the rules and methods of local auditors and the tax commissioner. Property taxes are imposed by local taxing authorities or a vote of the people pursuant to R.C. 5705; subject to the ten-mil limitation of R.C. 5705.02 and the reduction factors of R.C. 319.301 and R.C. 319.302. Changes to locally imposed tax rates are not known and measurable prior to authorization because they are authorized by the legislative process or local elections, and even these changes are subject to statutory limitations on effective tax rates that are intertwined with the property assessment process.

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<sup>65</sup> R.C. 5713.01.

Because of the lag in collection of real and personal property taxes “Duke is attempting to collect property taxes that will not be due to be paid until December 31, 2023, and June 30, 2024.”<sup>66</sup> Changes in local tax rates and assessed values during calendar year 2022 and any additional changes in local tax rates during calendar year 2023 mean that the amount of additional property tax expense is not known and measurable.

**c. The PUCO should adopt OCC’s recommendation for only collection of Duke’s actual 2022 property taxes.**

To protect consumers from being charged for expenses that are not known and measurable, the PUCO should adopt the proposal of OCC witness Meyer, which reflects Duke’s actual 2022 property taxes.<sup>67</sup> Meyer’s approach uses Duke’s actual tax bill for 2022<sup>68</sup> as the property tax expense, which may be obtained from the company’s accounting records. Meyer’s approach estimates the property tax bill that would be payable during the test year by replicating PUCO Staff’s calculation while using plant-in-service balances on December 31, 2021.<sup>69</sup> OCC’s proposal “results in an annualized level of 2022 property taxes of approximately \$39.0 million” that decreases the adjustment contained in the Settlement by approximately \$2.5 million.<sup>70</sup> This is consistent with the Supreme Court’s holding in the *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm’n of Ohio* (1986) that “the commission should use the actual calendar year-end

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<sup>66</sup> Ex. 11 at 19.

<sup>67</sup> *Id.* at p 19.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 20.

<sup>70</sup> *Id.*

property tax expense as the federal income tax deduction for ratemaking purposes.”<sup>71</sup>

Unlike the Settlement adjustment, OCC Witness Meyer’s approach reflects Duke’s actual property tax expense during the test year: a known and measurable amount as required by Ohio Supreme Court ruling in *Cleveland* and consistent with the test year concept.

Adopting Greg Meyer’s methodology for calculating property tax will protect consumers from being charged for expenses that are not paid during the test year and are not known and measurable. OCC’s proposal “reduce the rates for Duke’s consumers,”<sup>72</sup> benefiting consumers and the public interest.

- 3. The Settlement’s provisions regarding Rider CEP harms consumers and the public interest.**
  - a. The Settlement provides for caps on Rider CEP that are inconsistent with the lower rate caps set and approved by the PUCO. Using higher rate caps does not limit capital expenditure, harming consumers and the public interest.**

The Settlement provides for the CEP Rider rate caps<sup>73</sup> for collections of annual CEP investments:

<b>CEP Investment Year</b>	<b>CEP Investment Year</b>	<b>CEP Investment Year</b>	<b>CEP Investment Year</b>	<b>CEP Investment Year</b>	<b>CEP Investment Year</b>
<b>2022</b>	<b>2023</b>	<b>2024</b>	<b>2025</b>	<b>2026</b>	<b>2027</b>
<b>\$2.25</b>	<b>\$2.25</b>	<b>\$1.53</b>	<b>\$1.00</b>	<b>\$1.00</b>	<b>\$1.53</b>

These proposed rate caps on annual CEP Rider increases are too high for consumers. The PUCO approved Duke’s CEP Rider in Case No. 19-791-GA-ALT and set lower limits on CEP Rider increases to consumers.<sup>74</sup> The Case No. 19-791 Settlement

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 6.

<sup>73</sup> OCC Ex. 9 at 34.

<sup>74</sup> Case No. 19-791-GA-ALT, Opinion and Order (April 21, 2021).

states in its entirety that: “For Rider CEP update filings made by the Company [Duke] to recover the revenue requirement associated with investments and associated CEP regulatory assets beginning January 1, 2021 and forward, the monthly residential Rider CEP rate will be allowed to increase no more than \$1.00 per year over the prior year’s residential Rider CEP rate.”<sup>75</sup> The Settlement goes on to state that “[t]he annual residential rate caps agreed to in this Stipulation shall apply until the effective date of the Company’s next natural gas base rate case.”<sup>76</sup>

The effective date for Duke’s “next natural gas base rate case” is the date of a PUCO opinion and order in this case (and is yet to be issued). Therefore, the PUCO should enforce the provisions of the Case No. 19-791 Settlement and reject the Settlement’s proposed \$2.25 CEP Rider caps for CEP assets placed in service in 2022 and thereafter, until the date of the PUCO’s Order that decides and sets the effective date for this rate case. The PUCO should state directly that the \$1.00 CEP rate caps adopted in Case No. 19-791-GA-ALT will apply to CEP assets placed in service in 2022 up to the date of its opinion and order in this rate case. Otherwise, the new Settlement violates the PUCO Order that approved the Settlement in Case No. 19-791-GA-ALT.

Further, the proposed Settlement in this case sets CEP Rider caps at a level that circumvents their purpose. The PUCO found in Case No. 19-468-GA-ALT that rate caps are meant to limit CEP capital investments. In the Case No. 19-468-GA-ALT Opinion and Order, the PUCO stated: “The fundamental purpose of either of the caps is...to limit the amount of the capital investments made by Dominion.”<sup>77</sup>

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<sup>75</sup> Case No. 19-791-GA-ALT, Stipulation and Recommendation (November 16, 2020) at ¶ 6, pp. 5-6.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 40.



OCC witness Kerry Adkins testified that the proposed rate caps are too high to serve as limits on capital investment.<sup>78</sup> This is because, even with the cap at its current level of \$1.00, Duke has a history of massive annual CEP spending increases.<sup>79</sup> Mr. Adkins testified that “Duke’s CEP gross capital investments increased from \$21,877,330 in 2013 (the first year of the CEP Program) to \$95,136,703 in 2018 (the final year covered under the 19-791-GA-ALT case) – a 335% increase. In 2019, Duke’s CEP expenditures grew even more to \$141,494,735, a 547% increase over the first year of the CEP. And in 2020, the CEP expenditures grew further still. 2020’s total CEP expenditures were \$167,271,891 – a 665% increase over the first year of the Program.”<sup>80</sup> Duke’s high level of capital investment necessitates a lower CEP Rider cap than the Settlement provides.

In addition, Mr. Adkins testified that “growth is often cited as another reason for increased CEP expenditures and higher CEP caps.”<sup>81</sup> But population in Duke’s service area is expected to increase only modestly -- by 0.89% in 2025 and by 1.91% from 2025 to 2030.<sup>82</sup> In the four counties where Duke is the only natural gas service provider, ODSA projects a slight population contraction in 2030.<sup>83</sup> Very modest anticipated growth

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<sup>78</sup> OCC Ex. 9 at 42.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 43; *See e.g.*, Case No. 19-771-GA-ALT Post Hearing Brief of Duke Energy Ohio, Inc. (February 24, 2021) at 16-17 where Duke states “As discussed above, Company witness Petchul supports the **drivers of the Company’s [CEP] investments**, both during the audit review period and going forward. These drivers include **customer growth**, government-driven relocations, replacement of aging infrastructure, infrastructure improvements, and investments required to meet existing and emerging state and federal integrity management requirements.” (Emphasis supplied.)

<sup>82</sup> *Id.* at 43; *see also* Attachment KJA-1, 2, and 3.

<sup>83</sup> *Id.*

in the population of Duke's service area over the next seven to ten years is another reason to set the annual cap in CEP Rider increases at a low level.

Allowing Duke to impose greater CEP Rider charges harms consumers and the public interest. It is not justified by Duke's runaway capital investment history or population growth in its service territory. The PUCO should instead enforce the settlement in Case No. 19-468-GA-ALT and limit rate caps to \$1.00.

**b. The CEP Rider should include a savings offset to return operation and maintenance costs to consumers.**

The CEP Rider does not benefit consumers or the public interest because it does not include a savings offset that returns to consumers O&M costs currently included in their rates. All expenditure categories in Duke's CEP include "at least some replacement or upgrade of existing infrastructure and facilities."<sup>84</sup> As Duke builds new facilities that are less expensive to maintain than older infrastructure, "monitoring, maintenance, and repair costs built into the base rates that consumers pay" are "avoided."<sup>85</sup> Costs avoided by new facilities should be returned to consumers through an O&M offset.

OCC witness Kerry Adkins testified that, without an O&M offset, "consumers ended up paying for both the new and upgraded infrastructure and facilities, while continuing to pay for maintenance of the old infrastructure and facilities that were replaced or upgraded in their base gas distribution rates."<sup>86</sup> This is unjust and unreasonable.

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<sup>84</sup> *Id.* at 46.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

Duke has already acknowledged that capital expenditures reduce O&M costs by including an O&M savings offset in its Accelerated Main Repair Project (AMRP) Rider.<sup>87</sup> The CEP Rider should have an O&M offset, as the AMRP Rider does, because the programs serve similar functions: replacing aging pipelines with new infrastructure. Ms. Lawler stated that “the primary purpose of [the AMRP] rider was to replace old mains that were prone to leaks.”<sup>88</sup> Ms. Lawler also agreed on cross that, through the AMRP program, Duke “replaced a great deal of cast iron and bare steel pipe... which was many years old and in need of repair.”<sup>89</sup>

Like Duke’s AMRP Rider – which includes an O&M savings offset – Duke’s CEP Rider funds replacement of aging pipelines. Mr. Weisker testified that the CEP project funded, for example, the CG04 MAOP Project, the purpose of which was “removing the existing 4 miles of 20’ high pressure pipeline from service” and “recommissioning the pipeline to service.”<sup>90</sup> The CEP Rider will also fund the D000B Pipeline Replacement project, which “was needed to replace” an “aging 20- and 24- inch dual diameter natural gas pipeline that was constructed in 1948, which supplies various distribution pipelines” and “end users...”<sup>91</sup>

Under the CEP, pipe-replacement projects have reduced leaks in Duke’s system. Duke witness Weisker testified that, under the CEP from 2020 to 2022, Duke reduced the number of open leaks from 609 to 18.<sup>92</sup> This means that Duke had 591 fewer open leaks

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<sup>87</sup> *Id.* at 70.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 68.

<sup>90</sup> Direct Testimony of Brian R. Weisker at 29.

<sup>91</sup> *Id.* at 30.

<sup>92</sup> Supplemental Testimony of Brian R. Weisker (May 4, 2023) at 4.

to monitor. Reducing leaks should generate O&M savings, as did the AMRP program, which was also intended to reduce leaks.

And the CEP Rider is much broader than the AMRP; it covers “the vast majority of the capital investment” for Duke.<sup>93</sup> The comparatively greater capital investment funded by the CEP Rider for pipeline replacement should allow Duke to avoid even more O&M costs than the AMRP Rider does. So, the CEP Rider – like the AMRP Rider – should include an O&M savings offset that allows these avoided costs to be returned to consumers. The Settlement does not provide for one, which does not benefit consumers or the public interest.

**c. Removing the depreciation offset from Rider CEP allows Duke to overcharge consumers for new investment between rate cases without reducing charges to account for simultaneous depreciation.**

Without the depreciation offset to Rider CEP, the Settlement does not benefit consumers and the public interest and will charge consumers unjust and unreasonable rates. Rider CEP allows for rates to be increased in between rate cases for additional plant investment.<sup>94</sup>

OCC witness Greg Meyer testified that the depreciation offset to Rider CEP “is necessary to recognize the undisputed reduction in the rate base in between rate cases” caused by “accumulated depreciation.”<sup>95</sup> The depreciation offset reduces the return on the new Rider CEP investments that correspond to the decline in rate base caused by depreciation that occurs in between rate cases.<sup>96</sup> If the depreciation offset is not

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<sup>93</sup> *Tr. I* at 75-76.

<sup>94</sup> Settlement at 7.

<sup>95</sup> OCC Ex. 11 at 7.

<sup>96</sup> *Id.*

recognized, Duke will be allowed to charge consumers for new investments that add to rate base without reducing CEP charges to account for depreciation that reduces rate base. This harms consumers and the public interest by allowing Duke to overcharge for new investment. The PUCO should reject this proposal and require Duke to maintain the depreciation offset to Rider CEP.

**4. 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 capital structure and overall cost of capital agreed to in the Settlement are excessive compared to national averages among similar entities. The PUCO should use OCC's capital structure and resulting rate of return. OCC recommends that the PUCO accept the Staff's original Return on Equity (ROE) in this case but modify the capital structure and resulting rate of return.

PUCO precedent for calculating rate of return comes from *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679 (1923) ("Bluefield") and *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944) ("Hope"). The *Bluefield* decision can be summarized as follows: "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management to maintain and support its credit to enable the utility to raise necessary capital."<sup>97</sup> The *Hope* decision can be summarized as follows: "The return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in

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<sup>97</sup> OCC Ex. 7 at JPB-01.

the financial integrity of the enterprise, so as to maintain its credit and attract capital. **In addition, it is the end result that is important and not the methods used to arrive at the rates.**”<sup>98</sup> (Emphasis added.)

To ensure an “end result” that benefits consumers and the public interest, OCC witness Joe Buckley recommended that the PUCO modify Duke’s capital structure.<sup>99</sup> The PUCO Staff has used a capital structure different than a utility-applicant requests as recently as 15-1830-EL-AIR (Dayton Power and Light). In that case, the PUCO Staff used a hypothetical capital structure that was comprised of averages of other companies’ capital structures.<sup>100</sup> Mr. Buckley recommended that the PUCO do so again in this case because Duke’s capital structure under the settlement it is “equity heavy.”<sup>101</sup> The Settlement includes a capital structure of 47.68 percent long-term debt and 52.32 percent common equity.<sup>102</sup> Mr. Buckley found that Duke’s proposed capital structure exposes the Company to “less financial risk than the capital structures of other gas utility companies” and should be rejected.<sup>103</sup>

To reach his conclusion that Duke’s proposed common equity ratio is higher than average compared to similar utilities, Mr. Buckley analyzed The National Average of Capital Structure for Gas Companies (National Average) review of rate decisions from January 1, 2022, to September 30, 2022, Duke Energy’s Capital Structure, and the average Capital Structures of the Comparable Companies selected by Staff (Staff

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<sup>98</sup> *Id.*

<sup>99</sup> OCC Ex. 7 at 5.

<sup>100</sup> 15-1830-EL-AIR, PUCO Staff Report (March 12, 2018) at 18.

<sup>101</sup> OCC Ex. 7 at 11.

<sup>102</sup> Settlement at 4.

<sup>103</sup> OCC Ex. 7 at 5.

Comparable).<sup>104</sup> The National Average capital structure for gas utilities in the first half of 2022 according to S&P Market Intelligence Focus is 49.00% debt and 51.00% equity.<sup>105</sup> The average capital structure of Staff Comparable companies is 57.02% debt and 42.95% equity.<sup>106</sup>

Mr. Buckley proposed instead that the PUCO adopt a capital structure of 52.39% long-term debt and 47.61% common equity ratio. To develop his recommendation, Mr. Buckley averaged the National Average, Staff Comparable, Duke-Ohio and Duke Energy’s capital structures.<sup>107</sup>

	Debt	Equity
National Average	49.00%	51.00%
Average of Staff Comparable	57.02%	42.95%
Duke-Ohio	47.66%	52.34%
Duke Energy	55.87%	44.13%
Average Capital Structure	52.39%	47.61%

This structure aligns Duke’s common equity and financial risk more appropriately to the average capital structures of similar gas utility companies.

Next, Mr. Buckley recommended that the PUCO adopt the PUCO Staff’s original proposed return on equity, rather than the figure in the Settlement.<sup>108</sup> Mr. Buckley testified that the PUCO Staff’s methodologies for calculating ROE – averaging the DCF

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<sup>104</sup> OCC Ex. 7 at 7-8.

<sup>105</sup> *Id.* at 8.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 9.

<sup>108</sup> *Id.* at 5.

model and the CAPM – are “reasonable in this case.”<sup>109</sup> The average ROE granted nationwide to a BBB+ S&P rated company during the period of January 1, 2022 to September 30, 2022 was 9.42%.<sup>110</sup> PUCO Staff recommended a return on equity of 9.52% (after issuance costs were added).<sup>111</sup> Duke, on the other hand, proposes an inflated ROE of 9.6%.<sup>112</sup> PUCO Staff’s proposal is closer to investment returns with corresponding risk, as *Hope* requires, and should be adopted.

Duke’s proposed capital structure and return on equity results in an overall rate of return of 6.96 percent.<sup>113</sup> The national average of rates of return for gas companies granted in the first nine months of 2022 is 6.83%.<sup>114</sup> Adopting OCC’s proposed capital structure and endorsement of the PUCO Staff’s original return on equity would result in the following overall rate of return:

	Cap. Structure	ROE	Cost of Debt	Rate of Return
Debt	52.39%	9.52		2.13
Equity	47.61%		4.07	4.54
Total	100			6.67

OCC’s proposed 6.67% rate of return is more appropriate than Duke’s proposal. Mr. Buckley concluded that Duke’s risk profile does not warrant a higher rate of return than the national average.<sup>115</sup> Even at a lower rate of return, “Duke will still be able to

<sup>109</sup> *Id.* at 7.

<sup>110</sup> S&P Global Market Intelligence.

<sup>111</sup> OCC Ex. 7 at 7.

<sup>112</sup> Settlement at 4.

<sup>113</sup> *Id.*

<sup>114</sup> OCC Ex. 7 at Attachment JBP-02.

<sup>115</sup> OCC Ex. 7 at 10.



attract capital.”<sup>116</sup> This is because Duke Energy Ohio’s natural gas operation presents low financial risk to investors.

Duke Energy has stated in its Retail Investor Update<sup>117</sup> that it provides “[t]op tier dividend yields compared to S&P 500 Utility Companies, with a proven track record of dividend growth by increasing quarterly dividend payments for 16 consecutive years.” Additionally, Duke Energy claims it will be able to provide ~10% in risk adjusted shareholder returns through 2027.<sup>118</sup> Also, Duke Energy<sup>119</sup> and Duke-Ohio<sup>120</sup> are both stable BBB+ rated by S&P. Thus, OCC’s proposed rate of return is “adequate” “to enable the utility to raise necessary capital,” as *Bluefield* requires. Duke’s proposal goes beyond what is necessary. Given Duke’s comparatively low financial risk to investors, the PUCO should not grant Duke’s request for a rate of return above the national average. The PUCO should adopt OCC’s modified capital structure, ROE and resulting lower-than-average rate of return.

**5. The Settlement’s proposal to allow Duke to allocate 67.83% of base distribution revenue charges to residential consumers and collect from consumers an additional \$21.7 million annually does not benefit consumers, nor is it in the public interest.**

Residential consumers should not be “over-burdened with large utility price increases after nearly three years of economic hardships caused by COVID and ongoing inflation.”<sup>121</sup> As Mr. Fortney, who has decades of utility regulation experience, testified,

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<sup>116</sup> *Id.*

<sup>117</sup> OCC Ex. 7 at Attachment JPB-03.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> S&P Global Ratings Duke Energy Ohio February 24, 2022.

<sup>121</sup> OCC Ex. 5 (Fortney) at 5.

COVID and inflation have already caused “almost everything in [consumers’] lives to cost more.”<sup>122</sup>

The PUCO should not approve a 67.8% allocation of base distribution revenues to residential consumers, as the Settlement provides.<sup>123</sup> Instead, non-residential consumers should receive a greater allocation. As Mr. Fortney testified, if commercial/industrial consumers’ rates are increased, they can compensate by increasing their prices.<sup>124</sup> Residential consumers, on the other hand, have no similar solution. Residential consumers, in fact, may have to give up other goods and services to continue paying for utility services, which they cannot go without.<sup>125</sup> For this reason, non-residential consumers should pay a greater allocation than they would under the Settlement, if approved.

The PUCO should also reject the additional \$21.7 million<sup>126</sup> in base distribution revenue the Settlement permits Duke to collect from residential consumers each year. Under the Settlement, the overall base distribution revenues are \$368,233,177, of which residential consumers are allocated 67.83%.<sup>127</sup>

Duke (and the other signatory parties to the Settlement) failed to demonstrate that the alleged benefits of the Settlement justify the charges that residential consumers will be forced to pay during a period of economic hardship. Again, residential consumers

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<sup>122</sup> *Id.*

<sup>123</sup> Settlement at 6.

<sup>124</sup> OCC Ex. 5 at 5.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at RBF-1.

<sup>127</sup> *Id.*

have been ravaged by COVID and high inflation.<sup>128</sup> Public policy should recognize those hardships when evaluating a utility's proposed rates. The Settlement heaps more costs on residential consumers. The revenue increase proposed in the Settlement violates the second prong of the PUCO's three-part test.

In light of the economic difficulty residential consumers are currently facing, OCC witness Fortney recommended that the PUCO should use a residential allocation of 67.00%.<sup>129</sup> The revenue increase to the residential class under Mr. Fortney's proposal would be no more than \$18,575,793 million.<sup>130</sup> 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. 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<sup>131</sup> to gradually<sup>132</sup> move the Residential Class closer to the cost of service.

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<sup>128</sup> *Id.* at 5.

<sup>129</sup> *Id.* at RBF-1.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> The "...regulatory principle of gradualism, which seeks to minimize the impact of rate changes on customers..." *Ohio Consumers' Counsel v. PUC of Ohio*, 125 Ohio St.3d 57, 2010-Ohio-134, 926 N.E.2d 261, ¶ 19.

**6. The Settlement’s proposed fixed delivery charge for the residential class does not benefit consumers and is not in the public interest.**

The Settlement calls for a fixed delivery charge of \$43.29 for the residential consumer class and \$39.29 for low-income consumers.<sup>133</sup> Duke’s current fixed delivery charge is \$31.26.<sup>134</sup> This 38.48% increased consumer charge does not benefit consumers or the public interest. Heavy fixed charges are “inferior from a conservation and energy efficiency standpoint than pricing structures that require consumers to incur more costs with additional consumption.”<sup>135</sup> That is because charges do not provide consumers direct financial incentive to reduce usage.

OCC recommended a residential fixed charge of \$34.23.<sup>136</sup> This reflects Mr. Fortney’s recommendation that any increase to residential fixed charge be “no more than the overall increase to the Residential classes’ base distribution revenues,” or 9.49% under the Settlement.<sup>137</sup> This was the basis for Mr. Fortney’s calculation that the fixed delivery charge should increase no more than \$2.97.<sup>138</sup>

The PUCO should reject or modify the Settlement because the fixed 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 recommended charge of \$34.23.

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<sup>133</sup> Settlement at 8.

<sup>134</sup> OCC Ex. 5 at 6.

<sup>135</sup> *Id.* at 7.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

**7. The Settlement harms consumers and the public interest because it reduces shareholder funding for Duke’s low-income weatherization program and does not provide adequate PUCO oversight.**

As structured, the low-income weatherization cuts annual shareholder funding for low-income weatherization by \$150,000. As OCC witness Colleen Shutrump testified, “weatherization programs are not strictly necessary for the provision of utility service, so Duke shareholders should pay at least some of the program costs.”<sup>139</sup> But under the proposed Settlement, annual shareholder contributions for low-income weatherization programs fall from \$350,000<sup>140</sup> to \$200,000, while consumer charges for the program remain at \$1,795,000 annually.<sup>141</sup> This means the Settlement effectively gives money back to shareholders, who also stand to benefit from an annual revenue increase of \$31.7 million proposed by the Settlement.<sup>142</sup>

Second, Ms. Shutrump recommended that funding for low-income weatherization be considered in its own case.<sup>143</sup> In Ms. Shutrump’s expert opinion, addressing low-income programs in a ratemaking proceeding risks that they will be “used as a bargaining chip” to obtain both concessions on unrelated issues and signatures on a Settlement.<sup>144</sup> Further, because many people rely on low-income weatherization programs, they should have a predictable funding mechanism. Ms. Shutrump concluded that a rider case

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<sup>139</sup> OCC Ex. 3 at 5.

<sup>140</sup> Opinion and Order, Case No. 12-1685-GA-AIR at 16 (November 13, 2013).

<sup>141</sup> Settlement at 13.

<sup>142</sup> Settlement at 3.

<sup>143</sup> OCC Ex. 3 at 4.

<sup>144</sup> *Id.*

achieves this, while Duke’s current low-income weatherization program is “dependent on sometimes infrequent timing of rate cases.”<sup>145</sup>

Generic rider cases also allow for more oversight, which protects consumers. The need for oversight of low-income programs is demonstrated by Case No. 19-1456-GA-RDR, in which a PUCO Staff audit of Pike Natural Gas Company’s weatherization program revealed that more than half of weatherized homes experienced no reductions in natural gas usage.<sup>146</sup> Ms. Shutrump testified that necessary “oversight includes (but is not limited to) annual review and reconciliation of actual program expense for accuracy and reasonableness.”<sup>147</sup> Ms. Shutrump also recommended that an audit of Duke’s low-income weatherization program “provide recommendations to improve programs, such as lowering administrative costs while maximizing the number of consumers that would benefit from weatherization services through lower bills.”<sup>148</sup> This would ensure funding collected from consumers is not wasted. It would also ensure that program funds actually benefit at-risk consumers, as intended.

Ms. Shutrump recommended<sup>149</sup> the PUCO adopt an audit of the low-income weatherization program that includes the following:

- a. The program expenditures, including average and mean dollars expended per household and per property;

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<sup>145</sup> *Id.* at 6.

<sup>146</sup> Entry (September 26, 2019).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 7.

<sup>149</sup> OCC Ex. 3 at 8-9.

- b. Any administrative fees collected by Duke and the weatherization providers;
- c. Eligibility documentation for program applicants;
- d. Spending of the program budget or failure to spend the program budget;
- e. Prioritization, if applicable, of weatherization services;
- f. Accounting of expenses that relate directly to reducing gas usage by low-income consumers;
- g. The timeline of providing weatherization services;
- h. The impact of health and safety expenditures on the low-income weatherization program;
- i. The number and types of properties (*e.g.*, owner-occupied, rental, etc.) that receive weatherization funding;
- j. Compliance with program guidelines, include determining eligibility of program recipients and, if applicable, limitations on funding; and
- k. To the extent Duke knows, identifying any rental properties sold or converted by the property owner to non-low-income properties within two years of receiving weatherization program services to that property.

Funds for weatherization programs should be used for services that will reduce natural gas usage and at-risk consumers' natural gas bills. OCC's proposed audit will ensure consumer dollars are being spent to deliver these benefits for at-risk consumers.

However, as structured, Duke’s low-income weatherization lacks these important consumer protections and does not benefit consumers or the public interest.

**8. The Settlement does not benefit consumers and the public interest because it charges them for financial performance incentives which do not benefit them.**

The Settlement allows Duke to charge consumers for financial performance incentives. Financial performance incentives are compensation to utility employees for achieving performance goals set by the utility management.<sup>150</sup> The Settlement states that the “Stipulated Schedules include an addition to rate base as compared to the Staff Report of \$2,132,937 associated with financial incentives that were capitalized within net-plant in-service.”<sup>151</sup> And the Settlement provides that Duke will retain its corporate parent’s program for capitalizing employee “bonus expense,” which is defined as “the portion of the Company’s incentive compensation attributable to the achievement of financial goals and that which is issued to the employee in the form of Company stock.”<sup>152</sup> The PUCO should find that this harms consumers, who receive no benefit for these charges.

The financial performance incentives, which consumers fund under the Settlement, are unjust and unreasonable. OCC witness Kerry Adkins testified that “Duke’s performance incentive awards benefit only the utility and its shareholders and do not provide any benefit to consumers. They are not necessary for the provision of utility service.”<sup>153</sup> The PUCO has retained independent auditors in prior cases that have described the consumer harm from including financial performance incentives in charges

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<sup>150</sup> OCC Ex. 9 at 52.

<sup>151</sup> Settlement at 4.

<sup>152</sup> *Id.* at 7.

<sup>153</sup> OCC Ex. 9 at 53.



on consumers. For example, in its audit report in Case No. 19-791-GA-ALT recommending removing financial performance incentives from Duke's CEP, Larkin & Associates stated:

the basis for our recommendation is that incentive compensation expense that is tied to a utility's financial performance should not be borne by ratepayers. Specifically, the portion of incentive compensation expense that is directly attributable to meeting financial performance goals, such as net income or earnings per share, is not properly recoverable from ratepayers for several reasons. First, if the financial goals are set properly, achieving the necessary performance should be self-supporting. That is, measures that achieve additional cost savings, improves sales, or otherwise improves financial results of the Company should provide the income necessary to fund the awards. Second, the payouts for financial goal achievement can be distinguished from incentive compensation that is measured for improving the quality of service, efficiency, or safety goals. Finally, the incentive to improve financial performance is not necessarily consistent with ratepayers' interests.<sup>154</sup>

Further, Mr. Adkins testified that including financial performance incentives in the rate base harms consumers because it causes them to pay more in rates than they would otherwise pay.<sup>155</sup> Consequently, the financial performance incentives in the Settlement charge consumers unjust and unreasonable rates for a benefit they do not receive. For this reason, the PUCO should find the Settlement harms consumers and the public interest.

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<sup>154</sup> See Case No. 19-791-GA-ALT 'Plant in Service and Capital Spending Prudence Audit of Duke Energy Ohio, Inc. (Natural Gas) Covering the Period April 1, 2012 through December 31, 2018' by Larkin & Associates ("Case No. 19-791 Larkin Audit Report" (May 11, 2020)) at 9-9.

<sup>155</sup> OCC Ex. 9 at 6.

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

- 1. Allowing Duke to treat the propane caverns as a “cost” of “rendering the public utility service for the test period,” under R.C. 4909.15(A)(4), would violate the important regulatory principle and practice that utility assets must be used and useful at date certain. The PUCO is barred by Supreme Court precedent from using an accounting device to circumvent Ohio ratemaking law, as the Settlement does.**

At the outset, OCC incorporates the ratemaking law cited in its related argument (about including Duke’s caverns in rates) under the PUCO’s second settlement prong into this argument against charges to consumers for the caverns under the PUCO’s third settlement prong. Allowing Duke to collect deferred costs related to the propane caverns violates the important regulatory principle in R.C. 4909.15(A)(1) that “property of the public utility” must be “used and useful” at date certain.<sup>156</sup> As demonstrated above, Duke repeatedly represented publicly, over a period of years, before multiple regulatory bodies, that the purpose of the Central Corridor Pipeline was to retire the propane caverns, rendering them no longer used and useful. Duke’s public representations also demonstrate that the Central Corridor Pipeline began commercial operation – rendering the propane caverns not used and useful – before the date certain in this case.

The PUCO should not treat the propane caverns as a “cost to the utility of rendering the public utility service for the test period...,” under R.C. 4909.15(A)(4). This would allow Duke to charge consumers for the propane caverns even though they were no longer used and useful.

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<sup>156</sup> R.C. 4909.15(A)(1).

While R.C. 4909.15(A)(1) requires utility property to be used and useful, R.C. 4909.15(A)(4) includes no such requirement for costs. Treating the propane caverns as a cost of service under R.C. 4909.15(A)(4) would be contrary to law. The Ohio Supreme Court has “seriously question[ed] whether the General Assembly contemplated that the commission would treat the type of expenditures controverted herein [major capital investments] as costs under [R. C. 4909.15\(A\)\(4\)](#).”<sup>157</sup> It has explained that a major capital investment cannot be transformed into an operating expense by “commission fiat.”<sup>158</sup> The propane caverns were major capital investments that must be analyzed under R.C. 4909.15(A)(1), not costs under R.C. 4909.15(A)(4). As OCC expert Kerry Adkins concluded, “the propane facilities and the propane inventory were a utility asset,” not a cost of rendering service.

In fact, Duke has never treated the propane caverns as a cost of rendering utility service before. As Mr. Adkins testified, “[p]reviously, they have always been in rate base.” Only when the propane caverns ceased to be used and useful, as R.C. 4909.15(A)(1) requires property to be, did Duke attempt to treat the propane caverns as a cost of rendering utility service. The PUCO should not allow this bait and switch. The propane caverns are property, not costs of rendering service, meaning they must be used and useful at the date certain.

The PUCO should and must apply the used and useful standard embodied in the statutory ratemaking formula in R.C. 4909.15. The propane facilities were not useful for providing utility service on the date certain, so charging consumers for them (as

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<sup>157</sup> *Consumers’ Counsel*, 67 Ohio St.2d at 164.

<sup>158</sup> *See id.*

permitted under the Settlement) would violate important regulatory practices and principles.

**2. The PUCO should reject the Settlement because it violates the important regulatory principle that utilities must charge just and reasonable rates.**

The Settlement should be rejected because it is inconsistent with important regulatory practices and principles. R.C. 4905.22 provides that every public utility must charge ‘just, reasonable’ rates and furnish ‘necessary and adequate facilities and services’ in exchange. OCC witness Joe Buckley testified that the Settlement violates important regulatory practices and principles because it “results in rates to consumers that are not just and reasonable.”<sup>159</sup>

Again, the United States Supreme Court provided further guidance for setting the appropriate level of profitability for regulated public utilities in the *Hope* and *Bluefield* cases.<sup>160</sup> The *Hope* decision, in summary, states that the “end result,” “not the methods,” is paramount in setting rate of return.<sup>161</sup> And the “end result” “should be commensurate with returns on investments in other enterprises having corresponding risks.”<sup>162</sup> In summary, the *Bluefield* decision provides that a utility’s return on equity “should be adequate” “to enable the utility to raise necessary capital.”<sup>163</sup>

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<sup>159</sup> OCC Ex. 7 at 4.

<sup>160</sup> OCC Ex. 7 at 7, *see also 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*”).

<sup>161</sup> OCC Ex. 7 at JPB-01.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

Mr. Buckley concluded that the Settlement violates the *Hope* and *Bluefield* decisions. Duke proposes an inflated ROE of 9.6%.<sup>164</sup> But the average ROE granted nationwide to a BBB+ S&P rated company during the period of January 1, 2022 to September 30, 2022 was 9.42%.<sup>165</sup> OCC endorses instead PUCO Staff’s return on equity of 9.52% (after issuance costs are added).<sup>166</sup> This ROE aligns more closely with national average than Duke’s, allowing for a return commensurate to similarly risky investments, as *Hope* requires.

OCC’s proposed 6.67% rate of return is also more appropriate than Duke’s proposal of 6.96 percent. The national average of rates of return for gas companies granted in the first nine months of 2022 is 6.83%.<sup>167</sup> Mr. Buckley concluded that Duke’s risk profile does not warrant a higher rate of return than the national average.<sup>168</sup> “Duke will still be able to attract capital”<sup>169</sup> with a below-average rate of return because its operation presents low financial risk to investors.

Duke Energy has stated in its Retail Investor Update<sup>170</sup> that it provides “[t]op tier dividend yields compared to S&P 500 Utility Companies, with a proven track record of dividend growth by increasing quarterly dividend payments for 16 consecutive years.” Duke has further claimed it will be able to provide ~10% in risk adjusted shareholder

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<sup>164</sup> Settlement at 4.

<sup>165</sup> OCC Ex. 7 at JPB-02.

<sup>166</sup> OCC Ex. 7 at 7.

<sup>167</sup> OCC Ex. 7 at JPB-02.

<sup>168</sup> *Id.* at 10.

<sup>169</sup> *Id.*

<sup>170</sup> OCC Ex. 7 at JPB-03.

returns through 2027.<sup>171</sup> Duke Energy<sup>172</sup> and Duke-Ohio<sup>173</sup> are also both stable BBB+ rated by S&P. So, OCC's proposed rate of return is "adequate" to ensure Duke can raise capital, as *Bluefield* requires. The above-average rate of return in the settlement is inflated beyond what is necessary for Duke Energy, Ohio to attract capital investment. For this reason, the PUCO should reject it.

Because the Settlement violates important regulatory principles articulated in *Hope* and *Bluefield*, it does not meet the PUCO's three-part standard for approval. The PUCO should reject the settlement.

**3. The PUCO should reject the Settlement because it violates the important regulatory principles of gradualism.**

Gradualism refers to the regulatory principle and practice that rates should increase gradually over time, so they do not cause "rate-shock" to consumers.<sup>174</sup> This promotes "continuity" between "current and proposed pricing structures."<sup>175</sup> A gradual increase to rates protects consumers from sudden high bills that are unaffordable.

Mr. Fortney testified that he concluded, based on decades of utility regulation experience, that this Settlement violates the regulatory principle of gradualism.<sup>176</sup> The Settlement fails to moderate the level and change of Duke's base rates, which will prevent undue financial burden on residential consumers. Residential consumers are uniquely unable to handle these burdens at present because of COVID and high

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<sup>171</sup> *Id.*

<sup>172</sup> OCC Ex. 7 at JPB-04.

<sup>173</sup> *Id.*

<sup>174</sup> OCC Ex. 5 at 9-10.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 10.

inflation.<sup>177</sup> For this reason, the Settlement violates the third prong of the PUCO’s three-part test for evaluating settlements.

OCC witness Fortney proposed a more gradual move of the rates of return for each consumer class towards the cost of service. Mr. Fortney recommended using a proposed allocation of revenue, 67%, which gradually moves the rates of return of each class towards the cost of service.<sup>178</sup> The distribution revenue increase to the Residential Class under that proposal is \$18,575,793 million, out of a total increase of approximately \$31.7 million.<sup>179</sup> This increase would gradually move the Residential Class closer to the cost of service while adhering to the public policy of gradualism.<sup>180</sup>

**4. The fixed delivery charge of \$43.29 for residential consumers (\$39.29 for low-income consumers) violates the important regulatory principle of cost causation.**

The important regulatory principle of “cost causation dictates that assets used individually should be charged individually.”<sup>181</sup> The Settlement adopts a \$43.29 fixed delivery charge for residential consumers and \$39.29 for low-income consumers.<sup>182</sup> Consumers pay this cost regardless of how much natural gas they use. That violates the important regulatory principle of cost causation.

On page 34 of the Staff Report,<sup>183</sup> Staff finds “[b]ased on this review, Staff finds that the cost to serve consumers within each of the current GS/FT -Small and GS/FT-

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<sup>177</sup> *Id.* at 5.

<sup>178</sup> *Id.* at RBF-1.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Case No. 17-32-EL-AIR, Opinion & Order (December 19, 2018) at 87.

<sup>182</sup> Stipulation at 8.

<sup>183</sup> Staff Report of Investigation (December 21, 2022).

Large rate classes are not the same. The rate structure should be analyzed and general service consumers should be separated into rate classes with similar cost causation characteristics to achieve fair and equitable rates under the Modified Straight Fixed Variable (MSFV) rate design. Consumers within a non-homogenous rate class should not be billed such that consumers who place a small cost on the system may be subsidizing the larger cost causers within their own rate class.”

This is true of residential consumers as well. Residential consumers are not homogenous, and those residential consumers who place a small cost on the system may be subsidizing the larger cost causers within their own class.<sup>184</sup> As Mr. Fortney testified, costs are allocated to the fixed charge, “the signal is that all residential consumers require the same amount of system capacity, regardless of the size of the residence (or, the size of the connected load). As the PUCO Staff has recognized for the non-residential classes, and should have recognized for the Residential classes, this is simply not true.”<sup>185</sup> Further, the fixed cost in the Settlement violates the important regulatory principle of cost causation because “residential consumers who use *less* energy will experience the *greatest* percentage jumps in their gas bills if the fixed charge is raised.”<sup>186</sup> For this reason, the PUCO should reject the fixed delivery charge proposal for Residential consumers in the Settlement. As Mr. Fortney recommended, any increase to the fixed delivery charge should be no more than the overall increase to the Residential classes’ base distribution revenues (i.e., if the increase to the Residential classes is 9.5%, then the

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<sup>184</sup> OCC Ex. 5 at 7-8.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* (emphasis added).



fixed delivery charge increase should be no more than  $\$31.26 * 9.5\%$ , or  $\$2.97$ ).<sup>187</sup> The fixed delivery charge should be  $\$34.23$ .<sup>188</sup> Any remaining revenue requirement should be recovered through a volumetric charge. Because this settlement includes a significant fixed charge that violates the important regulatory principle of cost causation, the PUCO should reject it.

**5. The Settlement includes financial performance incentives that violate PUCO precedent and the important regulatory principle and practice of cost causation.**

Financial performance incentives included in the settlement also violate PUCO precedent and the important regulatory principle and practice of cost causation. The PUCO has disallowed Duke's attempts to charge consumers for utility employee incentive pay.<sup>189</sup> OCC witness Kerry Adkins described this principle as meaning "utility costs should be charged to those who benefit from the services that led to the utility costs."<sup>190</sup> Again, Duke and Duke's shareholders, not consumers, are the beneficiary if Duke achieves financial targets. Since consumers do not benefit from these incentives, charging consumers for them violates cost causation principles. The PUCO should eliminate financial performance incentives from the Settlement.

### **III. 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

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<sup>187</sup> OCC Ex. 5 at 8.

<sup>188</sup> OCC Ex. 9 at 54.

<sup>189</sup> Case No. 17-781-EL-RDR, Finding & Order (May 15, 2019) at ¶¶13, 16-17.

<sup>190</sup> OCC Ex. 9 at 54.

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 Initial Brief for Consumer Protection was served by electronic transmission upon the parties below this 16<sup>th</sup> day of June, 2023.

/s/ William J. Michael  
William Michael  
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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