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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Aqua Ohio, Inc. for Authority to Increase its Rates and Charges in its Masury Division.	)))	**Case No. 09-560-WW-AIR**

MOTION TO STRIKE TESTIMONY SUBMITTED BY THE OHIO CONSUMERS' COUNSEL

July 2, 2009 Aqua Ohio, Inc. ("Aqua"), an Ohio public utility providing water service to over 80,000 Ohio customers, filed a notice of intent to file an application for an increase in its rates and charges to customers in its Masury Division, a service territory comprising approximately 1473 customers. By Entry dated July 29, 2009, the Public Utilities Commission of Ohio ("PUCO" or "Commission") approved the requested test period beginning January 1, 2008 and ending December 31, 2008 and the requested date certain of June 1, 2008. The Application to Increase Rates and Charges in the Masury Division was filed on August 7, 2009. By Entry dated September 23, 2009 the Commission ordered that the application be accepted for filing as of August 7, 2009. On January 7, 2010, the Commission entered an Order granting Aqua's motion to change the date certain to June 30, 2009, consistent with the work papers in the case

On January 21, 2010, the Staff of the Commission docketed its report. Pursuant to an Order dated January 22, 2010, the Office of the Ohio Consumer's Counsel ("OCC") filed Objections to the Staff Report along with supporting testimony on February 22, 2010. Since the testimony of several of OCC's witnesses fails to comply with Ohio's hearsay rules and some of the testimony is irrelevant in that it relates to matters outside the PUCO's jurisdiction, Aqua requests an Order striking several portions of OCC's

witness testimony. The grounds for this motion are set forth more fully in the attached memorandum.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

According to Ohio Revised Code ("R.C.") Section 4903.22, "Rules of practice":

> "Except when otherwise provided by law, all processes in actions and proceedings in a court arising under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., 4923., and 4925. of the Revised Code shall be served, and ***the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions***." (Emphasis added.)

Rule 12(F) of the Ohio Rules of Civil Procedure provides as follows:

> "(F) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter."

The determination of a motion to strike is vested within the broad discretion of the court. *Squire v. Geer* (2008), 117 Ohio St.3d 506, 885 N.E.2d 213.

1. **Witness Daniel J. Duann, PhD.**

Evidence Rule 706 states:

> "Statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art are admissible for impeachment if the publication is either of the following:
>
> A) Relied upon by an expert witness in reaching an opinion;
>
> B) Established as reliable authority (1) by the testimony or admission of the witness (2) by other expert testimony, or (3) by judicial notice.
>
> If admitted for impeachment, the statements may be read into evidence but shall not be received as exhibits."

The learned treatise exception to the hearsay rule set forth in Fed.Evid.R. 803(18) has no counterpart in Ohio Evid.R. 803. Thus, in Ohio, medical books or treatises are not admissible as substantive evidence. A learned treatise may sometimes be used for impeachment purposes, but a learned treatise may not be admitted into evidence. ***Hinkle v. Cleveland Clinic Foundation*** (8th Dist. 2004), 159 OhioApp.3d 351, 364, 823 N.E.2d 945, 954 (8th Dist 2004)(citing ***Stinson v. England*** (1994) 69 Ohio St.3d 451, 633 N.E.2d 532.

In addition to the hearsay problem, learned treatises are not admissible because the opinions or conclusions contained therein are unverifiable, the technical language may not be understood by most jurors, the opinions or conclusions would be admitted into evidence without an oath of truthfulness, and the opposing party would be unable to cross examine the person who gave the opinion or conclusion. ***Id.***

On page 18, footnote 22 of Dr. Duann's testimony, he quotes Morin, New Regulatory Finance, and directly quotes Dr. Morin. Those references must be stricken as hearsay under the relevant law set forth above.

2. **Witness Amr A. Ibrahim**

Quotes in Witness Ibrahim's testimony from the literature of Bonbright and others located on page 15 in footnote 28 must also be stricken as hearsay, for the reasons stated above.

Further, in Ohio, it is axiomatic that the PUCO, as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly. While the General Assembly has delegated authority to the PUCO to set just and reasonable rates for public utilities under its jurisdiction, it has done so by providing a detailed, comprehensive and, as construed by the Ohio Supreme Court, mandatory rate making formula, set forth in R.C. 4909.15. The PUCO has no authority under R.C. 4909.15 to order the phase-in of a utility's annual revenues. ***Columbus Southern Power Co. v. Public Utilities Commission of Ohio*** (1993), 67 Ohio St.3d 535, 620 N.E.2d 835.

Beginning on page 16, line 1 of Witness Ibrahim's testimony and continuing to page 23, line 21 of that testimony, witness Ibrahim discusses his recommendation and reasoning that the PUCO should order a phase-in of rates for Aqua over a six year period. Since it is well established law that the Commission is wholly without jurisdiction to order a phase- in of rates, all of this testimony is completely irrelevant and immaterial. The Commission simply may not do what Witness Ibrahim is urging. The testimony is therefore immaterial to this proceeding and its inclusion in the record is merely confusing

and superfluous. This testimony must be stricken from the record as being wholly immaterial to the issues presented in this case.

3. **Witness Steven B. Hines**

Beginning on page 10 lines 18 through 22 of Witness Hines' testimony, and continuing on to page 11, lines 1 through 8, Witness Hines makes a recommendation that Staff should have excluded fifty percent of Aqua's $96,000 rate case expense because "customers should not have to pay the entire cost of a rate case that will benefit the Company and its shareholders as much as, or even more so than the customers themselves."

Of course, the level of rate case expense in a given case is impacted by several factors, not all of which are under the control of the Company.[1] This testimony is offered without citing any authority for the proposition that the Commission may disallow half of a Company's rate case expense because customers "should not have to pay it." It appears that the OCC is working on such a bill[2], but has not yet succeeded in getting it adopted. In the meantime, this testimony should be stricken because no recognized law in Ohio allows the Commission to arbitrarily disallow half of a Company's reasonable rate case expense.[3]

Further, on page 14, lines 19 through 23 and continuing on to page 15, lines 1 through 5, Hines discusses his recommendation for a merger of the Masury Division into the Lake Erie Division.

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[1] In a case involving 1475 customers, OCC served 92 interrogatories and 36 requests for production of documents, despite the fact that Aqua Ohio provided OCC with all informal discovery requested by OCC. For a further discussion of OCC's tactics regarding rate case expense, see, Initial Brief of Ohio American Water Company at pages 37 through 38 (attached).

[2] See, Senate Ohio House Bill 344, discussed in Initial Brief of Ohio American water Company in Case No. 09-391-WS-AIR, at pages 35 through 38 (attached).

[3] In fact, a large number of cases recognize that rate case expense is properly included among operating expenses. See, ***City of Canton v. PUCO*** (1980), 63 OhioSt.2d 76.

As noted above, the Commission, as a creature of statute, may exercise only such authority as is conferred on it by statute. ***Montgomery County Board of Commissioners v. Pub.Util. Comm.*** (1986), 28 Ohio St.3d 171, 503 N.E.2d 167. The only statute requiring Commission approval of a merger or consolidation of two Ohio public utilities is R.C. 4905.49, which applies only to telephone company public utilities. Therefore, the Commission has no jurisdiction to order a merger between Aqua's Masury Division and Aqua's Lake Erie Division. Since the Commission is without jurisdiction to order a merger between Masury and Lake Erie, this testimony is irrelevant to this proceeding and should be stricken.

CONCLUSION

In summary, several portions of OCC's witness testimony should be stricken as violative of Ohio's hearsay rule or because the testimony is completely immaterial to the present case. That testimony, as, identified above, should be stricken.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *Motion To Strike Testimony Submitted by The Ohio Consumers' Counsel* was served this 8th day of March, 2010 upon the following via electronic mail and U.S. regular mail, postage prepaid.

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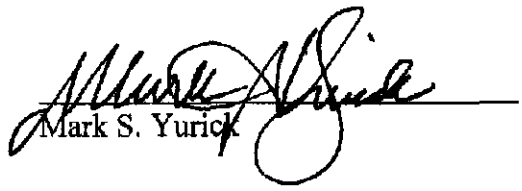

Mark S. Yurick

ND: 4845-4878-7973, v. 3

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio American Water Company for Authority to Increase its Rates For Water and Sewer Service Provided to its Entire Service Area.	))))	Case No. 09-391-WS-AIR

INITIAL BRIEF
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Case No.	Application Filed	Date Approved	Actual Number of Months Between Rate Cases	Number of Months Between Rate Case Approvals	Actual or Estimated Expense	Staff Cap on Rate Case Expense
99-1038-WW-AIR	09/01/1999	06/29/2000	----------	----------	$507,235	$312,400
01-626-WW-AIR	05/03/2001	02/06/2002	11 months	20 months	$386,000[15]	$246,000
03-2390-WS-AIR	12/11/2003	02/23/2005	22 months	36 months	$371,586[16]	$371,586
06-433-WS-AIR	03/17/2006	03/07/2007	13 months	25 months	$558,795	$400,000
07-1112-WS-AIR	10/12/2007	11/12/2008	7 months	20 months	$564,627	$523,417
09-391-WS-AIR	06/08/2009	–	7 months	–	$973,106[17]	$523,417

2. OCC's arbitrary and unreasonable proposal to cut rate case expense by 50% is self-serving and contrary to Ohio law.

OCC's arbitrary proposal to cut in half Ohio American's actual rate case expense violates the Ohio Supreme Court's longstanding principle that reasonable rate case expenses should be included as part of a utility's operating expenses. See e.g., *City of Canton v. PUCO* (1980), 63 Ohio St.2d 76 (concluding that even rate case expenses incurred in a successful appeal should be "included by the commission among the operating expenses in computing a fair return to the company").

Interestingly, the Commission long ago recognized the OCC's unreasonable position in seeking to exclude rate case expenses:

> OCC renews its request for total disallowance of rate case expense, despite numerous Commission and supreme court decisions upholding a utility's right to recover reasonable rate case expense as an ordinary and necessary business expense. [citations omitted] We believe it may be time for the OCC to reexamine its "customary position" in light of the escalating legal expenses incurred by the parties to these rate proceedings. Absent some change in circumstances, we see no useful purpose or service to the residential consumers of this state by continuing to challenge such well-established precedent.

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15 This amount includes $140,000 of the unamortized portion from the 1999 rate case.

16 This amount includes $42,000 of the unamortized portion from the 2001 rate case.

17 Revised Company response to Staff Data Request No. 80.

Cincinnati Gas & Electric Company, Case No. 91-410-EL-AIR (Opinion and Order dated May 12, 1992). In fact, the Commission expressly rejected OCC's recommendation that shareholders and ratepayers equally share rate case expenses. See *Columbia Gas of Ohio, Inc.*, Case Nos. 88-716-GA-AIR; 88-717-GA-AIR; 88-718-GA-AIR; 88-719-GA-AIR; 88-720-GA-AIR; 88-1011-GA-CMR (Opinion & Order dated October 17, 1989).

Perhaps more pointedly, in *Ohio Fuel Gas Co. v. PUCO* (1942), 139 Ohio St. 581, the Court rejected the same type of arbitrary reduction proposed by OCC in this case—concluding that no justification existed for the Commission to arbitrarily reduce the utility's rate case expenses by 40%. This ruling is consistent with Commission precedent holding that it is improper to impose a cap on rate case expense that is not founded on evidence. See e.g. *The Cleveland Electric Illuminating Company*, Case No. 85-675-EL-AIR (explaining "[i]t is our conclusion that no basis exists in the record for imposition of a 'cap' on rate case expense as proposed by the city").

Not coincidentally, and at the same time OCC proposes to arbitrarily cut in half Ohio American's rate case expense, OCC is publicly promoting Ohio House Bill 344—a bill designed to cut in half[18] the recoverable rate case expenses for large Ohio water utilities (Tr. VII, pp. 1158-60). For example, on December 8, 2009, OCC distributed a letter to many Ohio American customers (including, ironically, Ohio American's corporate office) encouraging support for HB 344, and negatively influenced customers' perception of Ohio American[19] (Tr. II at 216). In fact, the letter expressly encouraged support for HB 344 (e.g. asking for customer "support in helping

[18] Recently a similar bill has been introduced in the Ohio Senate, S.B. 228, which proposed to exclude all rate case expenses from a rate application.

[19] The December 8, 2009 letter was admitted into evidence during the evidentiary hearing as Company Ex. 1C.

us (OCC) to encourage the legislature to pass this legislation" through letter-writing and testifying in favor of HB 344).

OCC's support for HB 344 clearly served as the basis for its proposal to halve rate case expense in this proceeding. In fact, OCC acknowledges that its support and promotion of HB 344 is a contributing factor to its conduct in this proceeding (Tr. VII at 1161)—conduct which resulted in OCC pushing for litigation, refusing to even discuss a stipulation with Ohio American (despite stipulations having been reached in Ohio American rate cases for the last three decades), and commencing a scorched earth litigation strategy without regard for the cost of recovery from the residential customers they espouse to represent.

Rather than seeking to control rate case expense in this proceeding, OCC did just the opposite. OCC issued approximately 354 formal discovery requests in this case (251 interrogatories and 103 requests for production of documents plus five lengthy depositions), which were in addition to numerous informal discovery requests (Tr. VII at 1163-66), one immediately prior to the evidentiary hearing. Preparing responses to the extraordinary number of discovery requests in this case involved countless hours of time by both Ohio American and Service Company employees; in particular, Mr. Little, and Mr. VerDouw and his team (Tr. VII at 1166). The response to OCC's discovery nearly filled a banker's box, and the OCC discovery documentation was in addition to the hundreds of pages of documentation already provided as part of the Application in this proceeding.

OCC's dilatory and cost intensive litigation tactics continued through the evidentiary hearing. For example:

a. OCC's drawn-out cross-examination of Ohio American witnesses often involved the reading of questions and answers from the deposition transcripts of Ohio American witnesses

despite the fact that those witnesses appeared live at the evidentiary hearing.

b. OCC filed a motion approximately two weeks before the evidentiary hearing asking the Commission to require two more public hearings in Ashtabula and Tiffin, despite the fact that the Commission already set five (5) other local public hearings in Ohio American's service territories, and the lack of interest at the public hearings in Ashtabula and Tiffin in past rate cases. Although the Commission ultimately granted OCC's motion, Ohio American representatives and its counsel were required to travel more than six hours to and from the Ashtabula public hearing, and nearly four hours to and from the Tiffin public hearing, neither of which lasted more than 25 minutes.

It is entirely improper for the OCC to use this rate case proceeding as a platform to publicize its legislative efforts and strengthen its arguments in support of HB 344 (e.g. by intentionally increasing rate case expense in this proceeding).

C. Incentive Compensation

Mr. Hecker excluded all incentive pay compensation, $223,935. Based on Ms. Choudhary's agreement, only 40%, representing the financial standard portion of the plan, should have been eliminated, leaving $134,361 that should not have been excluded from management fees.

As part of the 2007 Rate Case, both Staff and OCC recommended excluding only 40% of Ohio American's incentive compensation expense (Tr. VIII at 1335). This recommendation was consistent with the standard by which recovery of incentive compensation would be decided as set forth in the Commission's Opinion & Order in FirstEnergy's most recent distribution rate case (Case No. 07-551-EL-AIR "FirstEnergy Rate Case")—a decision relied upon by the parties in this case. Ohio American's incentive compensation plan involved no significant changes between the 2007 Rate Case and this proceeding (Tr. VIII at 1336-1337). Yet, without