

4. Approve the rejection of ineligible claims as determined by the Claims Administrator.
5. Approve the Claims Administrator's use of July 31, 2016 as a cut-off date for the initial filing of all claims, and that no further adjustments to existing claims will be accepted for claim cures submitted after December 12, 2016, except as otherwise approved by the Court.
6. Approve the distribution to Authorized Claimants of the Net Settlement Fund established by the Settlement of the Action.
7. Approve payment of outstanding Claims Administrator expenses of \$1,950,878.64 from the fund identified in paragraph 16(d) of the Stipulation.
8. Approve payment of outstanding support expenses to database consultant Media Stew of \$88,755.00 from the fund identified in paragraph 16(d) of the Stipulation.
9. Approve reallocation of any residual funds remaining following distribution from the funds identified in ¶¶ 16(a), (b), (d) of the Stipulation to the Class Benefit Fund identified in ¶ 16(c) of the Stipulation.
10. Allow destruction of: (a) paper copies of the Proofs of Claim and all supporting documentation one year after final distribution of the Net Settlement Fund; and (b) electronic copies of the Proofs of Claim and all supporting documentation three years after final distribution of the Net Settlement Fund.

The Defendants take no position on this motion, and will not be filing responses. The grounds for this motion are set forth in the accompanying Memorandum in Support. A proposed form of Order is also attached.

Respectfully submitted,

/s/ W.B. Markovits

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Plaintiffs' Counsel

Now, pursuant to Fed. R. Civ. P. 23(e), Plaintiffs' Counsel respectfully submit this memorandum of law in support of their motion for a Class Distribution Order. Pursuant to the Stipulation, Defendants have no interest in the relief sought by this motion.²

II. BACKGROUND

The Stipulation provided for all-cash payments totaling \$80,875,000, plus accruing interest from time of payment, to compensate members of the Class, to pay attorneys' fees and expenses awarded by the Court, to pay for the Class Benefit Fund, and to pay related administrative expenses. Stipulation, ¶¶ 2, 16. On April 25, 2016, this Court granted final approval of the \$80,875,000 cash Settlement between and among Lead Plaintiffs, on behalf of the Class, and Settling Defendants under the terms generally set forth in the Stipulation. *See* Opinion and Order [Doc. # 268].

The Court awarded Plaintiffs' Counsel attorneys' fees of \$19,237,122.76 and litigation expenses of \$720,321.83, with interest accrued thereon. *Id.* at ¶ 8(b-c). The Court awarded incentive awards totaling \$80,000 for all four Class Representatives. *Id.* at ¶ 8(c). The Court has approved subsequent payments to the Claims Administrator of \$349,121.36 in connection with its work for the Notice of Pendency notice program and some settlement administration. The Court also approved up to \$18,000 of licensure, design, training and administrative support expenses for the Class Benefit Fund Board [Doc. # 273] and grants totaling approximately \$6,967,030.00 from the Class Benefit Fund to be paid from 2017-2019 [Doc. # 275]. To date, the Class Benefit Fund Board has received \$47,873.58 for Board-related fees and expenses from May 2016 through November 2016. As of December 30, 2016, the total balance of the Settlement Fund, including

² *See* Stipulation, ¶ 33 (“ . . . Defendants take no position with respect to any proposed or approved Plan of Allocation . . .”).

accrued interest, is \$56,746,125.17, with another \$4,000,000 due to be paid into the Class Benefit Fund in June 2017. *See* Declaration of W.B. Markovits in Support of Plaintiffs’ Motion for Class Distribution Order (“Markovits Decl.”), ¶ 2, filed concurrently herewith. The Settlement Fund continues to accrue interest. *Id.*

The Stipulation provides in part for the distribution of portions of the Settlement Fund, in accordance with the Plan of Allocation, among Authorized Claimants who received retail electric generation service from Duke Energy Corp. and/or Cinergy Corp., or their subsidiaries or affiliates, at any time between January 1, 2005 and December 31, 2008 in the CG&E/Duke electric service territory and did not receive rebates under the side agreements. Stipulation, ¶ 1(e). On behalf of Lead Plaintiffs, Plaintiffs’ Counsel retained GCG as the Claims Administrator. GCG has extensive experience in handling the administration of complex class actions. The Court approved the selection of GCG in its Order granting preliminary approval. [Doc. # 247, ¶ 5].

Pursuant to the Court’s Preliminary Approval Order, Plaintiffs’ Counsel caused to be published the Summary Notice in December 2015. GCG also posted downloadable copies of, *inter alia*, the Notice and the postcard Notice and Proof of Claims at www.dukeclassaction.com. Moreover, GCG disseminated more than 390,000 copies of the Postcard Notice and Claim Forms and emailed the Summary Notice to over 49,000 potential Class Members. *See* Declaration of Jose Fraga in Support of Plaintiffs’ Motion for Class Distribution Order (“Fraga Decl.”), ¶ 4, filed concurrently herewith. In response to the notice efforts, GCG received and processed a total of over 237,000 claims from potential Class members in connection with this Class Action. Fraga Decl., ¶ 10.

The Notice provided information concerning the Class Action, described the circumstances leading up to the Settlement, supplied the details of the Settlement and the process leading up to

the Settlement, gave notice of the Settlement Fairness Hearing, and provided instructions for Class Members regarding submission of claims, exclusion from the Settlement, objection to the terms of Settlement and application for attorneys' fees and reimbursement of expenses, and their right to attend the Settlement Fairness Hearing.

III. CLAIMS ADMINISTRATION

Pursuant to the Stipulation, the Court's Preliminary Approval Order, and the Notice, all Class Members wishing to be eligible to participate in the Settlement Fund were required to submit claims forms postmarked by April 13, 2016. A small percentage of claims were submitted after the deadline. Due to the high level of participation, and the fact that these claims did not cause any delay in processing, GCG continued to process these claims until July 31, 2016. Fraga Decl., ¶ 10.

GCG, in conjunction with Plaintiffs' Counsel and Plaintiffs' Counsel's IT personnel and economist, have gone through an extensive process to analyze and validate claims. Fraga Decl., ¶¶ 10-24, 26-28; Declaration of Kevin Lewis in Support of Plaintiffs' Motion for Class Distribution Order ("Lewis Decl."), ¶ 4; Markovits Decl., ¶ 3. GCG has prepared detailed lists of: (i) all valid and timely claims by Authorized Claimants; and claims that were submitted after the applicable claims deadline of April 13, 2016 but not later than July 31, 2016, that are otherwise valid ("Late But Otherwise Authorized Claims") and approved for payment in whole; (ii) similar claims approved for payment in part; (iii) claims for which Plaintiffs' Counsel are seeking the waiver of any deficiencies in whole or part; and (iv) rejected claims that were deemed ineligible ("Rejected or Ineligible Claims"). Fraga Decl., ¶ 29.

GCG made substantial efforts to contact Residential Class Members that had submitted deficient claims (such as unsigned claims or claims that required information to substantiate the

claimant's status as a Class Member during the Class Period). *Id.* at ¶¶ 15-21. GCG made a comprehensive effort to contact Non-Residential Class Members that had submitted claims – deficient or otherwise – notifying them of deficiencies or, in the case of apparently valid claims, notifying them of the kWh usage information on which their claim would be based (allowing them an opportunity to contest that kWh usage information if they felt it was incorrect). *Id.*

GCG mailed a total of 30,039 Deficiency Letters (as defined below) to Residential and Non-Residential claimants who filed deficient claims, plus an additional 10,927 Eligibility Letters (as defined below) to claimants who filed as, or were deemed to be, Non-Residential Class Members with apparently valid claims. *Id.* at ¶ 19.

The Deficiency Letters to potential Residential and Non-Residential Class Members informed the claimant that failure to cure the deficiencies may lead to rejection of his, her or its claim. *Id.* at ¶ 16. GCG's efforts with respect to the deficiency process allowed claimants who presented deficient claims to have an opportunity to cure those claims. *Id.* at ¶¶ 16, 17. GCG notified claimants with curable deficiencies that they were currently partially or wholly ineligible to participate in the Settlement because the deficient claims, *inter alia*: (1) had service address(es) that were located outside the Duke service area; (2) had no signature on the claim form; or (3) one or more of the service addresses provided by the claimant could not be verified against Duke's data. These claimants received letters entitled "Notice of Conditional Rejection of your Residential Claim or Notice of Conditional Rejection of your Non-Residential Claim (the "Deficiency Letters)," which explained the reason the claim was being rejected. In the case of Non-Residential claimants, the "Notice of Conditional Rejection of Your Non-Residential Claim" also provided the kWh usage information in the Duke database for the Non-Residential claimant, if any, and indicated how the claimant could, within 20 days, provide to GCG information to

contest such kWh usage amount and substitute a higher amount that might qualify them for additional payments based upon kWh usage. *Id.* at ¶ 17.

The Deficiency Letters advised claimants that they had the right to disagree with GCG's administrative determination of deficiencies or ineligibility within 20 days by submitting information or documentation to fix or otherwise complete their claim, as applicable. GCG reviewed and addressed all responses to the Deficiency Letters and responded to or reached out to claimants to facilitate the submission of missing information or documentation where applicable. *Id.* at ¶¶ 16, 20, 21. As a result of these efforts, many additional claimants are now included as Authorized Claimants who are eligible to participate in the Settlement.

Non-Residential claimants with otherwise valid claims were sent letters entitled "Information Regarding your Non-Residential Claim" (the "Eligibility Letters"). These letters provided the kWh usage information in the Duke database for the Non-Residential claimant, if any, and indicated how they could, within 20 days, provide to GCG such information to contest such kWh usage amount and substitute a higher amount that might qualify them for additional payments based upon kWh usage. GCG reviewed and addressed all responses to the Eligibility Letters and responded to or reached out to claimants to facilitate the submission of missing information or documentation where applicable. *Id.* at ¶¶ 17, 20, 21. Because of these efforts, many additional claimants are now included as Authorized Claimants entitled to receive additional payments based upon kWh usage.

Of the 40,966 Residential and Non-Residential claimants that were sent a Deficiency Letter or Eligibility Letter, 21,473 claimants were successfully cured; 1,597 were approved for the amount contained in Duke's data by waiving minor deficiencies (i.e., the deficiency was not cured but the claim is set for payment) or the claimants did not provide documentation sufficient enough

to contest and update their kWh usage and will be paid an amount based on the kWh usage set forth in Duke's data. *Id.* at ¶ 24. There remain 17,896 claims that have been rejected and are submitted to this Court for review. *Id.* at ¶¶ 24, 25.

IV. PROPOSED DISTRIBUTION PLAN FOR THE RESIDENTIAL AND NON-RESIDENTIAL SETTLEMENT FUNDS

GCG, in consultation with Plaintiffs' Counsel and an economist retained by Plaintiffs' Counsel, has developed a distribution plan for the Residential and Non-Residential settlement funds that will allow for the fair and expeditious distribution of those funds, pursuant to the Plan of Allocation and Stipulation. The claims GCG has received through July 31, 2016 and deficiency responses received by December 12, 2016 have been fully processed and 201,211 Authorized Claimants and Late But Otherwise Authorized Claimants are ready to be paid from the Residential and Non-Residential Funds. *Id.* at ¶ 25.

A. Residential Claims

Plaintiffs' Counsel ask the Court to approve payment to Residential Class Members who have valid and timely claims, and those who have Late But Otherwise Authorized Claims, out of the Residential Class Members Payment Fund (which includes accrued interest), as was established under ¶ 16(a) of the Stipulation.

To distribute this fund, the following steps would be taken:

1) Expenses related to the claims-made process for this fund, and not otherwise available under the fund established by ¶ 16(d), would be subtracted from the fund. These expenses are currently at zero.³ Markovits Decl., ¶ 2.

³ To maximize payment to Residential Class Members, and in accordance with the Stipulation, administration expenses will primarily be paid from the fund established by ¶ 16(d) of the Stipulation.

2) From the remaining fund of \$25,021,279.59 (as of 12/30/2016), payments of \$10.00 would be made to those potential Residential Class Members currently designated to receive less than \$10.00. These payments total \$13,340.00. *Id.* at ¶ 4(a).

3) From the remaining fund of \$25,007,939.59 (as of 12/30/2016), we would reserve \$9,041.59 to resolve future disputes. The remaining \$24,998,898.00 would be distributed on a *pro rata* basis, based on service days within the Class Period, to all valid and timely claims and Late But Otherwise Authorized Claims. The service days for Authorized Claimants who are Residential Class Members total 260,154,076 days. Each Residential Class Member would receive \$0.096146 per day, or \$140.47 for a full Class Period at a single service address. *Id.* at ¶ 4(b-c).

B. Non-Residential Claims

Plaintiffs' Counsel ask the Court to approve payment to Non-Residential Class Members who have valid and timely claims, and those who have Late But Otherwise Authorized Claims, out of the Non-Residential Class Members Payment Fund (which includes accrued interest), as was established under ¶ 16(b) of the Stipulation.

To distribute this fund, the following steps would be taken:

1) Expenses related to the claims-made process for this fund, and not otherwise available under the fund established by ¶ 16(d), would be subtracted from the fund. These expenses are currently at zero.⁴ Markovits Decl., ¶ 2.

2) From the remaining fund of \$25,021,279.59 (as of 12/30/2016), payments of \$10.00 would be made to those potential Non-Residential Class Members currently designated to receive less than \$10.00. These payments total \$660. *Id.* at ¶ 5(a).

⁴ To maximize payment to Residential Class Members, and in accordance with the Stipulation, administration expenses will primarily be paid from the fund established by ¶ 16(d) of the Stipulation.

3) From the remaining fund of \$25,020,619.59 (as of 12/30/2016), we would reserve \$115,409.45 to resolve future disputes. The remaining \$24,905,210.14 would be distributed on a *pro rata* basis, based on service days within the Class Period and the kWh usage formula attached as Exhibit A to the Markovits Declaration, to all valid and timely claims and Late But Otherwise Authorized Claims. *Id.* at ¶ 5(b-c).

V. PAYMENT FOR CLAIMS ADMINISTRATION SUPPORT.

Plaintiffs' Counsel ask the Court to approve payment to GCG and Media Stew, out of the fund created by ¶ 16(d) of the Stipulation, for their work on claims administration. GCG has provided claims administration services on this matter, including *inter alia*: the original notice; the notice of settlement and claim form; a manned toll-free hotline; a settlement website; initial claims processing; deficiency and eligibility letters; a "cure" website; and deficiency processing. Fraga Decl., ¶¶ 2-22, 26-28. GCG has worked with Media Stew for, *inter alia*: database programming; computerized and manual review of claims; application of allocation formulas; development of database lists for the various categories of claimants (*e.g.* accepted/rejected, residential/non-residential). Fraga Decl., ¶¶ 14, 18, 21, 22; Lewis Decl., ¶¶ 3, 4, 5. All of this has taken place with the involvement and supervision of Plaintiffs' Counsel. Markovits Decl., ¶ 3.

GCG has been paid to date \$349,121.36 out of that portion of the Settlement Fund created by ¶ 16(d) of the Stipulation. It has outstanding unpaid invoices of \$1,950,878.64. Fraga Decl., ¶ 36. Plaintiffs' Counsel requests that the Court approve payment for those outstanding invoices. GCG will continue with claims administration, in particular the mailing of distribution checks and the follow up normally associated with such a distribution. Fraga Decl., ¶¶ 31-37. GCG has agreed to cap all of its expenses at \$2.3 million. Fraga Decl., ¶ 37.

Media Stew has been paid to date \$5,805.00 out of that portion of the Settlement Fund created by ¶ 16(d) of the Stipulation. Lewis Decl., ¶ 6. It has outstanding unpaid invoices of \$88,755.00. *Id.* at ¶ 7. Plaintiffs' Counsel requests that the Court approve payment for those outstanding invoices. Media Stew will continue to support GCG's claims administration efforts as necessary going forward. *Id.* at ¶ 8. Future work will be assessed to the fund created by ¶ 16(d).

VI. REVERSION TO CLASS BENEFIT FUND.

Pursuant to ¶ 19(d) of the Stipulation, any monies remaining from the Settlement Fund after payment of attorney fees and expenses, incentive payments, Notice and Administration Costs, and Class Benefit Fund fees and expenses shall be allocated and transferred to the Class Benefit Fund. Plaintiffs' Counsel seeks the Court's approval to transfer remaining funds from ¶ 16(d) to the Class Benefit Fund (¶ 16(c)) once such expenses and costs have been paid and finalized.

Respectfully submitted,

/s/ W.B. Markovits

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CERTIFICATE OF SERVICE

I certify that on January 5, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record in this matter who are registered on the CM/ECF.

/s/ W.B. Markovits

W.B. Markovits (0018514)

MARKOVITS, STOCK & DEMARCO, LLC