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

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

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July 14, 2023

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I. INTRODUCTION

Duke, the PUCO Staff, and other parties urge the PUCO to approve a settlement that would allow Duke to raise consumers' natural gas rates. OCC opposes the settlement because it would harm Duke's residential consumers, who are already vulnerable to soaring energy prices, inflation, and a possible recession. The settlement lacks important consumer protections for Duke's 411,000 Cincinnati-area consumers. It also provides Duke with a $31.7 million base distribution revenue increase,[1] the ability to charge consumers for propane caverns that were not used and useful on the date certain, and

[1] Stipulation and Recommendation (April 28, 2022) ("Settlement") at 3.

other costly add-on charges (riders). For these reasons, the Settlement fails to satisfy each of the three prongs of the PUCO's settlement test and should be rejected.

The PUCO should resolve Duke's rate case so that it benefits all of Duke's consumers. That includes OCC's recommendations to protect consumers from paying for propane facilities that are no longer used and useful, overinflated property taxes, and Rider CEP caps that exceed limits set by the PUCO.

II. ARGUMENT

Duke, the PUCO Staff, and other parties filed initial briefs arguing that the Settlement satisfies the PUCO's three-part settlement test.[2] They are wrong, for the following reasons.

A. The Settlement is not the product of serious bargaining, and therefore harms consumers.

The parties ask the PUCO to find that the Settlement satisfies the first prong of the PUCO's three-part test for evaluating settlements. It does not.

1. Evidence that all parties attended regular settlement meetings does not establish that serious bargaining occurred where, as here, the utility wields unfair bargaining power that harms consumers.

Duke argues that the Settlement was produced through serious bargaining because it hosted "regular meetings . . . almost weekly," in which "all parties, including OCC, . . . had the opportunity to express their opinions…."[3] The PUCO should reject claims of serious bargaining that are based on OCC attending settlement negotiations. Where

[2] Parties filing initial briefs include Duke, the PUCO Staff, Interstate Gas Supply, Retail Energy Supply Association, Ohio Energy Group and People Working Cooperatively.

[3] Duke Energy Ohio, Inc. Initial Brief ("Duke Brief") at 14-15.

money gives a utility, like Duke, an outsized role in the settlement process, no *serious* bargaining occurs. As OCC witness Colleen Shutrump stated as illustration, "low-income programs should not be made utility bargaining chips to garner support for utility rate increase settlements."[4] When this happens, the utility obtains support for settlements using negotiating leverage, rather than serious bargaining. The PUCO should reject Duke's argument that serious bargaining occurred on the basis that Duke hosted settlement meetings and that OCC was invited.

2. Settlement terms that are less favorable than Duke requested does not establish that serious bargaining occurred because Duke's application was unreasonable and would harm consumers.

Duke argues that serious bargaining occurred because the Settlement calls for Rider CEP caps that are "lower than those proposed in the Application."[5] But the lower caps in the Settlement are not evidence of serious bargaining because they are unreasonable.

The Rider CEP caps in the Settlement violate PUCO precedent in Case No. 19-791-GA-ALT. In that case, the PUCO set lower limits on CEP Rider increases to consumers.[6] The Case No. 19-791 settlement states: "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

[4] OCC Ex. 3 (Shutrump Testimony) at 6.

[5] Duke Brief at 21.

[6] Case No. 19-791-GA-ALT, Opinion and Order (April 21, 2021).

year over the prior year's residential Rider CEP rate."[7] The settlement then provides 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."[8]

The effective date for Duke's "next natural gas base rate case" is the date of a PUCO opinion and order in this case (yet to be issued). By providing for CEP Rider caps of $2.25 for assets placed in service in 2022, the Settlement violates the precedent established in Case. No. 19-791-GA-ALT. It was unreasonable for Duke to apply for CEP Rider caps higher than the $1.00 limit the PUCO authorized. In the 19-791 case, the PUCO Staff said: "a key component of the Stipulation, and the most significant issue during the negotiations, is the Company's agreement to establish caps on the incremental revenue requirement increase and the deferral balances going forward for residential customers."[9] The PUCO Staff emphasized that "for Rider CEP update filings made by the Company 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 over the prior year's residential Rider CEP rate."[10] So, it is not evidence of serious bargaining that the Settlement lowers those caps relative to the application (to a level that still violates the PUCO-approved limit).

[7] Case No. 19-791-GA-ALT, Stipulation and Recommendation (November 16, 2020) at ¶ 6.

[8] *Id.*

[9] *See e.g.,* Initial Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (February 24, 2021) at 6-7.

[10] *Id.*

3. The Settlement ROE does not establish serious bargaining occurred because it is unreasonable.

Duke also argues serious bargaining occurred because the Settlement increases Duke's profits ("return on equity" or "ROE") and revenue requirement by less than what Duke initially requested.[11] This does not establish serious bargaining. It shows Duke's application contained unrealistic terms.

Duke requested a ROE of 10.30%.[12] As OCC witness Joe Buckley testified, "that ROE is clearly excessive for a BBB+ S&P rated company" like Duke.[13] This is because "the average ROE granted nationwide between January 1, 2022 to September 30, 2022" was just 9.42%.[14] The lower (but still inappropriate) ROE in the Settlement does not establish that serious bargaining occurred.

Duke argues it is evidence of serious bargaining that the Settlement provides for a "reasonable" stipulated ROE.[15] Duke argues its ROE is reasonable because "[i]t is very close to the national average . . . between May 1, 2022 through April 20, 2023…."[16] But this national average includes nearly four months of data outside the test year, which ended on December 31, 2022. Joe Buckley was the only witness in this case that developed an ROE based solely on test year data. Mr. Buckley testified that the average ROE granted nationwide to a BBB+ S&P rated company during the test period of January 1, 2022 to September 30, 2022 was 9.42%.[17] For this reason, OCC endorsed the

[11] Duke Brief at 14-15.

[12] OCC Ex. 7 (Buckley Testimony) at 7.

[13] *Id.*

[14] *Id.*

[15] Duke Brief at 19.

[16] *Id.*

[17] OCC Ex. 7 (Buckley Testimony) at JPB-02.

PUCO Staff's comparable return on equity of 9.52% (after issuance costs are added).[18] Duke's 9.60% ROE[19] is too high and based on data outside the test year. It does not establish serious bargaining.

Duke also submits that the Settlement provides for a reasonable capital structure that is evidence of serious bargaining.[20] This is false. Duke argues that its proposed equity ratio of 52.32 percent is reasonable "comparable to other similarly situated natural gas utilities…."[21] But the range of "comparable" debt-equity ratios Duke cites is from 2019 and 2020.[22] This data is outside the test year in this case, which began in 2022.

By contrast, OCC witness Joe Buckley recommended a 47.61 equity ratio in part by averaging rate decisions between January 1, 2022 and September 30, 2022.[23] These decisions all occurred in the 2022 test year in this case, making them more appropriate points of comparison. Mr. Buckley's recommendation also averaged capital structures for gas utilities in the first half of 2022, which was also within the test year. Mr. Buckley's adherence to test year data makes his recommendation more accurate than Duke's, which is too high.

Duke argues that Mr. Buckley's proposed capital structure is unreasonable because it was calculated in part by averaging capital structures of non-regulated holding companies.[24] Duke uses an average of operating companies instead, whose equity ratios

[18] *Id.* at 7.

[19] Settlement at 4.

[20] Duke Brief at 20.

[21] *Id.*

[22] Direct Testimony of James. M. Coyne at Attachment JMC-10.

[23] OCC Ex. 7 (Buckley Testimony) at 7-8.

[24] Duke Brief at 20.

range from 47.44 to 60.04 percent.[25] Mr. Buckley's proposed equity ratio of 47.71 percent is within that range. So, it is immaterial that Mr. Buckley considered holding company equity ratios in reaching his recommendation. Duke also argues that Mr. Buckley's recommendations are inappropriate because it "ignores more recent data."[26] Again, data more recent than 2022 is outside the test year in this case. Duke's unreasonable capital structure and return on equity do not demonstrate that the Settlement was the product of serious bargaining.

4. Duke's arguments that the revenue requirement and fixed delivery charge are reasonable have nothing to do with serious bargaining.

Duke argues serious bargaining occurred because the revenue requirement was "reasonable based on the cost-of-service study."[27] This makes no sense. Duke itself created the cost-of-service study, which it submitted with its application. That Duke's proposed revenue requirement aligns with a study Duke itself produced is not evidence that Duke seriously bargained with other parties.

Further, it is not evidence of serious bargaining that Duke adopted PUCO Staff's recommended 68.2% residential revenue requirement.[28] That is only a 0.1% less than what Duke requested in its application.[29] This concession is too small to evidence *serious* bargaining. It still allows Duke to increase base distribution revenues by $31.7 million.[30] And this after, as OCC witness Bob Fortney testified, residential consumers have been

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[25] *Id.*

[26] *Id.*

[27] *Id*. at 24.

[28] *Id.*

[29] *Id.*

[30] Settlement at 3.

"ravaged by the economic hardships caused by covid and ongoing inflation that has caused almost everything in their lives to cost more."[31] Duke's increased residential revenue allocation is unreasonable and does not evidence serious bargaining.

Duke also argues serious bargaining occurred because the Settlement increased the monthly fixed charge consumers pay from $31.26 to $43.29.[32] Duke argues that this increase is "reasonable" because it is offset by the termination of Rider AMRP and Rider CEP being reset to zero.[33] Per Duke, this means consumers "are paying the same amount in total fixed charges as they currently pay."[34] This is not evidence of serious bargaining. Duke itself asserts that it would have charged consumers the $12.03 per month increase (through Riders) even without the Settlement. That consumers would be burdened with the same fixed costs regardless of this case's outcome shows a *lack* of mutual concessions between parties, not serious bargaining.

5. The low-income weatherization program is not evidence of serious bargaining because the Settlement cuts shareholder funding and keeps overall funding constant, to consumers' detriment.

Duke argues the Settlement is the product of serious bargaining because it "includes a commitment to provide $200,000 a year in shareholder contributions to be used in support of low-income weatherization projects…."[35] But this is a *reduction* from Duke shareholders' prior commitment of $350,000 per year.[36] Duke's proposal to reduce

[31] OCC Ex. 5 (Fortney Testimony) at 5.

[32] Duke Brief at 25-26.

[33] *Id.* at 26.

[34] *Id.*

[35] *Id.* at 28.

[36] OCC Ex. 3 (Shutrump Testimony) at 5.

costs for shareholders while charging consumers an additional $31.7 million does not demonstrate that Duke seriously bargained with the intervenors in this case. In fact, it shows the opposite: Duke shareholders benefit while conceding nothing to other parties.

The low-income weatherization program's overall budget is not evidence of serious bargaining, either. The Settlement provides for $1,795,000 in consumer funding for the program.[37] That is the exact level of funding allocated to the program before this rate case.[38] So, the Settlement merely requires Duke to do what it was already doing. That is not a concession to any party in this case and not evidence of serious bargaining.

For these reasons, the Settlement is not the product of serious bargaining. The PUCO should find the Settlement fails the first prong of its three-part test and reject it.

B. Settling parties' claims that the Settlement benefits consumers because it gives Duke less than what Duke initially requested in its application does not prove 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 a lower revenue requirement and ROE than it originally asked for.[39] That Duke settled for less than it first requested does not benefit consumers or the public interest. Again, OCC witness Joe Buckley produced evidence that the 10.3% ROE in Duke's application was unreasonable.[40] The average ROE granted nationwide between January 1, 2022 to September 30, 2022 was just 9.42%.[41] So, Duke's

[37] Settlement at 13.

[38] OCC Ex. 3 (Shutrump Testimony) at 5.

[39] *See e.g.,* Duke Brief at 30.

[40] OCC Ex. 7 (Buckley Testimony) at JBP-02.

[41] *Id.*

abandonment of its initial 10.3% ROE application demonstrates an unrealistic initial bargaining position, not a consumer benefit.

Duke also argues the Settlement benefits consumers and the public interest because "[a]ll customers benefit from a utility that is able to operate with sufficient revenues to cover its ongoing costs of operations and receives a reasonable opportunity to earn a return on its capital."[42] But the Settlement calls for an ROE of 9.6%,[43] which exceeds the 9.42% national average. So, the Settlement provides Duke an *excessive* opportunity to earn a return on its capital, at consumer expense. This is not a benefit to consumers and the public interest. It is also counter to the regulatory compact between consumers and utilities, in which consumers should only pay a fair and reasonable rate of return for monopoly services.

Next, Duke states that the Settlement benefits consumers and the public interest because it provides for a "small overall increase to customers' rates…."[44] But Duke fails to address how this increase will impact consumers. At hearing, a Duke witness testifying that the Settlement benefitted consumers and the public interest admitted she did not analyze household income data or average household savings among Duke consumers.[45] The same witness admitted she did not analyze the cost of living in Duke's service territory.[46] Duke merely *asserts* that the rate increase benefits consumers and the public interst because it is small as a percentage of a consumer's overall bill.[47] Without

[42] Duke Brief at 30.

[43] Settlement at 4.

[44] Duke Brief at 30.

[45] Tr. I. at 19-20.

[46] *Id.*

[47] Duke Brief at 30.

analyzing consumers‘ ability to pay, Duke fails to prove this increase benefits consumers and the public interest.

By contrast, OCC expert Mr. Fortney concluded, based on decades of utility regulation experience, that this Settlement will impose undue financial burden on residential consumers.[48] Residential consumers are uniquely unable to handle these burdens at present because of COVID and high inflation.[49] The increase Duke proposes would burden consumers at a time they are particularly vulnerable. For this reason, the Settlement does not benefit consumers and the public interest.

Further, Duke asserts that “the public interest benefits when a utility has sufficient funds to provide safe, reliable and reasonable service.”[50] Duke further asserts that the “foundation” of this Settlement’s purported reliability and safety benefit “is the utility’s ability to be financially sound, have strong credit metrics, and have access to capital markets….”[51] Duke does not explain how improving its financial profile will improve reliability and safety. Duke also does not attempt to quantify these purported reliability benefits. And Duke’s assumption that allowing it to collect more money results in more reliable service could justify anything that enhances Duke’s financial profile, regardless of the cost to consumers. This is too vague a reason to justify charging consumers an additional $31.7 million. It is also counter to the regulatory compact between consumers and utilities, in which consumers should only pay a fair and reasonable rate of return for monopoly services.

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[48] OCC Ex. 5 (Fortney Testimony) at 5.

[49] *Id.*

[50] Duke Brief at 31.

[51] *Id.*

Lastly, Duke identifies several specific so-called benefits to consumers. The first is the Settlement's lower-than-requested CEP caps.[52] Again, Duke's CEP caps still exceed the $1.00 limit the PUCO approved in Case No. 19-791-GA-ALT.[53] This unlawfully-high charge is not a benefit to consumers. Duke asserts that its "natural gas delivery system has seen remarkable gains in reliability and safety as a result of the programs like those integrity management programs recovered through Rider CEP." Yet Duke continues to maintain that consumers should not see the benefit stemming from improved relaibilty through Operation and Maintenance (O&M) savings offsets to the CEP Rider. Duke also identifies continuation of and shareholder contribution to the low-income weatherization program as a consumer benefit.[54] But again, the Settlement only requires Duke to do what it was already doing, funding the program at the same level it was before this rate case.[55] And Duke shareholders are required to provide $150,000 less in funding for the program than they were before, all while Duke levies $31.7 million in additional charges against consumers.[56] These are benefits to Duke, not to consumers.

Duke fails to prove that the Settlement benefits consumers and the public interest. For this reason, the PUCO should reject it.

[52] Duke Brief at 30.

[53] Case No. 19-791-GA-ALT, Opinion and Order (April 21, 2021).

[54] Duke Brief at 30.

[55] OCC Ex. 3 (Shutrump Testimony) at 5.

[56] *Id.*

C. The Settlement violates Ohio law and numerous important regulatory principles and practices, thereby harming consumers.

The settling parties have not demonstrated that the Settlement satisfies prong three of the three-part settlement test. Several Settlement provisions violate important regulatory principles and practices.

1. The fixed delivery charge and financial performance incentives violate the important regulatory principle of cost causation, thereby harming consumers.

Duke argues that the Settlement advances the important regulatory principle and practice of "cost causation."[57] It does not. The principle of "cost causation dictates that assets used individually should be charged individually."[58] 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."[59]

Under the Settlement, consumers pay a fixed delivery charge of $43.29 ($39.29 for low-income consumers) regardless of how much natural gas they use.[60] This means consumers that use low amounts of natural gas pay more than their share, while high users receive a subsidy. This violates cost causation.

The Settlement also provides Duke incentives to hit financial performance goals.[61] But Duke shareholders, not consumers, benefit if Duke achieves financial targets. Since the Settlement requires Duke consumers to pay for incentive programs from which they receive no benefit, the Settlement violates cost causation principles.

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[57] Duke Brief at 33.

[58] Case No. 17-32-EL-AIR, Opinion & Order (December 19, 2018) at 87.

[59] OCC Ex. 9 (Adkins Testimony) at 54.

[60] Settlement at 8.

[61] Settlement at 4.

2. The Settlement imposes rate hikes during a time of high inflation, violating the important regulatory principle of gradualism and harming consumers.

Duke also claims the Settlement demonstrates the important regulatory principle and practice of "gradualism."[62] But OCC witness Bob Fortney testified that he concluded, based on decades of utility regulation experience, that this Settlement *violates* that principle.[63] Gradualism refers to the regulatory principle and practice that rates should increase gradually over time, so they do not cause "rate-shock" to consumers.[64] Imposing on consumers $31.7 million in additional charges during a period of high inflation risks rate shock. This is especially so given that Duke has provided no analysis proving Duke consumers are able to pay increased rates.[65] The Settlement violates the principle of gradualism.

3. The PUCO has authority to divert from Generally Accepted Accounting Principles and, to protect consumers, should reject Duke's request to calculate property tax using the plant in service balance.

Duke argues it is not a violation of an important regulatory principle or practice that the Settlement calculates property taxes charged to consumers by using a plant in service balance at date certain.[66] Duke urges the PUCO to reject OCC's proposal that property tax be calculated using Duke's actual tax bill for 2022 as the property tax expense.[67]

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[62] Duke Brief at 33.

[63] OCC Ex. 5 (Shutrump Testimony) at 10.

[64] *Id.* at 9-10.

[65] *See* Tr. I at 19-20.

[66] Duke Brief at 35.

[67] *Id.*

OCC witness Greg Meyer adopted this methodology because Duke's plant in service balance includes taxes that will "not be due to be paid until December 31, 2023, and June 30, 2024."[68] This is because property taxes lag – they are collected 12-18 months behind the year in which they are valued.[69] Using Duke's 2022 tax bill to calculate property taxes ensures consumers are charged only for taxes actually paid in the test year (2022). Duke's proposal, on the other hand, allows it *overcharge* consumers for taxes that will not be paid until *after* the test year.[70]

Duke argues against OCC's methodology because using plant in service balance to calculate property tax "is consistent with prior Commission precedent…."[71] But binding Ohio Supreme Court precedent dictates that "the commission should use the actual calendar year-end property tax expense as the federal income tax deduction for ratemaking purposes."[72] OCC's methodology of using Duke's 2022 tax bill to calculate property tax does exactly that.

Duke also argues the PUCO should accept its proposal because it is consistent with the accrual method of accounting articulated under Generally Accepted Accounting Principles (GAAP). But "the Commission has full authority pursuant to Section 4905.13, Revised Code, to issue accounting orders without reference to GAAP, and the company may not ignore or disobey the Commission's orders."[73] The PUCO should do so here. As OCC witness Greg Meyer articulated, using Duke's plant in service balance will

[68] OCC Ex. 11 (Meyer Testimony) at 19.

[69] *Id.* at 3.

[70] *Id.* at 16.

[71] Duke Brief at 35.

[72] *Cleveland Electric Illuminating Co. v. Public Utilities Com.*, 24 Ohio St.3d 135, 139.

[73] Case No. 89-1001-EL-AIR, Opinion & Order (August 16, 1990) 153-154.

"consistently inflate property taxes when a utility is experiencing a growth in plant in service."[74] This overcharges consumers for property taxes not payable during the test year.

The PUCO should also divert from GAAP because Duke's proposal violates the important regulatory principle and practice that post-test period adjustments to a utility's expenses be known and measureable. R.C. 4909.15(D) allows for post-test period adjustments to a utility's expenses "when necessary to smooth out anomalies which would make the test year unrepresentative or misleading for ratemaking purposes."[75] 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."[76] A cost is "known and measurable" when it is "able to be calculated with certainty," "beyond the control of the Company," and "not be so remote as to violate the test year concept."[77] 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. Duke's methodology for calculating property taxes overcharges consumers for non-test-year expenses that are not known and measurable, violating important regulatory principles and practices.

[74] OCC Ex. 11 (Meyer Testimony) at 3.

[75] *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).

[76] Case No. 80-376-EL-AIR, 1981 WL 703433, Opinion & Order (May 1, 1981) at 30.

[77] *Id.*

4. Duke cannot charge consumers for the propane caverns because they were no longer used and useful when the Central Corridor Pipeline commenced commercial operation on March 14, 2022.

Duke argues "the propane air facilities should not be excluded from the Company's total revenue requirement."[78] The "revenue requirement" is either rate base or operating expenses.[79] Here Duke is attempting to turn a rate base item (the propane caverns) into an expense. But 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)."[80] It has explained that a major capital investment cannot be transformed into an operating expense by "commission fiat."[81]

Duke states that "all the activities to retire the facilities occurred after the date certain in this proceeding."[82] This is because "severing of the propane facilities and cavern" was approved on April 6, 2022 and completed on April 12, 2022."[83] Further, per Duke, "the caverns were taken out of service for retirement on April 15, 2022."[84] In Duke's view, this makes the caverns used and useful at date certain, as R.C. 4909.15(A)(4) requires. But as OCC expert witness Kerry Adkins testified, "no longer necessary means no longer useful."[85] And the caverns were no longer necessary weeks in

[78] Duke Brief at 36.

[79] *See* R.C. 4909.15.

[80] *Consumers' Counsel*, 67 Ohio St.2d at 164.

[81] *See id.*

[82] *Id*. at 41.

[83] Duke Brief at 41.

[84] *Id.*

[85] Tr. I at 169.

advance of the March 31, 2022 date certain in this case. This is because the Central Corridor Pipeline – designed to replace the propane caverns – went into service on March 14, 2022.[86]

a. Duke's public representations confirm that the propane caverns were not used and useful on the date certain.

Duke asserts that propane caverns were used and useful on the date certain.[87] But on the date certain (March 31, 2022),[88] the propane caverns were not used and useful because the Central Corridor Pipeline went into commercial operation on March 14, 2022.[89] At this date, Duke was able to provide safe and reliable service to consumers without the propane caverns.[90] Duke's own public representations, including in multiple regulatory cases before the PUCO, Ohio Power Siting Board ("OPSB"), and the Securities and Exchange Commission ("SEC") demonstrate this.

Before the OSPB, Duke made clear that the purpose of the Central Corridor Pipeline was to replace the propane caverns.[91]

Duke publicly represented to the PUCO that the Central Corridor Pipeline would make the propane caverns obsolete in its application to defer costs related to the caverns.[92]

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[86] Although Duke discusses the propane caverns in the context of regulatory principles and practices, and OCC replies accordingly, we pointed out in our initial brief that allowing Duke to charge consumers for the propane caverns would also be contrary to consumers' and the public's interest. *See* OCC's Initial Brief at 6-15.

[87] *See, e.g.,* Duke Brief at 42.

[88] Entry (June 29, 2022) at 1.

[89] *In re the Application of Duke Energy Ohio, Inc*., Case No. 16-253-GA-BTX, Correspondence (March 15, 2022) (attached to OCC Ex. 9), *see also* OCC Ex. 9 at 5.

[90] *Id.* at 15.

[91] *See* OCC's Brief at 9.

[92] *See id.* at 9-11.

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."[93] As simply put by OCC witness Adkins during cross examination at the evidentiary hearing, "no longer necessary means no longer useful."[94]

In support of its application in this case, Duke represented before the PUCO in filed direct testimony that completion of the Pipeline eliminated the need for the propane caverns.[95] Duke also clarified the timing regarding operation of Central Corridor Pipeline, stating that the Central Corridor Pipeline was officially placed it into service on March 14, 2022and confirming that the propane caverns remained in service until the completion of the Central Corridor Pipeline on March 14, 2022.[96] The propane caverns were not used and useful two weeks before the date certain in this case.

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."[97] "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."[98] The letter demonstrates that

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[93] Duke Energy Corporation Form 10-K for Fiscal Year Ended December 31, 2022 at 147 (italics added) (OCC Ex. 9 at 18); *see generally* OCC's Brief at 11.

[94] Tr. I at 169.

[95] OCC Brief at 12.

[96] *See id.*

[97] Case No. 16-253-GA-BTX, Correspondence (March 15, 2022) (attached to OCC Ex. 9); *see also* OCC Ex. 9 (Adkins Testimony) at 19.

[98] O.A.C. 4906-1-01(M)(3).

the Central Corridor Pipeline was ready to serve its intended purpose on March 14, 2022.[99] Thus, the propane caverns were not used and useful as of the March 31, 2022 date certain.

Significant in this rate case, Duke did not include the propane facilities in the proposed rate base in this case (when it previously had been).[100] This confirms that Duke itself did not consider the propane facilities a "used and useful" asset when it filed its application in this case.

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 own actions confirm that the propane caverns were not used and useful on the date certain.

Duke claims that the caverns were used and useful at date certain because they were available for backup supply and pressure support until April 14, 2022, when the cavern were disconnected from the system.[101] But Duke's own actions demonstrate that the propane facilities were no longer necessary (and thus not useful) as emergency

[99] *See* OCC's Brief at 13-14.

[100] OCC Ex. 9 (Adkins Testimony) at 14.

[101] Duke Brief at 40, Duke Ex. 11 at 17.

backup after the Central Corridor Pipeline started service. The Pipeline went into service on March 14, 2022 – 17 days before the date certain in this case.

In Duke's response to OCC-INT-09-005, it said that the propane caverns had no emergency backup supply or pressure support during their operational years. And the Central Corridor Pipeline has no emergency backup supply or pressure support today.[102] Duke has provided no reason that an emergency backup was purportedly "necessary" exclusively for the month between the Central Corridor Pipeline's March 14, 2022 start of commercial operation and the April 14, 2022 cavern disconnection from the system. Clearly, Duke has not considered emergency backup necessary at any other point in the operation of the propane caverns or Central Corridor Pipeline, since none has existed. This shows that, while the propane caverns were perhaps *available* until April 14, 2022, they were not *necessary* as a backup. Not necessary means not useful.

That the propane caverns were not necessary as emergency backup is further shown by Duke's assertions that the Central Corridor Pipeline had met all required inspections and testing before entering commercial operation on March 14, 2022. Duke stated that "[t]he Central Corridor Pipeline was able to operate at its MAOP on the commercial operation date."[103] MAOP stands for "Maximum Allowable Operating Pressure," which is typically greater than normal operating pressure. Duke further stated that "at the commercial operation date, Central Corridor Pipeline operations resulted in capacity that reasonably met the design model for that date."[104] Emergency backup was

[102] Joint Ex. 2 (Duke Response to OCC INT-009-005).

[103] *Id.* (Duke Response to OCC INT 009-003).

[104] *Id.*

not necessary once the Central Corridor commenced commercial operation on March 14, 2022, since all required inspections and testing were completed by this date.

Further, Duke historically has stopped using propane earlier in the year than March 31, the date certain in this case. Between 2012-2022, the latest date in March that propane was injected into Duke's system for pressure support or supply was March 16, 2014.[105] So in the 10 years preceding the date certain in this case, the *latest* use of the caverns for their intended purpose of providing system supply and/or pressure support in the winter heating season was 15 days *before* March 31. Based on past use, Duke had no reasonable expectation that it would need to use the propane caverns as emergency backup as late as the March 31, 2022 date certain.

Additionally, Duke demonstrated that it did not need the propane caverns as emergency backup by intentionally depleting the propane from them. As early as the winter of 2021, Duke injected propane into its system for everyday, non-emergency use. This continued through February 24, 2022.[106] Since Duke was depleting its propane supply, it could not guarantee it would have enough in the event of an emergency. This undermines Duke's claim that the propane caverns were necessary as emergency backup.

Lastly, Duke had not used its caverns for natural gas supply or backup support in years. The last time Duke used its East Works propane caverns for natural gas supply or backup support was on January 20, 2020 – more than two years before the date certain in this case. Over $1.3 million of the deferral Duke seeks to collect in this case is the net book value of Dick's Creek propane cavern, which was last used to inject propane for

[105] *Id.* (Duke Response to OCC INT 009-006).

[106] *Id.* (Duke Response to OCC INT 011-004).

utility use on January 17, 2013.[107] Given how long it had been since Duke used its propane caverns for additional natural gas supply or backup support, its claim that these facilities were "necessary" on March 31, 2022 for emergency backup is not credible.

c. Duke's efforts to show that its propane cavern investments were "prudent" are irrelevant and fail to show prudency.

Duke's independent engineering study[108] in the deferral case settlement, which Duke asserts shows that its propane caverns investments were prudent,[109] also does not establish that Duke can charge consumers for related deferred costs. The first part of the rate-making formula (R.C. 4909.15(A)(1)) requires that assets be used and useful on the date certain. This does not mean "prudency." The Ohio Supreme Court made this clear in *Suburban Natural Gas Co.*, 166 Ohio St.3d 176 (2021). Mr. Adkins concluded, based on his experience as a regulatory expert, that this case requires the PUCO to apply a "used and useful" test when determining the valuation of public utility assets under R.C. 4909.15(A)(1), rather than substituting a "prudent investment" test for it.[110] This means that an engineering study purportedly showing investments were prudent is not determinative of whether the facilities can be included in rates (whether they were used and useful on the date certain is).

Further, as Mr. Adkins testified, the study conducted by EN Engineering ("Engineering Study") appended to Duke witness Brian R. Weisker's direct testimony in this case, filed on July 14, 2022, is "not reliable for determining the prudence of Duke's

[107] *Id.* (Duke Response to OCC INT 011-001).

[108] EN Engineering 'Duke Energy East Works Gas Plant Engineering Study' (June 22, 2022) Appended to the Direct Testimony of Brian R. Weisker ("Engineering Study") at 6.

[109] Duke Brief at 40.

[110] OCC Ex. 9 (Adkins Testimony) at 22; *See Suburban Natural Gas Co*., 166 Ohio St.3d 176 (2021).

investments."[111] For 21 of the 22 projects evaluated the Engineering Study only considered either "do nothing" or "shut down the facility" against the actions that Duke took.[112] The Engineering Study did not consider any other approaches, intermediate steps, or actions that Duke could or should have taken at less cost. In the expert opinion of Mr. Adkins, who has been involved in many prudency analyses during over 30 years of experience at the PUCO and OCC, "there is no question but that a well-founded prudence review would have considered the costs of the capital projects that Duke undertook. It would have identified and reviewed potentially less costly alternatives that could have and should have been considered by Duke."[113] This demonstrates the Engineering Study is inadequate as a prudence review. It should not be relied on by the PUCO.

Another inadequacy of the Engineering Study is that "EN Engineering was not asked to review the costs of the projects nor complete their own estimates for the projects."[114] At issue in this case is what capital expenditures and costs by Duke are used and useful, prudent and just and reasonable. A so-called prudence review that – by its own admission – did not review the costs that Duke incurred cannot be relied on.

Additionally, the Engineering Study is unreliable because it failed to investigate whether Duke collected MGP remediation costs from consumers twice. The Engineering Study states that:

> EN Engineering was not asked to review the costs of the projects nor complete their own estimates for the projects. However, it should be noted that **there was considerable expense on some of the underground projects for soil remediation.** Duke Energy has completed soil

[111] *Id.*

[112] Engineering Study at 7-28.

[113] OCC Ex. 9 (Adkins Testimony) at 23.

[114] *Id.* at 24; *see also* Engineering Study at 7-28.

> remediation over many parcels on the site. The parcels where underground process piping is located were not previously remediated, resulting in significant remediation costs during excavation required for some of the projects. **The project summaries include soil remediation in the scope of work as applicable.**[115]

But all manufactured gas plant ("MGP") remediation costs incurred during the period covered in the Engineering Study were already addressed in the settlement adopted in Case Nos. 14-375-GA-RDR and 18-1830-GA-UNC et al. ("MGP Global Settlement").[116] In those cases, Duke's collection of 2013 – 2019 MGP remediation costs, reserve for MGP costs incurred after 2019, and conditions under which Duke could apply for future remediation costs were resolved.[117] Despite the MGP Global Settlement already addressing soil remediation, the Engineering Study did not address whether the "considerable expense…for soil remediation" in the Deferral Case included repeat charges.

In response to OCC Interrogatories Set 8, Duke claims that the term "soil remediation" as used in the Engineering Study is a "misnomer." Duke claims that "None of the work described in the June 22, 2022 EN Engineering 'Duke East Works Gas Plant Engineering Study' (the Study) involved MGP soil remediation."[118] However, Duke's claim that none of the project costs referred to in the Engineering Study included MGP

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[115] Engineering Study at 6 (italics added).

[116] Stipulation and Recommendation (August 31, 2021); *see also* OCC Ex. 9 (Adkins Testimony) at 24-25.

[117] *See* PUCO Opinion and Order in Case No. 14-375-GA-RDR et al. (April 20, 2022) where in summarizing the Stipulation and Recommendations filed in those cases and specifically discussing "Resolution of TCJA and MGP Proceedings," the PUCO stated "{¶ 59} Pursuant to the terms of the Stipulation, customers: (1) will not see any rate impact related to MGP remediation costs incurred through December 31, 2019; (2) will not be billed for MGP river investigation costs; and (3) ***will not be billed for remediation expenses related to the inaccessible upland areas that could not be remediated due to ongoing utility (e.g., propane) operations*** (Joint Ex. 1 at 10)." (Emphasis supplied.)

[118] Duke response to OCC Interrogatories Set 8 (May 8, 2023), at 1-2.

soil remediation costs has not been independently verified. Again, the Engineering Study states that it does not include a review of the costs of the projects. As OCC witness Adkins testified, a well-founded prudence review "would have made sure that there was no double recovery."[119]

The PUCO should not rely on the unreliable Engineering Study to establish the prudence of Duke's investments. In its Order in the deferral case, the PUCO said that Duke had to prove the prudence of the investments in the propane facilities before it could charge consumers for the investments. The PUCO stated that "Duke has also agreed to fund an independent engineering study to ***demonstrate prudency of its investments*** in the East Works and Dick's Creek propane facilities ***before it can recover such costs***."[120] As OCC witness Adkins testified, Duke's Engineering Study "is wholly inadequate as a prudence review."[121] Duke failed to prove that the propane investments were prudent. And even if the investments were prudent, that does not entitle Duke to charge consumers where the propane caverns were not useful at date certain in this case. The PUCO should adhere to the used and useful standard in the statutory ratemaking formula in R.C. 4909.15(A). The propane facilities were not useful for providing utility service on the date certain.

[119] Tr. I at 184.

[120] *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, Opinion and Order (October 5, 2022) at 11 (italics added).

[121] *See* OCC Ex. 9 (Adkins Testimony) at 26.

5. Duke cannot charge consumers for the propane caverns because they are "dying assets," because it obtained a deferral, or due to purported "financial damage".

Duke argues the PUCO already approved deferral of costs associated with the propane caverns, so Duke should be able to collect them. Per Duke, the propane caverns were a "dying asset . . . not fully depreciated by the end of [its] useful life."[122] Duke represents that in this situation "it is typical for a regulatory asset to be created" and "is typical that this amount is then amortized in base rates over a defined, reasonable period of time."[123]

But Duke misrepresents the state of the propane caverns on March 31, 2022. The propane caverns were not a "dying" asset. They were a *dead* asset. This was true as soon as the Central Corridor Pipeline started commercial operation on March 14, 2022. Further, there are no provisions in Ohio law governing natural gas utilities charging consumers for a "dying asset." The asset must be used and useful on the date certain. Period.[124] This is highlighted by the reality that there *is* a statute – R.C. 4928.40 – allowing electric utilities to collect for so-called "stranded" investments. But no such statute exists for gas utilities.

Also, Duke misapplies "typical" treatment of an undepreciated asset. It may be "typical" for a utility to collect amortized costs related to a facility that is no longer used and useful at the time consumers are charged (so long as it was used and useful as of the date certain of the last rate case). But it is a violation of R.C. 4909.15(A)(4) for the

[122] Duke Brief at 39.

[123] *Id.*

[124] R.C. 4909.15(A)(4).

PUCO to order in a rate case (as Duke is asking it to do here) amortization of costs for a facility that is already not used and useful *at the time of the rate case*.

And Duke is not entitled to charge consumers for costs related to the propane caverns just because it booked a deferral for these costs.[125] Booking a deferral does not authorize collecting costs from consumers.[126] Rather, "recovery of deferred amounts is not guaranteed" and "will be addressed in the subsequent proceeding."[127] 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.[128]

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.[129] Booking a deferral is an accounting mechanism, not ratemaking.[130] Duke's deferral of propane cavern costs does not entitle it to collect those costs from consumers.

Lastly, Duke asks the PUCO not to exclude the propane caverns from its revenue requirement because doing so would be "potentially financially damaging…."[131] But the mere possibility that Duke will be financially harmed by the outcome of this case is not enough to override the will of the General Assembly – memorialized in 4909.15(A)(4) –

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[125] *See* Duke Brief at 36-42; OCC Ex. 9 (Adkins Testimony) at 13-14.

[126] *Elyria Foundry Co., v. Pub. Util Comm.,* 114 Ohio St.3d 305 (2007).

[127] Case No. 15-222-GA-AAM, Finding & Order (July 29, 2015) at ¶18.

[128] *In re Duke*, 150 Ohio St.3d at 441.

[129] *See Office of Consumers' Counsel v. Public Utilities Com.*, 67 Ohio St.2d 153, 164 (1981).

[130] *Elyria Foundry Co., v. Pub. Util Comm.,* 114 Ohio St.3d 305 (2007).

[131] Duke Brief at 39.

that consumers pay for only utility property that is used and useful. The PUCO must follow the law.

The Settlement violates the important regulatory principle and practice that requires utility property to be used and useful at date certain. The PUCO should reject the Settlement.

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 July 2023.

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