

FILE

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

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MOTION TO STRIKE OBJECTIONS OF THE OHIO CONSUMERS' COUNSEL

On 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 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 December 10, 2009, Aqua filed a Motion to Correct the Date Certain and for an Expedited Ruling. The error in requesting a date certain of June 1, 2009 was due to an inadvertent error and miscommunication, as explained in the request. On December 17, 2009, the Office of the Ohio Consumers' Counsel ("OCC") filed a Memorandum in Opposition to Aqua's request to correct the error. On January 7, 2010, the Commission entered an Order granting Aqua's motion to accept its mistake and change the date certain to June 30, 2009, consistent with the work papers in the case. No mention was made of any failure of any defect in notice in the OCC Memorandum Contra, or the January 7, 2009 Order of the Commission.

On January 21, 2010, the Staff of the Commission docketed its Report ("Report" or "Staff Report"). Pursuant to an Order dated January 22, 2010, OCC filed Objections to the Staff

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Report on February 22, 2010. Since several of OCC's objections fail to satisfy the minimum requirements of Ohio Administrative Code 4901-1-28(B), Aqua requests an Order striking several of OCC's objections to the Staff Report. 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.

Pursuant to Ohio Administrative Code ("OAC") 4901-1-28 (B):

"Any party may file objections to a report of investigation described in paragraph (A) of this rule, within thirty days after such report is filed with the commission. *Such objections may relate to the findings, conclusions, or recommendations contained in the report, or to the failure of the report to address one or more specific items. All objections must be specific. Any objections which fail to meet this requirement may be stricken, upon motion of any party or the commission staff or upon motion of the commission, the legal director, the deputy legal director, or the attorney examiner.*"

OCC's objections must therefore relate to: 1. the findings, conclusions, or recommendations contained in the Report, or 2. the failure of the Report to address one or more specific items. Additionally, all objections must be specific. The merits of the objections will be dealt with following the evidentiary hearing on the matter.¹

However, several of OCC's objections fail to satisfy the meager requirements of the Code. These objections do not relate to findings, conclusions, or recommendations in the Staff Report or to the failure of the Report to address one or more specific items, or are so vague that they can not be considered specific. Some of the other objections are completely without merit, but these objections will not be addressed in this memorandum. Aqua seeks only to strike those of OCC's objections that fail to comport with minimum pleading standards set forth in OAC 4901-1-28(B).

First, OCC's sixteenth objection states:

"OCC objects to the PUCO Staff's failure to recommend that there be a process among the Parties where alternative rate design mechanisms, such as phase-in, are considered for avoiding or lessening the rate shock to

¹ In the Application of Water and Sewer LLC for an Increase in its Rates and Charges, Case No. 08-227-WS-AIR (April 14, 2009 Opinion and Order) at Paragraph 6; In the Matter of the Application of Mohawk Utilities, Inc. for an Increase in its Rates and Charges, 07-981-WW-AIR (April 11, 2008 Entry) at paragraph 5.

residential customers that would result from the rate increases proposed by the Company or others.”

This objection is not specific in that OCC fails to identify what specific process should have been recommended (mediation, arbitration, flip a coin, ect.) to determine an “alternative rate mechanism” or, other than a “phase-in” what “alternative rate mechanisms” the Staff should have proposed. Of course OCC cites no authority or rule under which the Staff could recommend these unidentified alternative rate mechanisms. It is also well-established that the Commission may not legally order a phase-in. Columbus Southern Power Co. v. Public Utilities Commission of Ohio (1993), 67 Ohio St.3d 535, 60 N.E.2d 835. Though the bar for stating an objection is admittedly low, OCC has failed to clear it with this objection.

Next, at paragraph 17, OCC appears to be objecting to Staff’s recommendation that Aqua’s practice of waiving late payment charges if payment is made within 6 days of the bill due date. Since this waiver allows customers extra time to pay, the objection is confusing as the recommendation clearly helps customers. However, though inartfully and clumsily worded, OCC’s actual objection appears to be that in addition, Staff should have recommended that “the first late payment charge in any 12 month period be waived.” OCC offers no rational reason or support for this suggestion, and one must assume that OCC merely thinks it would be a nice thing if customers could also pay more than 6 days late without charge at least once per year. Objections to a Staff Report should not devolve into a wish-list of things that would be nice for customers. Staff’s recommendation that an extended late payment waiver be incorporated into the tariff is not really being objected to here. This objection does not relate to the findings, conclusions, or recommendations contained in the Report, or to the failure of the Report to address one or more specific items, as required by the rule.

OCC objection number 24 states that OCC objects to the Staff Report because it “failed to provide conclusions regarding ways in which Aqua’s customer service can be improved, such as including more payment plans and options for customers.” Again, OCC appears to feel that some undefined “payment plans” and “options” would be good for customers, but fails to identify any such plans or options or offer any support for the proposition that Staff Reports should investigate the entire universe of all possible payment plans and options and recommend them to Aqua for the convenience of Aqua’s customers. Nor, of course, can OCC provide any support for the idea that this constitutes a “failure” of Staff. Rather, this is OCC in “wish list” mode again. Though the relevant pleading requirements are admittedly lenient, OCC again fails to satisfy them here.

The same may be said of OCC’s objection number 25, which is that Staff should make “recommendations for improvement” based on an analysis of a July 2009 water survey. OCC does not identify any specific “recommendation for improvements” based on the water study, only stating that customer surveys “can provide invaluable information.” This is again “wish list” territory. The Staff and Aqua are simply unable to respond to an “objection” that Staff did not make some recommendation or set of recommendations for improvement based upon information from a water survey. If OCC had mentioned a specific recommendation or recommendation that was supposedly lacking, perhaps the objection would meet the specificity requirement. As is, this objection is just too vague to understand.

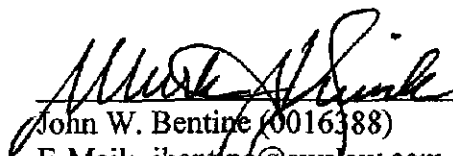
Likewise, OCC’s objection that the Staff Report “failed to review the Company’s water efficiency and conservation programs and failed to provide recommendations for ways that conservation initiatives can be improved” is so vague and non-specific that it should be stricken.

OCC offers no reasonably defined inadequacy in Aqua's efficiency and conservation programs making a response to this objection virtually impossible.

Finally, OCC's paragraph number 28 states that OCC objects to the Staff Report to the extent that Staff failed to address the "notice deficiencies" regarding the Company's correction of the date certain that is used for valuing rate base and for the setting of rates. Certainly OCC received the motion to correct the date certain - they filed a memorandum opposing the change. Also, in that memorandum of opposition, OCC made no mention of any defect in notice. Aqua notified all of the parties to the case as required by rule. Since OCC does not identify a specific failure of notice (whether it was not served on a correct party, was not served electronically, was not served by mail, was not served a particular non-party with a right to notice, or other failure) Aqua and Staff are left to guess. Again, while the form of objections must only be specific, OCC falls short of that simple requirement. If there is some legitimate issue with regard to notice, OCC should be required to state the issue clearly and specifically at some point prior to the hearing. The appropriate place would be in their objections to the Staff Report. Since they have not done this, the objection stated in paragraph 28 should be stricken.

In summary, several of OCC's objections fail to satisfy the requirements of Ohio Administrative Code 4901-1-8(B). Those objections, identified above, should be stricken.

Respectfully submitted,



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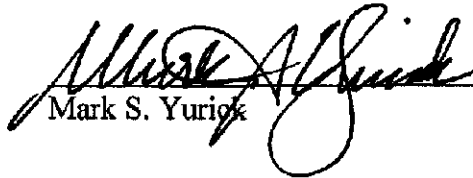
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *Motion To Strike Comments Of 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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