

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke     )  
Energy Ohio, Inc., for Approval of a     )  
General Exemption of Certain Natural Gas     ) Case No. 21-903-GA-EXM  
Commodity Sales Services or Ancillary     )  
Services.     )

In the Matter of the Application of Duke     ) Case No. 21-904-GA-ATA  
Energy Ohio, Inc. for Tariff Approval.     )

In the Matter of the Application of Duke     )  
Energy Ohio, Inc., for Approval to     ) Case No. 21-905-GA-AAM  
Change Accounting Methods.     )

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

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Maureen R. Willis (0020847)  
Ohio Consumers' Counsel

William J. Michael (0070921)  
Counsel of Record  
Donald J. Kral (0042091)  
Connor D. Semple (0101102)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, Suite 700  
Columbus, Ohio 43215-4213  
Telephone: [Michael]: (614) 466-1291  
Telephone: [Kral]: (614) 466-9571  
Telephone: [Semple]: (614) 466-9565  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[donald.kral@occ.ohio.gov](mailto:donald.kral@occ.ohio.gov)  
[connor.semple@occ.ohio.gov](mailto:connor.semple@occ.ohio.gov)  
(willing to accept service by e-mail)

October 24, 2023

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**I. INTRODUCTION**

Natural gas marketers<sup>1</sup> and the PUCO Staff have signed a Settlement<sup>2</sup> with monopoly utility Duke Energy Ohio, Inc. (“Duke”). The Settlement breaches Duke’s and the PUCO Staff’s prior commitment in Case Nos. 14-375-GA-RDR *et al.* (“Global Settlement”)<sup>3</sup> to include price-to-compare (PTC) language on Duke’s natural gas bills as part of its submission to the PUCO. Parties who sign a settlement agreement approved by the PUCO should abide by the settlement’s terms and conditions.

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<sup>1</sup> Marketers signing the Settlement include Interstate Gas Supply, LLC (“IGS”), Spire Marketing Inc., and The Retail Energy Supply Association (“RESA”).

<sup>2</sup> Joint Exhibit 1 (Stipulation and Recommendation) referred to in OCC’s Initial Brief as the “Settlement”.

<sup>3</sup> See *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-375-GA-RDR, et al., Case Nos. 15-452-GA-RDR, et al., Case Nos. 16-542-GA-RDR, et al., Case Nos. 17-596-GA-RDR, et al., Case Nos. 18-283-GA-RDR, et al., Case No. 19-174-GA-RDR, et al., and Case No. 20-53-GA-RDR and *In the Matter of the Application of Duke Energy Ohio, Inc., for Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1830-GA-UNC, et al. Stipulation and Recommendation (August 31, 2021) (“Global Settlement”) at 18.

If signatory parties are allowed to violate their obligations under a PUCO-approved settlement without consequence, there is no point to the settlement process at all. Duke includes a PTC on its bills for its electricity consumers. Such information should be provided to Duke's gas consumers as well.<sup>4</sup>

The Settlement also harms consumers by improperly shifting gas balancing and storage fees to consumers that should be paid for by natural gas marketers.

The PUCO should reject the Settlement and modify it consistent with OCC's recommendations.

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

Settlements are evaluated by the PUCO under a three-part test. The PUCO will adopt a settlement only if it meets the following three criteria: 1. whether the settlement is a product of serious bargaining among capable, knowledgeable parties; 2. whether the settlement, as a package, benefits customers and the public interest; and 3. whether the settlement package violates any important regulatory principle or practice.<sup>5</sup> Additionally, as set forth below, the PUCO routinely considers whether the parties to the settlement represent diverse interests.

OCC presented evidence demonstrating that the settlement violates all three parts of the PUCO's test. Most crucially, the Settlement ignores commitments made by Duke and the PUCO Staff as part of the Global Settlement and improperly shifts gas balancing

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<sup>4</sup> Duke included the price-to-compare language in the Application but under the Settlement is no longer seeking authorization from the PUCO for that language. *See, e.g.*, Application (April 27, 2022) at 3, 8.

<sup>5</sup> *Consumers' Counsel v. Pub. Util. Comm'n* (1992), 64 Ohio St.3d 123, 126.

and storage shifts costs to residential consumers when they should be paid by the marketers who signed the Settlement.

**A. The PUCO should modify the settlement for consumer protection because it is not the product of serious bargaining among diverse parties.**

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

Instead, a group of natural gas marketers with common interests (harmful to residential consumers) negotiated the Settlement with Duke and the PUCO Staff to serve their interests. Diverse interests are lacking. No representative of Duke's residential consumers joined the settlement.

The Settlement by Duke, the PUCO staff, Interstate Gas Supply, LLC, Spire Marketing, Inc., and The Retail Energy Supply Association serves narrow interests of the company and the marketers at the expense of Duke's residential consumers. The actions by the signatories to disregard prior PUCO-approved settlement commitments and to shift balancing and storage costs from the marketers to residential consumers confirms the unequal and unfair bargaining power that is an obstacle to serious bargaining.

Virtually no settlements are presented to the PUCO in multi-party litigation unless the utility is a settlement party. That empowerment of utilities like Duke is certainly not present for residential consumers. This reality bestows bargaining power on the utility, here Duke, and the PUCO Staff. That bargaining power diminishes the standing of others, such as OCC, in settlement negotiations like this one, and disrupts serious bargaining.

Duke, with the cooperation and assistance of the PUCO Staff, displayed this imbalance in bargaining power by blatantly disregarding its commitments under the Global Settlement.

Narrow-interest signatories - two marketers and an association that represents marketers – include two (IGS and RESA) that intervened in and opposed Duke's commitment regarding the PTC language in the Global Settlement. Those marketers benefit by denying information to consumers that would help consumers compare marketing prices to the standard offer. Through the Settlement, the marketers have persuaded Duke and the PUCO Staff to renege on commitments in the Global Settlement regarding PTC language. The ability of Duke and the PUCO Staff to back out of their commitments in the Global Settlement is clear evidence of their superior bargaining power to the detriment of consumers.

Continuing to display their special narrow marketer interests, the settlement shifts storage and balancing costs from marketers (who caused the costs) to consumers who have no control over such costs. Marketers can (as they do now) build such storage and balancing costs into the prices that they charge.

The PUCO should reject Duke's use of narrow-interest settlement signatures for justifying a settlement that is contrary to the prior PUCO-approved settlement and improperly shifts costs from marketers to consumers. The Settlement lacks serious bargaining and a diversity of interests. It should be modified consistent with OCC's recommendations.

**B. For consumer protection, the PUCO should modify the settlement because the settlement as currently constructed does not benefit consumers and the public interest.**

**1. A price-to-compare message benefits consumers by giving them information to compare the standard offer to what marketers charge for natural gas service. The price-to-compare is critical to maintaining a competitive marketplace for utility services, which benefits consumers.**

OCC expert witness Kerry Adkins testified that since the beginning of the natural gas choice programs in Ohio, price has been the primary reason that residential consumers consider switching to or from a natural gas or electric marketer.<sup>6</sup> Mr. Adkins added, for the most part, residential consumers want to save money, particularly during these times of rising utility bills and inflation.<sup>7</sup>

Mr. Adkins summarized a 1998 report on gas consumer surveys entitled ‘Staff Evaluation of Ohio’s Natural Gas Customer Choice Programs – Volume II A Customer Perspective’. In the report the PUCO Staff stated that for Columbia Gas of Ohio “[t]he Choice of a supplier is driven by price. ‘Price’ remains the overwhelming selection as the factor consumers are considering in making their choice of a natural gas supplier. In the baseline study, ‘Price’ was identified by 80.0% of the respondents, and it was selected 92.7% of the respondents in the follow-up study.”<sup>8</sup>

Mr. Adkins further explained that for Duke (then the Cincinnati Gas and Electric Company), the PUCO Staff reported that “[f]or the residential customers in the Customer

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<sup>6</sup> OCC Ex. 2 (Testimony Recommending Modification of the Stipulation of Kerry J. Adkins (“Adkins”)) at 13.

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

<sup>8</sup> See ‘Staff Evaluation of Ohio’s Natural Gas Customer Choice Programs – Volume II – A Customer Perspective,’ Case Nos. 98-593-GA-COI, 98-594-GA-COI, 98-595-GA-COI, 98-549-GA-ATA, 96-111-GA-ATA, 96-1019-GA-ATA, and 95-656-GA-AIR, ‘A Follow-Up Study of the Columbia Gas of Ohio Customer Choice Pilot Program: A Customer Perspective,’ at I; OCC Ex. 2 at 14.

Choice Program, the choice of a supplier appears to be driven primarily by ‘Price’ and ‘Reliable gas supply.’ ‘Price’ was identified by 78.3% of the respondents, and it was selected by 81.9% of the respondents in the follow-up study. The second selection in both studies was ‘Reliable gas supply.’”<sup>9</sup>

Mr. Adkins amplified these earlier survey results with a recent survey by an independent consulting group hired by Dominion East Ohio Gas (“Dominion”). This survey of consumers was designed to help Dominion focus its consumer education efforts. As Mr. Adkins testified, the survey results confirm the PUCO Staff’s earlier surveys.<sup>10</sup> In the March 2021 report entitled ‘Dominion Energy – Energy Choice Program Customer Research Presentation,’ independent consultant Research America reported that 89% of all consumer respondents reported a “[c]onsistent low price per Mcf” was “Very/Somewhat Important” and that “[c]ustomers feel that consistent low price per Mcf is most important when considering what rate plan to enroll in.”<sup>11</sup>

OCC witness Adkins further explained that a PTC provides consumers with a good comparison when researching shopping. He noted that when a consumer switches from the standard offer service to an energy marketer they need the information that is on their bill such as their Duke account number.<sup>12</sup> Moreover, Mr. Adkins explained it “is

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<sup>9</sup> See ‘Staff Evaluation of Ohio’s Natural Gas Customer Choice Programs – Volume II – A Customer Perspective,’ Case Nos. 98-593-GA-COI, 98-594-GA-COI, 98-595-GA-COI, 98-549-GA-ATA, 96-111-GA-ATA, 96-1019-GA-ATA, and 95-656-GA-AIR, ‘Follow-Up Study Summary of Conclusion: Residential Customers in the Cincinnati Gas and Electric Company Service Territory,’ at I; OCC Ex. 2 at 14.

<sup>10</sup> OCC Ex. 2 (Adkins) at 14-15.

<sup>11</sup> ‘Dominion Energy – Energy Choice Program Customer Research Presentation’ by Research America (March 2, 2021), at Slide 29 (attached as KJA-03 to OCC Ex. 2); OCC Ex. 2 (Adkins) at 14-15.

<sup>12</sup> OCC Ex. 2 (Adkins) at 15 (quoting the Direct Testimony of OCC Witness Michael P. Haugh at 9) (September 7, 2022). Mr. Adkins adopted the Direct Testimony of Mr. Haugh at p.7 of OCC Exh. 2 (Adkins) and attached the Direct Testimony of Mr. Haugh as KJA-02.



very helpful to be able to see what rate they are currently paying in order to compare it to the rate that is being offered to the consumer. This is an additional consumer protection that gives a consumer immediate information when they are being solicited by a marketer. Information like this is also beneficial to consumers who are being overcharged by a marketer....”<sup>13</sup>

Marketers’ rates, in the aggregate, have been higher than utility standard offer rates across Ohio. OCC receives shadow billing data from AEP Ohio since January 2019, Duke Gas since January 2019, and Columbia Gas of Ohio since April of 1997. Shadow billing data shows the aggregate dollar amount shopping customers paid versus being on the utility default rate. AEP Ohio shows cumulative losses of \$179 million for its shopping customers. (Attachment MPH-2), Duke shows cumulative losses of \$53 million for its shopping customers. (Attachment MPH-3). The most shocking is Columbia Gas of Ohio that shows cumulative losses of over **\$2 billion**. (Attachment MPH-4). This should not be a total shock because Columbia’s data cover almost 25 years, but it should be noted that only 70 months have shown savings for those shopping and 54 of them were in the first 4½ years.<sup>14</sup>

OCC’s expert Kerry Adkins testified about the updated shadow billing data reported through March 2023 for Columbia Gas of Ohio (“Columbia”) (attached as KJA-04 to OCC Ex. 2). This updated data continued to show cumulative losses for residential consumers in the aggregate and over time.<sup>15</sup> In fact, the long-term shadow billing data for Columbia showed that, in the aggregate, consumers have unnecessarily paid more than \$2.1 billion by switching to a competitive supplier versus staying with Columbia’s standard offer.<sup>16</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 15-16 (adopting Haugh Testimony (KJA-02 to OCC Ex.2) at 10).

<sup>15</sup> OCC Ex. 2 at 16-17.

<sup>16</sup> *Id.* at 16.

This result suggests that there is at least some degree of adverse selection by consumers when deciding between the SSO offer and competitive marketers.<sup>17</sup> Adverse selection is a term that economists use to describe where one party to a transaction has more and/or better information than the other party in the transaction leading to less favorable outcomes and losses by the party with less or poorer quality information.<sup>18</sup> In transactions involving consumers choosing to leave the utility's standard offer and choose a marketer or choosing among marketers, marketers almost always have more and better information than ordinary consumers.<sup>19</sup> Evidence for this information imbalance can be at least partially seen in the shadow billing. And it can be seen in instances where thousands of consumers enrolled and stayed with marketers despite paying prices that were three to four times higher than the utility's standard offer.<sup>20</sup> Additionally, the fact that some marketers are able to stay in business and attract and continue to enroll consumers despite price offers that are two or more times higher than the utility standard rate<sup>21</sup> again suggests that consumers are unknowingly acting counter to their own interests, likely due to a lack of information.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 16-17 (referencing Merriam-Webster dictionary definition: "a market phenomenon in which one party in a potential [transaction](#) has information that the other party lacks so that the transaction is more likely to be favorable to the party having the information and which causes [market prices](#) to be adjusted to compensate for the potential unfavorable results for the party lacking the information." <https://www.merriam-webster.com/dictionary/adverse%20selection#:~:text=%3A%20a%20market%20phenomenon%20in%20which,unfavorable%20results%20for%20the%20party>).

<sup>19</sup> *Id.* at 17.

<sup>20</sup> *Id.* at 17 (referencing Case Nos. 19-958-GE-COI and 19-2153-GE-COI involving PUCO Staff Reports alleging that marketers electric and natural gas marketers Verde and PALMCO enrolling consumers through deceptive means and charging them prices 3 to 4 times more than the comparable utility standard offer rates).

<sup>21</sup> *Id.* at 17 (referencing the Ohio Energy Choice Apples to Apples chart for Duke for the period September 1, 2023 – October 1, 2023 (attached as KJA-05), which showed 5 marketer offers that were more than two times Duke's GCR rate for the period and seven offers more than one and a half times Duke's GCR rate).

Mr. Adkins further testified that the PUCO can address the information imbalance between marketers and consumers by providing more information to consumers. The PUCO Staff and the PUCO very early on recognized the significant information imbalance between marketers and consumers during the development of the PUCO's rules governing natural gas and electric marketers.<sup>22</sup> PUCO rules governing marketing, solicitation, and consumer information require marketers to (among other things) clearly present and explain their price offers and, for natural gas, offer prices consistent with the incumbent utility's units (Mcf or Ccf) so that consumers can readily compare rates.<sup>23</sup> Consumer enrollment and consent rules require that specified information be provided to consumers and verified in telephonic and door-to-door enrollments.<sup>24</sup> Additionally, Mr. Adkins explained this is why there are minimum contract disclosure rules.<sup>25</sup> Importantly, he added, this is why there is O.A.C. 4901:1-10-22 (B)(24), which requires electric utilities to include "[t]he price-to-compare notice on residential customer bills and a notice that such customers can obtain a written explanation of the price-to-compare from their electric utility" on consumers' bills.

The PUCO should follow its prior practices and provide natural gas consumers more information. The PUCO should modify the settlement to include a PTC message on its natural gas consumer bills as it does for its electric consumers.

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<sup>22</sup> *Id.* at 18.

<sup>23</sup> *Id.* (referencing O.A.C. 4901:1-21-05 (electric) and O.A.C. 4901:1-29-05 and 4901:1-29-05(A) (gas)).

<sup>24</sup> *Id.* (referencing O.A.C. 4901:1-21-06 (electric) and O.A.C. 4901:1-29-06 (gas)).

<sup>25</sup> *Id.* (referencing O.A.C. 4901:1-21-12 (electric) and O.A.C. 4901:1-29-11 (gas)).

**2. The PUCO should modify the settlement because it harms consumers and the public interest by redistributing balancing and storage costs from marketers to consumers.**

OCC's expert Jatindar Kumar has had decades of experience with utility issues including regulatory aspects of the natural gas industry, utility accounting and taxation, and utility regulation. He has filed testimony/affidavits in more than 200 cases in 25 states, including Ohio, before the Federal Energy Regulatory Commission ("FERC"), Interstate Commerce Commission, Nuclear Regulatory Commission, and State and Federal Courts on all aspects of gas utilities and interstate gas and oil pipelines.<sup>26</sup>

Mr. Kumar testified that the settlement, if approved by the PUCO without modification, would shift all the storage and balancing costs and risks from marketers - who can control and limit such costs - to consumers - who do not cause the costs and risks and over which they have no control.<sup>27</sup> He explained that presently Duke recovers balancing fees under a procedure described in the settlement as follows:

Duke Energy Ohio currently assesses balancing fees for storage directly through the GCR. Further, Competitive Retail Natural Gas Suppliers ("CRNGS") providers currently pay for storage and balancing through Rider Firm Balance Charge ("FBS") and Rider Enhanced Firm Balance Charge ("EFBS"), with all revenue being credited to the GCR. Choice Customers served by CRNGS providers currently pay the balancing fees to the extent that the CRNGS providers include what they pay as part of the Rider EFBS and Rider FBS in the rates charged to their customers.<sup>28</sup>

Mr. Kumar explained that the settlement provides that Duke will charge consumers storage and balancing costs and exempt gas suppliers from these charges.<sup>29</sup>

The settlement states:

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<sup>26</sup> OCC Ex. 3 (Kumar) at 1-2.

<sup>27</sup> *Id.* at 10.

<sup>28</sup> Joint Ex. 1 at 5; OCC Ex. 3 (Kumar) at 5.

<sup>29</sup> OCC Ex. 3 (Kumar) at 6.

The Signatory Parties have agreed that Duke Energy Ohio shall modify its current assessment method for balancing fees and instead bill these charges directly to customers without markup. This would ensure all customers pay the same rider fee regardless of their shopping or non-shopping status.<sup>30</sup>

Essentially, Mr. Kumar explained, the settlement puts the GCR back into the tariffs with a “Enhanced Firm Balancing Service” charged to consumers and not to any gas suppliers.<sup>31</sup> But Mr. Kumar testified that consumers have no means to balance their gas consumption with supplies, suppliers have to do so.<sup>32</sup> It is the gas suppliers (whether SSO suppliers or competitive marketers) who can try to match supply with consumption on an hourly or at least a daily basis. If a supplier does not effectively balance supply with consumption they can pay Duke for the balancing services.<sup>33</sup>

Mr. Kumar further testified that the settlement creates a system under which gas suppliers can game the system causing substantial costs to consumers.<sup>34</sup> As he explained, under the settlement suppliers can supply more gas to Duke on behalf of their consumers when prices are low and supply less gas when prices are high.<sup>35</sup> While suppliers are required to match supplies with consumers’ consumption on an annual basis the daily supply imbalances designed to maximize supplier profits could cause substantial consumer costs due to storage charges that Duke would incur.<sup>36</sup> Duke does not assess any

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 8-9.

penalty for suppliers' failure to change intraday nominations and balance on a daily basis.<sup>37</sup>

Mr. Kumar also testified that the return on equity received by a utility includes that utility's operational and financial risks.<sup>38</sup> He explained that this is one reason the return on equity is much higher than the yield on Treasury bills, which are presumed to be risk free.<sup>39</sup> As a result, Duke and not consumers should be responsible for system operational risks such as supply imbalances.<sup>40</sup> Instead, the settlement inappropriately shifts all the risks and costs associated with storage and balancing services to consumers.<sup>41</sup>

As a result of shifting costs from the suppliers who created the costs to those who can do nothing to prevent the costs, Mr. Kumar testified that the settlement fails to provide just and reasonable charges to consumers.<sup>42</sup> Further, he testified that the settlement, as a package, does not benefit consumers and the public interest.<sup>43</sup>

As a result of the Settlement inequities, Mr. Kumar testified that it should be modified so that storage and balancing fees are charged to standard service offer suppliers and marketers.<sup>44</sup> Mr. Kumar testified this modification places the costs on the

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<sup>37</sup> *Id.* at 9.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.* at 10.

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

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

<sup>44</sup> *Id.* at 11.

“cost causers” and eliminates the “unfairness of charging consumers for costs that they have no control over.”<sup>45</sup>

Moreover, as Mr. Kumar testified, there would not be anti-competitive effects from the proposed modification since both standard service offer suppliers and marketers “would pay for their own storage and balancing costs.”<sup>46</sup> Marketers could (as they do now) build any storage and balancing costs into prices charged consumers under their contracts.<sup>47</sup> Standard service offer suppliers could build any storage and balancing costs into their standard service offer auction bids.<sup>48</sup>

The Settlement harms consumers and the public interest, and it should be modified to exclude language shifting balancing and storage costs from marketers to consumers.

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

- 1. The PUCO should modify the Settlement because it does not include important price-to-compare language Duke and the PUCO Staff previously agreed to in the Global Settlement, which the PUCO-approved. Allowing Duke and the PUCO Staff to renege on their previous settlement commitments undermines the settlement process and jeopardizes the ability to accomplish future settlements.**

The PUCO has routinely recognized that settlements promote administrative efficiency by resolving complex contested issues among the utilities, the PUCO Staff and

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<sup>45</sup> *Id.*

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

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

other parties.<sup>49</sup> However, a settlement is worthless if parties are allowed to later break the deal they struck. That is what Duke and the PUCO Staff have done in this case by refusing to support the price-to-compare language they agreed to in the Global Settlement.

Duke and the PUCO Staff signed the Global Settlement. It was signed and adopted as a package and, as set forth below, included a provision that signatory parties would support its provisions (including the PTC).<sup>50</sup> But Duke and the PUCO Staff have now agreed to break apart the package that was adopted in the Global Settlement and separate the PTC from the standard service offer. While breaking apart the package settlement, Duke and the PUCO Staff also claim to reserve the right to remain neutral on or actively oppose Duke's implementation of a PTC. This directly violates the terms of the Global Settlement.

The Global Settlement was an agreement to resolve 18 pending cases at the PUCO, including some that had been litigated in evidentiary hearings.<sup>51</sup> It involved resolution of many complex issues surrounding Duke's collection from consumers of environmental remediation costs incurred at two former manufactured gas plant ("MGP") sites and provisions and processes for Duke to pass back to consumers tax savings resulting from the Tax Cuts and Jobs Act of 2017 ("TCJA").<sup>52</sup>

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<sup>49</sup> Global Settlement at 36 (PUCO states that "(w)e have repeatedly found value in the parties' resolution of pending matters through a stipulation package, as an efficient and cost-effective means of bringing issues before the Commission, while also, often times, avoiding the considerable time and expense associated with the litigation of a fully-contested case.")

<sup>50</sup> Global Settlement at 22.

<sup>51</sup> OCC Ex. 2 ("Adkins") at 7.

<sup>52</sup> *Id.*



The Global Settlement resolved many complex issues that were the subject of extensive litigation at the PUCO. For example, as explained by OCC witness Adkins, the Global Settlement provided for disallowance of some contested MGP remediation costs and then further reduced MGP remediation costs subject to collection from consumers to zero through using TCJA tax savings credits and insurance proceeds.<sup>53</sup> Mr. Adkins further explained, the Global Settlement provided for the remaining TCJA tax savings and insurance proceeds to be returned to consumers through bill credits and billing assistance programs to low-income and senior consumers.<sup>54</sup> Mr. Adkins added the Global Settlement established a process for Duke to apply for deferral authority and potential recovery of future MGP remediation costs under specific circumstances, and it provided that Duke would apply to the PUCO to transition from its Gas Cost Recovery (“GCR”) process for procuring natural gas for consumers not served by natural gas marketers to an auction-based standard service offer for procuring gas for these consumers.<sup>55</sup>

Mr. Adkins further testified that the Global Settlement also provided that Duke would provide OCC “shadow billing” data, comparing aggregate shopping consumer costs to what those consumers would have paid had they been served on Duke’s GCR or standard service offer.<sup>56</sup>

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<sup>53</sup> OCC Ex. 2 (Adkins) at 8.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

Most importantly, Mr. Adkins explained that the Global Settlement provided that Duke would add a PTC message to its natural gas consumer bills.<sup>57</sup> Section C, Paragraph 24 of the Global Settlement directly discusses the PTC language and states:

***The Signatory Parties agree that Duke Energy Ohio shall add the SSO price-to-compare on its natural gas bills for customer information.*** Such billing system change shall commence with the second billing month that a customer is billed based upon the SSO. Duke Energy Ohio shall include this billing format change as part of its Auction Application.

- a. The Price-to-Compare message on bills for shopping customers shall prominently include language similar to the following: “In order for you to save money, a natural gas supplier must offer you a price lower than \$X.XX per CCF for the same usage that appears on this bill.”
- b. The Price-to-Compare message should be included on all shopping customer bills, including those customers who have gas only and those customers who are combination gas and electric.<sup>58</sup>

As the above language demonstrates, there was no vagueness or uncertainty about the agreement of the Signatory Parties regarding Duke’s obligation to add SSO price-to-compare on its natural gas bills. The Global Settlement states that the “**Signatory Parties agree that Duke Energy Ohio shall add the SSO price-to-compare....**” The Global Settlement doesn’t state that Duke “may” add the SSO price-to compare language. It doesn’t state that Duke shall add it and then withdraw it. Instead, the Global Settlement states that this billing system change **shall** commence with the second billing month that

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<sup>57</sup> OCC Ex. 2 (Adkins) at 8.

<sup>58</sup> *Id.* at 9-10; Global Settlement at 18.

a customer is billed based upon the SSO. There's no hedging in the Global Settlement. There's no ambiguity. There is an obligation for Duke to add the SSO that should be protected under the sanctity of settlements.

As testified to by Mr. Adkins, Section IV, Paragraph 34 of the Global Settlement directly discusses the signatory parties' support for the reasonableness of the Settlement before the PUCO and states:

Unless a Signatory Party exercises its right to terminate its Signatory Party status or withdraws from the Stipulation as described above, each Signatory Party agrees to and will support the reasonableness of this Stipulation before the Commission and in any appeal that it participates in from the Commission's adoption and/or enforcement of this Stipulation.<sup>59</sup>

Duke, the PUCO Staff, OCC, and the Ohio Energy Group were signatories to the Global Settlement.<sup>60</sup> Additionally, The Ohio Manufacturers Association Energy Group, The Kroger Company, and Ohio Partners for Affordable Energy agreed not to oppose the Global Settlement.<sup>61</sup>

Tearing apart the package adopted in the Global Settlement cannot be reasonably described as *supporting* the Global Settlement's provisions (including the PTC) as *was*

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<sup>59</sup> OCC Ex. 2 (Adkins) at 10; Global Settlement at 22.

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

<sup>61</sup> *Id.*

required in the Global Settlement. Duke agreed to submit for approval to the PUCO a price-to-compare provision on its natural gas bills as part of the Global Settlement.<sup>62</sup> Although it included price-to-compare language in its Application, Duke has now failed to present price-to-compare language to the PUCO for approval.<sup>63</sup> This is a direct violation of the Global Settlement and should lead the PUCO to modify the settlement to include price-to-compare language.

The PUCO was fully aware of the PTC provisions of the Global Settlement when it approved that settlement. In its Opinion and Order the PUCO noted that the settlement included a “new bill format proposal to include an SSO price-to-compare message on natural gas bills.”<sup>64</sup> The PUCO further stated that the “Signatory Parties agree that Duke shall add the SSO price-to-compare on its natural gas bills for customer information. Such billing change shall commence with the second billing month that a customer is billed based upon the SSO.”<sup>65</sup> Regarding timing, the PUCO stated that “Duke shall include the billing format change as part of its future auction application....”<sup>66</sup>

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<sup>62</sup> See *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-375-GA-RDR, et al., Case Nos. 15-452-GA-RDR, et al., Case Nos. 16-542-GA-RDR, et al., Case Nos. 17-596-GA-RDR, et al., Case Nos. 18-283-GA-RDR, et al., Case No. 19-174-GA-RDR, et al., and Case No. 20-53-GA-RDR and *In the Matter of the Application of Duke Energy Ohio, Inc., for Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1830-GA-UNC, et al., Opinion and Order (April 20, 2022) at 61 (stating that the “Stipulation provides a significant benefit with the resolution of 18 total proceedings....”).

<sup>63</sup> See Application at 3, 8.

<sup>64</sup> See *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-375-GA-RDR, et al., Case Nos. 15-452-GA-RDR, et al., Case Nos. 16-542-GA-RDR, et al., Case Nos. 17-596-GA-RDR, et al., Case Nos. 18-283-GA-RDR, et al., Case No. 19-174-GA-RDR, et al., and Case No. 20-53-GA-RDR and *In the Matter of the Application of Duke Energy Ohio, Inc., for Implementation of the Tax Cuts and Jobs Act of 2017*, Case No. 18-1830-GA-UNC, et al., Opinion and Order (April 20, 2022) at 6.

<sup>65</sup> *Id.* at 29.

<sup>66</sup> *Id.*

The PUCO further noted how the parties considered the price-to-compare language to be included in one of the three categories of benefits derived from the Global Settlement. The PUCO stated:

Further, these parties maintain the benefits provided by the Stipulation can be categorized in three separate groups: (1) resolving disputes regarding Duke's MGP cleanup and the extent to which consumers would have to pay for it; (2) passing to consumers the benefits of lower tax rates under the TCJA; and (3) the competitive market provisions, which include providing aggregate shadow billing data to OCC, filing an application with the Commission to transition from a GCR to an SSO, and including within that application, proposed price-to-compare language on shopping customers' bills.<sup>67</sup> [emphasis added].

As set forth above, the PUCO recognized that the price-to-compare language of the Global Settlement was one of the essential benefits negotiated as part of the settlement.

The PUCO's Opinion and Order acknowledges that through the Global Settlement Duke is committing itself to seeking approval of the price-to-compare language. The PUCO states that Duke will "seek Commission authorization to include a price-to-compare calculation on the Company's natural gas bills...."<sup>68</sup> The PUCO did not state that it understood that Duke would file price-to-compare language in its Application and then not submit that language under a settlement to the PUCO. Duke's duty was clear to the PUCO – it would seek and support PUCO authorization.

As set forth above, the Global Settlement was negotiated and approved as a package. The parties that signed the Global Settlement, including Duke, the PUCO Staff, and OCC, no doubt had differing views and thoughts about the individual components and provisions in the Global Settlement. But all agreed that *as a package* the Global

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<sup>67</sup> *Id.* at 53.

<sup>68</sup> *Id.* at 73.

Settlement was a reasonable compromise of all of the complex issues in the 18 cases at issue that were resolved.<sup>69</sup>

In this case, two signatory parties to the Global Settlement (Duke and the PUCO Staff) have joined together to try and break the package deal that they agreed to in the Global Settlement.<sup>70</sup> Duke and the PUCO Staff are agreeing in this settlement that “[t]he Signatory Parties recommend that the Commission conduct an evidentiary hearing as to the adoption of the proposed PTC language in the Application.”<sup>71</sup> Duke and the PUCO Staff are further suggesting that they are not obliged to support inclusion of the PTC on consumer bills. They seek to be free to remain neutral or even oppose the PTC language in the evidentiary hearing they now recommend for the PTC language. The settlement in this case provides that “[e]ach Signatory Party shall be entitled to provide, in its sole discretion, new testimony supporting, remaining neutral on, or opposing the PTC language at that evidentiary hearing.”<sup>72</sup> This conflicts with their commitment to support *the package* as set forth in the Global Settlement and approved by the PUCO.

And such an action or reservation of rights directly contravenes the provision in the Global Settlement that signatory parties would support the reasonableness of the Global Settlement as package before the PUCO. It’s not consistent with the fact that all parties and the PUCO itself recognized that Duke would seek authorization from the PUCO for the PTC language as part of this action. Duke and the PUCO’s Staff are directly undermining the PUCO settlement process.

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<sup>69</sup> OCC Ex. 2 (Adkins) at 10-11.

<sup>70</sup> OCC Ex. 2 (Adkins) at 11.

<sup>71</sup> Joint Ex. 1 (Settlement) at 9.

<sup>72</sup> *Id.* at 9-10.

The PUCO should modify the settlement in this case to require that the PTC message be included on the natural gas bills of Duke’s consumers as set forth in the Global Settlement. This was recommended in Duke’s Application in this case. It was agreed to by Duke and the PUCO Staff in the Global Settlement. The PUCO should enforce the settlements that it approves.<sup>73</sup>

OCC believes that the settlement process can be improved for consumer protection. But once a settlement is reached, it should be enforced. Otherwise, there is no point to settlement negotiations in the first place. Parties spend substantial time and resources on reaching a settlement. They compromise. Settlements (as demonstrated by the Global Settlement itself) often resolve complex, sophisticated issues that would otherwise have to be litigated. Parties rely on settlement terms and plan and conduct themselves accordingly. Further, settlements can add to administrative efficiency. If settlements are not enforced, parties will be much less inclined to settle disputes, thereby increasing costs and reducing administrative efficiency.

The PUCO, Duke, PUCO Staff, and OCC all understood what the PUCO recognized in its Opinion and Order adopting the Global Settlement that Duke will “seek Commission authorization to include a price-to-compare calculation on the Company’s natural gas bills....”<sup>74</sup> Duke is no longer seeking such authorization. Instead, through the present settlement, Duke seeks to withdraw the price-to-compare from this proceeding and have the option to remain neutral or even oppose its own price-to-compare language in a future proceeding. Not only is Duke breaching the Global Settlement but the PUCO

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<sup>73</sup> OCC Ex. 2 (Adkins) at 13.

<sup>74</sup> Global Settlement, Opinion and Order (April 20, 2022) at 73.

Staff (as a Signatory Party to the Global Settlement and to this settlement) is, unfortunately, empowering Duke to accomplish that end by entering into the current proposed settlement.

The Global Settlement was a hard fought highly contentious settlement. The competitive market provisions including the price-to-compare language were, as recognized by the PUCO, an essential part of that settlement. The term of the settlement that Duke required Duke to seek PUCO authorization for price-to-compare language was unequivocal. The PUCO itself recognized that fact. The Global Settlement was a properly executed settlement approved by the PUCO. Its terms should not be disturbed. The sanctity of settlements should not be undermined by the PUCO.

The PUCO should modify the settlement and adopt the price-to-compare language set forth in Duke's Application.

**2. The settlement's provisions regarding balancing violate important regulatory and legal principles and should be modified.**

Mr. Kumar testified that the settlement as currently constructed is a "gross violation of sound regulatory principles and practice."<sup>75</sup> He explained that the settlement violates three regulatory principles: (1) Cost Causation Principle; (2) Utility Operational Risks; and (3) Necessary and adequate facilities and services at just and reasonable rates.<sup>76</sup>

Mr. Kumar explained the cost causation principle. It's a simple one. The entity that causes a cost should pay the cost caused by the entity.<sup>77</sup> As explained above, under

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<sup>75</sup> OCC Ex. 3 (Kumar) at 6.

<sup>76</sup> *Id.* at 7.

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



the settlement both standard service offer suppliers and marketers who have control over and cause storage and imbalancing costs will not be paying those costs. Instead, the settlement redistributes those costs to consumers who have no ability to control the costs.

And under the settlement suppliers can game Duke and create unnecessary storage and imbalancing costs yet face no penalty or cost for doing so. These are violations of the cost causation regulatory principle.

Also, as set forth above, Mr. Kumar testified that risks of storage and imbalancing costs are part of the return on equity that utility companies receive. Duke and not consumers should be responsible for the system's operational risks such as imbalances.<sup>78</sup> By inappropriately shifting all the risks and costs associated with storage and balancing services to consumers the settlement violates this operational risk principle.

Finally, by requiring consumers to pay for balancing and storage costs that they do not cause and over which they have no control, the charges that Duke would receive under the settlement are not "in all respects just and reasonable."<sup>79</sup> This violates Ohio policy and law as set forth in R.C. 4905.22. Accordingly, the PUCO should reject the Settlement.

### **III. CONCLUSION**

For the reasons set forth above, the narrow interest 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 modify consistent with OCC's recommendations.

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<sup>78</sup> *Id.* at 9.

<sup>79</sup> *See, e.g.,* OCC Ex. 3 at 10.

Respectfully submitted,

Maureen R. Willis (0020847)  
Ohio Consumers' Counsel

/s/ William J. Michael  
William J. Michael (0070921)  
Counsel of Record  
Donald J. Kral (0042091)  
Connor D. Semple (0101102)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, Suite 700  
Columbus, Ohio 43215-4213  
Telephone: [Michael]: (614) 466-1291  
Telephone: [Kral]: (614) 466-9571  
Telephone: [Semple]: (614) 466-9565  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[donald.kral@occ.ohio.gov](mailto:donald.kral@occ.ohio.gov)  
[connor.semple@occ.ohio.gov](mailto:connor.semple@occ.ohio.gov)  
(willing to accept service by e-mail)

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Initial Brief for Consumer Protection by Office of the Ohio Consumers' Counsel has been served via electronic transmission upon the following parties of record this 24th day of October 2023.

/s/ William J. Michael  
William J. Michael  
Assistant Consumers' Counsel

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

### **SERVICE LIST**

[rhiannon.plant@ohioAGO.gov](mailto:rhiannon.plant@ohioAGO.gov)  
[mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  
[glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)  
[tjwhaling@vorys.com](mailto:tjwhaling@vorys.com)  
[Michael.nugent@igs.com](mailto:Michael.nugent@igs.com)  
[joe.oliker@igs.com](mailto:joe.oliker@igs.com)  
[Evan.betterton@igs.com](mailto:Evan.betterton@igs.com)  
[Stacie.cathcart@igs.com](mailto:Stacie.cathcart@igs.com)

[Rocco.dascenzo@duke-energy.com](mailto:Rocco.dascenzo@duke-energy.com)  
[Jeanne.kingery@duke-energy.com](mailto:Jeanne.kingery@duke-energy.com)  
[Larisa.vaysman@duke-energy.com](mailto:Larisa.vaysman@duke-energy.com)  
[Elyse.akhbari@duke-energy.com](mailto:Elyse.akhbari@duke-energy.com)  
[talexander@beneschlaw.com](mailto:talexander@beneschlaw.com)  
[mkeaney@beneschlaw.com](mailto:mkeaney@beneschlaw.com)  
[dparram@bricker.com](mailto:dparram@bricker.com)

Attorney Examiner:  
[matthew.sandor@puco.ohio.gov](mailto:matthew.sandor@puco.ohio.gov)  
[nicholas.walstra@puco.ohio.gov](mailto:nicholas.walstra@puco.ohio.gov)

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**Case No(s). 21-0903-GA-EXM, 21-0904-GA-ATA, 21-0905-GA-AAM**

Summary: Brief Initial Brief for Consumer Protection by Office of the Ohio  
Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of  
Michael, William J..