

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.	)	Case No. 12-1682-EL-AIR
	)	
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 12-1683-EL-ATA
	)	
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval To Change Accounting Methods	)	Case No. 12-1684-EL-AAM
	)	

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**DUKE ENERGY OHIO, INC.'S  
MEMORANDUM CONTRA STAFF AND OCC MOTIONS TO STRIKE**

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**I. Introduction**

Now comes Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) in accordance with Ohio Administrative Code 4901-1-28 and hereby submits its Memorandum Contra the Motions to Strike the Objections of Duke Energy Ohio filed by Staff of the Public Utilities Commission of Ohio (Staff) and the Office of the Ohio Consumers' Counsel (OCC) (Motions to Strike). Staff's and OCC's Motions to Strike raise a single issue, namely, Duke Energy Ohio's objection to Staff's failure to support the Company's proposal for a Facilities Relocation-Mass Transportation Rider (Rider FRT or the Rider). The Motions, claim that Duke Energy Ohio's objections to the Staff Report regarding Rider FRT are "vague, overbroad, and not specific enough." Staff and OCC are incorrect in their contentions.

## II. Applicable Law and Argument

Staff and OCC both assert that support for their respective motions to strike can be found in O.A.C. 4901-1-28, which merely provides:

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...<sup>1</sup>

The only guidance set forth under O.A.C. 4901-1-28(B) with respect to a party's objections is that it may relate to the Staff report's "findings, conclusion or recommendations" or the failure to address an item, and that the objection must be specific.<sup>2</sup> That is the only standard. There is no explicit threshold of specificity required under the rule. However, recent Commission Entries on the issue hold that all that is necessary with respect to specificity under the rule is that the objection be specific enough to convey what is actually being placed at issue.<sup>3</sup> Furthermore, "the intrinsic merit or lack of merit of any particular objections must be dealt with following the evidentiary hearing on the matter, not by striking it prior to that time."<sup>4</sup> The Ohio Supreme Court has found it to be reversible error for the Commission to strike an objection that meets these requirements.<sup>5</sup> The objections submitted by Duke Energy Ohio in these proceedings were designed with this purpose in mind.

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<sup>1</sup> O.A.C. 4901-1-28(B).

<sup>2</sup> *Id.*

<sup>3</sup> *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR *et al.*, (Entry at paragraph 8)(May 23, 2008).

<sup>4</sup> *In re Application of Water and Sewer LLC for an Increase in its Rates and Charges*, Case No., 08-227-WS-AIR (Entry at 1-2) (April 14, 2009).

<sup>5</sup> *Industrial Energy Consumers v. Public Utilities Com.*, 63 Ohio St. 3d 551 (Ohio 1992)

The Company's objections relate to findings, conclusions or recommendations in the Staff Report or the failure of Staff to address the same. Duke Energy Ohio's objections are sufficiently specific and targeted to the Staff Report so to allow parties to understand what is actually being placed at issue. These issues are thus in the case and should be decided on the merits.<sup>6</sup> The Commission must deny Staff's and OCC's motions to strike.<sup>7</sup>

### **III. Motions to Strike the Company's Objection to Staff's Recommendation Related to Rider FRT**

The focus of Staff's and OCC's Motions to Strike is the Company's proposal for Rider FRT. Despite assertions by Staff and OCC in their respective Motions to Strike, the Company's objections regarding Staff's recommendations on Rider FRT are specific, as required by Rule 4901-1-28(B), O.A.C, and sufficiently notify the parties of the Company's specific concerns at issue.

In its Staff Report, Staff recommended against the approval or implementation of Rider FRT, through either policy or legal opinion. Staff's opinions speak to the merits of the tariff itself and should be addressed in the hearing on the merits. Duke Energy Ohio's objections are designed to preserve the issue for hearing consistent with the intent of O.A.C. 4901.4901-1-28(B).<sup>8</sup> Duke Energy Ohio objected to the Staff's reasoning supporting rejection of Rider FRT as flawed and unsupportable for a number of reasons.

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<sup>6</sup> See *Industrial Energy Consumers v. Public Utilities Com.*, 63 Ohio St. 3d at 554 (Ohio 1992); "Because partial service rates were placed at issue, IEC was permitted to object to the rates, pursuant to R.C. 4909.19, and the commission was required to consider the merits of the objection at hearing. Thus, it was error for the examiner to strike IEC's objection and related prefiled testimony. The commission's order which upholds the ruling of its examiner is reversed and this case is remanded to consider the matters raised by IEC's objection. *Id.*

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

<sup>8</sup> *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR *et al.*, (Entry at paragraph 8)(May 23, 2008); *In re Application of Water and Sewer LLC for an Increase in its Rates and Charges*, Case No., 08-227-WS-AIR (Entry at 1-2) (April 14, 2009).

The Company refers directly to Staff's five arguments against the creation of Rider FRT. The Objections then elaborate that "Staff's concerns in this regard are misplaced, raise issues that are beyond the jurisdictional capabilities of the commission to consider and, in some cases, are simply false." The context of the Company's objections regarding defined recommendations in the Staff Report are clearly compliant with the requirements of Rule 4901-1-28(B), O.A.C., for objections.

Staff's recommendations that the Commission should reject Rider FRT allege the following:

- The Company's tariff fails to identify what type of public mass transportation is  
eligible for inclusion under Rider FRT;
- Rider FRT does not distinguish between projects that should be funded solely by  
the governmental subdivision and projects funded by the utility in  
accordance  
with the home rule;
- Staff is unclear that the design of Rider FRT ensures that appropriate customers  
are charged for projects;
- Rider FRT is unclear about the manner in which overruns would be addressed;  
and
- Future environmental liability is not addressed under Rider FRT.

The format of Duke Energy Ohio's objections readily indicates that all objections raised under "(18) Facilities Relocation Tariff (Rider FRT)" pertain directly to the assertions made on this topic in the Staff Report. This initial objection hones in on the specific Staff recommendation, namely findings, recommendations and conclusions supporting its rejection of Rider FRT. Staff initially withholds its support for the creation of Rider FRT based upon the argument that the Company's proposal does not identify what type of public mass transportation project would be eligible under Rider FRT. Staff's conclusion in this regard is false and misplaced. The Company's Rider FRT and supporting testimony filed in these proceedings clearly define and identify the type of public transportation projects eligible for inclusion and specifically identify one particular project, namely the City of Cincinnati's street car project, as such a project.<sup>9</sup> Further, Rider FRT itself defines the projects eligible for recovery as:

Applicable to a request and/or requirement for the construction, removal, modification, or relocation of facilities, equipment, or wiring related to the distribution or transmission of electric service when Duke Energy Ohio (Company), absent such request or requirement would do otherwise, and where the recovery of additional expense for such request and/or requirement is agreed upon by the parties and is not otherwise provided for pursuant to agreement between the Company and requesting entity. *This rider becomes applicable when the said request/requirement is directly related to the construction and operation of any mode of mass transportation, including but not limited to, light rail, heavy rail, high-speed rail, street cars, subways, trolleys, trams or buses.*<sup>10</sup>

The language of the proposed Rider FRT tariff is quite explicit. Nonetheless, there are no other specific projects to be identified presently pursuant to Rider FRT because no such projects exist at this time. Thus, Staff's assertion that the Company failed to identify projects to be included under the Rider FRT, and that recovery under

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<sup>9</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Distribution Rates*, Case No. 12-1682-EL-AIR et al., Direct Testimony of Richard Harrell at 20-23.

<sup>10</sup> Rider FRT, Applicability Section I (emphasis added).

that provision should accordingly be denied, is false and inaccurate. Indeed, the Rider is designed with some intentional flexibility as to project that could be included for recovery. Accordingly, Duke Energy Ohio's objection relating to this recommendation should be sustained.

Second, the Staff's concern under Rider FRT regarding projects covered by home rule, versus those that should be recovered directly by the political subdivision, as object by the Company is misplaced and beyond the jurisdiction of the Commission. Staff's concern regarding application of Ohio's home rule is fact specific, requires legal interpretation beyond the Commission jurisdiction, and is irrelevant to a situation like that under Rider FRT. Therefore, the Company's objection to Staff's recommendation on this issue should be sustained by the Commission.

Staff's concern that Rider FRT does not recognize the indirect benefits of a project such as economic development is misplaced and misstates the law. There is no public benefit test or expense offset regarding the cost recovery for utility facility relocations directed by a municipality. Similarly, Staff's concern that the Company's Rider FRT does not follow cost causation principles is simply false. The Company is proposing for eligible projects to charge the municipality directing the utility facility relocation. Because Duke Energy Ohio's objection on this particular recommendation meets specificity standards under Rule 4901-1-28(B), O.A.C., the Commission should overrule the motions to strike the Company's objection.

As referenced in the Company's objections, Staff's confusion with the Company's proposal to offer two different types of payment options is also misplaced. Under Rider FRT, either the municipality pays for relocation or the citizens of the

municipality pay for the relocation. Staff and OCC may be confused about the issue, but that does not indicate that the Company's objection is not sufficiently specific to identify the issue. The Company's objection to Staff's recommendation on this issue should therefore be sustained.

Finally, Duke Energy Ohio objected to Staff's concerns regarding a perceived lack of clarity on the treatment of overruns and remediation liability. Staff's recommendation is misplaced because as proposed in Rider FRT, Duke Energy Ohio would apply to the Commission to implement the Rider, and the Commission would review the costs, including overruns, if any. Further, environmental liability issues exist anytime the utility relocates its facilities, irrespective of Rider FRT. Staff's concern is thus misplaced and beyond the jurisdiction of the Commission. As such, the Company's objection that Staff's justification to reject the Rider FRT based upon issues beyond the jurisdiction of the Commission is accurate and serves to give notice that the jurisdictional issues raised by Staff in its Staff Report will be an issue in these proceedings. Therefore the Company's objection on this issue should not be stricken.

Staff further relies upon Commission decisions regarding the fate of objections in *In re Consumers Ohio Water Company*, Case No. 95-1076-WW-AIR, Entry (July 2, 1996) and *In re Ohio American Water Company*, Case No. 01-626-WW-AIR, Entry (January 4, 2002). However, the Company's objections related to its proposed Rider FRT do not readily allow comparison with the cases cited by Staff. The financial matters at issue in the above cases are quite different from the issues raised by the proposed Rider FRT, which proposes a tariff that is creative and tailored to address a specific need. Thus the cases cited by Staff are inapplicable. .

Staff overlooks or strategically fails to mention the Commission's language in *In the Matter of the Application of Mohawk Utilities, Inc. for Authority to Increase its Rates and Charges*, Case No. 07-981-WW-AIR, Entry at 4 (April 11, 2008), in which it stated that "since the three issues outlined [therein] do relate to the staff's recommendations, the issues are specific enough to meet the standards of Rule 4901-1-28(B), Ohio Administrative Code." This language strongly supports the Commission's decision in *In the Matter of the Application of Water and Sewer LLC for an Increase in Rates and Charges*, Case No. 03-318-WS-AIR (November 10, 2003), which notes that the only requirements regarding objections "are that they must relate to findings, conclusions or recommendations in a staff report, or must relate to the failure of the staff report to address items and must be specific." Because the Company's objections specifically relate to Staff's recommendations as advanced in the Staff Report, the Commission must deny Staff's and OCC's motions to strike them.

All that is required is the Company's objection be specific enough to convey what is actually being placed at issue, and not to argue the intrinsic merit or lack of merit of any particular objection.<sup>11</sup> The Company's objections provide adequate notice of these issues related to Rider FRT and are certainly detailed such that Staff and OCC can discern the need to prepare for argument with respect to the Rider and Staff's legal and policy-related opinions set forth in the Staff Report. The Company will provide ample factual and legal support for the Rider as part of the hearing in this proceeding. Such brief-like support is not necessary for the purposes of objections under O.A.C. 4901-1-28.

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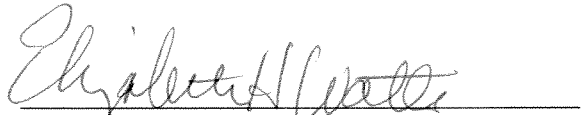
<sup>11</sup> *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR *et al.*, (Entry at paragraph 8)(May 23, 2008); *In re Application of Water and Sewer LLC for an Increase in its Rates and Charges*, Case No., 08-227-WS-AIR (Entry at 1-2) (April 14, 2009).



#### **IV. Conclusion**

As stated above, the assertions by Staff and OCC that the Company's objections relating to Rider FRT should be stricken are misplaced and erroneous. Further, OCC's assertions that the Company's objection (6) and its specific subparts are vague and overbroad, and should thus be stricken, are without merit. The Company has objected with the requisite specificity regarding the recommendations set forth in the Staff Report pertaining to the Rider FRT and Rider MGP and the issues related thereto. Accordingly, the Commission should deny Staff and OCC's Motions to Strike the Company's objections.

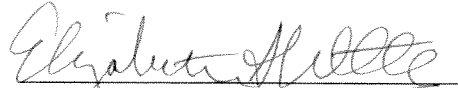
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The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 26th day of February, 2013, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.

  
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**Case No(s). 12-1682-EL-AIR, 12-1683-EL-ATA, 12-1684-EL-AAM**

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Staff and OCC's Motions to Strike electronically filed by Ms. Elizabeth H Watts on behalf of Duke Energy Ohio, Inc.