

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Duke Energy Ohio, Inc. for an)	Case No. 12-1685-GA-AIR
Increase in Gas Rates.)	

In the Matter of the Application of)	
Duke Energy Ohio, Inc., for Tariff)	Case No. 12-1686-GA-ATA
Approval.)	

In the Matter of the Application of)	
Duke Energy Ohio, Inc. for Approval)	Case No. 12-1687-GA-ALT
of an Alternative Rate Plan for Gas)	
Distribution Service.)	

In the Matter of the Application of)	
Duke Energy Ohio, Inc., for Approval)	Case No. 12-1688-GA-AAM
to Change Accounting Methods.)	

**JOINT MOTION TO STRIKE DUKE’S NEW EXPERT TESTIMONY
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY**

The Office of the Ohio Consumers’ Counsel (“OCC”) and Ohio Partners for Affordable Energy (“OPAE”) move the Public Utilities Commission of Ohio (“Commission” or “PUCO”) to strike the Direct Testimony of Shawn S. Fiore, the Second Supplemental Testimony of Gary J. Hebbeler, and the Third Supplemental Testimony of William Don Wathen filed on behalf of Duke Energy Ohio, Inc. (“Duke” or “Utility”). Duke’s new testimony was filed on April 22, 2013, nine months past the deadline for direct testimony¹ and two months past the deadline for supplemental direct

¹ Ohio Adm. Code 4901-1-7, Appendix A.

testimony in this rate case.² OCC and OPAE submit that the PUCO's Entry of April 4, 2013, was not an invitation to provide for the filing of this direct testimony on the manufactured gas plant issue -- the deadlines for which had long passed -- but was intended only to allow parties to address the impact, if any, of the Stipulation on the issues for hearing.

Furthermore, the Direct Testimony of Shawn S. Fiore is, in reality, rebuttal testimony submitted as if it was direct testimony, in rebuttal to the timely filed Direct Testimony of OCC witnesses Dr. James R. Campbell. This Duke testimony, without directly referencing OCC witness, still address specific various arguments raised in OCC witness's testimony, or to matters raised in the deposition of OCC witness Campbell.

The statutory scheme and the PUCO's rules are designed for a fair process to allow parties to prepare for hearings in rate cases, with Duke (as the utility with the burden of proof) required to file its case before intervenors (such as OCC) to provide ample time for discovery and development of evidence including OCC's own testimony. Duke's new testimony, filed just one week before the hearing and after OCC filed its case under law and rule, upends the intended fair process.

Therefore, this OCC and OPAE Motion to Strike should be granted for the reasons more fully explained in the attached Memorandum in Support.

² Ohio Adm. Code 4901-1-29.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	3
A. For a Fair Process, the PUCO’s Rules Require Public Utilities to File Their Testimony in Rates Cases on a Specific Schedule—Not Adhered to by Duke’s New Testimony—to Allow for Intervenors to Prepare for Hearing and to File Their Own Testimony with Knowledge of the Utilities’ Direct Testimony. Duke’s New Testimony Should Be Stricken.	3
B. The Testimony Filed On April 22, 2013, Is Improper Rebuttal Testimony and Therefore, It Should Be Stricken.	7
C. The Attorney Examiner’s Entry Permits Additional Testimony, But Not Duke’s Out of Time, Late Filed Testimony.....	10
D. Duke’s Testimony Filed on April 22, 2013 is Highly Prejudicial to OCC, OPAE and Other Interested Parties	12
III. CONCLUSION.....	13

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On June 7, 2012, Duke filed its Prefiling Notice with regards to its request to increase its natural gas distribution rates. As part of the Company's Rate Case Application, subsequently filed on July 9, 2012, Duke sought the authority to collect from its customers \$65.3 million in investigation, remediation and carrying costs associated with the remediation of two manufactured gas plant sites ("MGP"). Duke's Direct Testimony that was supposed to support the Application was filed on July 20, 2012.

On January 4, 2013, the Staff Report of Investigation was filed. On February 4, 2013, OCC and OPAE, as well as other interested parties, filed Objections to the Staff Report as required by R.C. 4909.19. Included within the 31 objections filed by OCC were five objections pertaining to Duke's request to collect MGP-related costs from Duke's customers.³

On January 18, 2013, the Attorney Examiner issued an Entry that established a procedural schedule for these proceedings. As part of that procedural schedule, February 19, 2013 was established as the deadline for the filing of Motions to Strike Objections to the Staff Report.⁴ Duke did not file a motion to strike any of OCC's Objections on February 19, 2013. January 18, 2013, was also the date of the discovery cut-off under the Commission's rules.⁵

On February 25, 2013, OCC timely filed the testimony of a number of expert witnesses in support of its Objections. Included was testimony of James R. Campbell who filed testimony in support of OCC Objection No. 26.⁶ At this time, Duke took the opportunity to file testimony in support of its objections to the Staff Report by witnesses Bednarcik (Supplemental), Middleton (Supplemental) and Margolis (Direct).

On April 2, 2013, a Stipulation and Recommendation ("Stipulation") was entered into between Duke, the PUCO Staff, OCC, OPAE and other interested parties. As part of the Stipulation, the signatory parties agreed that the issue of MGP-related cost recovery and collection would not be settled as part of the Stipulation, but instead would be

³ OCC Objections to the PUCO Staff Report of Investigation, Objection Nos. 25-29 (February 4, 2013).

⁴ Entry at 5 (January 18, 2013).

⁵ Ohio Adm. Code 4901-1-17 (B).. ("In general rate proceedings, no party may serve a discovery request later than fourteen days after the filing and mailing of the staff report of investigation required by section 4909.19 of the Revised Code.")

⁶ Direct Testimony of James R. Campbell at 5 (February 25, 2013).

litigated.⁷ The parties agreed to litigate their positions.⁸ OCC's position relative to the MGP issues to be litigated was as stated in its Objections to the Staff Report.⁹

On April 4, 2013, a procedural Entry was filed in these proceedings that established the date for the evidentiary hearing. In addition, the Entry stated: "Staff and all parties shall file any additional expert testimony by April 22, 2013."¹⁰ It is presumably in response to the Attorney Examiner's Entry that Duke filed its new Testimony.

II. ARGUMENT

A. **For a Fair Process, the PUCO's Rules Require Public Utilities to File Their Testimony in Rates Cases on a Specific Schedule—Not Adhered to by Duke's New Testimony—to Allow for Intervenors to Prepare for Hearing and to File Their Own Testimony with Knowledge of the Utilities' Direct Testimony. Duke's New Testimony Should Be Stricken.**

The PUCO's Rules include standard filing requirements for Utility Applications that involve an increase in rates, as was filed by Duke in these proceedings. Ohio Adm. Code 4901-7-01 states:

All applications for an increase in rates filed under section 4909.18 of the Revised Code, all complaints filed under section 4909.34 of the Revised Code, and all petitions filed by a public utility under section 4909.35 of the Revised Code shall conform to the standard filing requirements, set forth in appendix A to this rule. The commission may, upon timely motion, waive specific provisions of the standard filing requirements, but such waivers must be obtained prior to the time that application, complaint, or petition is filed with the commission. In the absence of such a waiver, the

⁷ Stipulation at 8 (April 2, 2013).

⁸ Id.

⁹ OCC Objections to the Staff Report at 11-14 (February 4, 2013).

¹⁰ Entry at (April 4, 2013).

commission may reject any filing which fails to comply with the requirements of this rule.

Ohio Adm. Code 4901-7-01 includes Appendix A which provides details of the specific filing requirements that a utility applicant must comply with. Appendix A, *inter alia*, includes requirements that pertain to the filing of expert testimony. These filing deadlines permit all parties, including the Staff and the OCC, an ample opportunity to prepare their cases including through the conduct of discovery. The following specific provision applies in a rate case, for filing the direct and supplemental testimony that Duke has now filed one week before hearing:

(6) Submission of written testimony (a) **Utilities shall file the prepared direct testimony of utility personnel or other expert witnesses in support of the utility's proposal within fourteen days of the filing of the application for increase in rates.** Prepared direct testimony should be in question and answer format and should, in all other particulars, conform to the requirements of rule 4901-1-29 of the Administrative Code. **Prepared direct testimony shall fully and completely address and support all schedules and significant issues identified by the utility as well as all adjustments made to rate base and operating income items. Any new schedules or adjustments or revisions to previously filed schedules or adjustments proposed by the utility shall be accompanied by prepared direct testimony which fully supports the utility's proposal.**¹¹

The testimony as described in paragraph (A)(6)(a) of Chapter II of this appendix shall be the utility's case in chief. Any utility that files a rate increase shall be prepared to go forward at hearing time on the data and prepared direct testimony filed in support of the application, the two-month update, and any revisions or new schedules to sustain the burden of proof that the rate increase is just and reasonable. Supplemental testimony filed with objections to the staff report and testimony filed with the two-month update and any revisions shall be limited to matters which the applicant could not reasonably expect to be raised in the case, such as:

¹¹ Ohio Adm. Code 4901-1-07 Appendix A Page 12 – 13. (Emphasis added)

- (i) Matters raised for the first time in the staff report.
- (ii) Matters caused by changes in the law and/or in financial conditions.
- (iii) Matters resulting from unforeseen changes in the utility's operations.
- (iv) Matters raised by the staff during its investigation or by intervenors during discovery.¹²

Pursuant to the rules, the Utility's direct testimony in compliance with paragraph (A)(6)(e) was filed on July 20, 2012. Portions of the Duke Testimony filed on July 20, 2012, support Duke's litigation position with regards to the MGP-related issues that are the subject of the evidentiary hearing, specifically William Don Wathen (Direct), Jessica Bednarcik (Direct) and Andrew Middleton (Direct).¹³

Furthermore, the other reasons provided in the Standard Filing Requirements for filing supplemental testimony do not apply in this case to Duke's Testimony that was filed on April 22, 2013. For example, (ii) Matters caused by changes in the law and/or in financial conditions; (iii) Matters resulting from unforeseen changes in the utility's operations; or (iv) Matters raised by the staff during its investigation or by intervenors during discovery are not argued by Duke and are not reasons discussed in the testimony filed on April 22, 2013. Therefore, the testimony filed on April 22, 2013 is not contemplated under the Commission's Rules and should be stricken.

The PUCO's Rules also address the appropriate time line for parties to file expert testimony in a general rate proceeding. Ohio Adm. Code 4901-1-29 states:

(A) Except as otherwise provided in this rule, all expert testimony to be offered in commission proceedings, except testimony to be offered by the commission staff, shall be reduced to writing, filed with the commission, and served upon all parties prior to the time such testimony is to be offered. The commission, the legal director,

¹² Ohio Adm. Code 4901--07-01 Appendix A Page 13. (Emphasis added)

¹³ Duke's Statement as to Relevant Objections and Witnesses (April 22, 2013).

the deputy legal director, or an attorney examiner may establish a schedule in any proceeding for the filing of testimony to be presented by staff.

(1) Unless otherwise ordered by the commission, the legal director, the deputy legal director, or an attorney examiner:

(a) All direct expert testimony to be offered by the applicant, complainant, or petitioner in a general rate proceeding shall be filed and served no later than: ten days prior to the commencement of the hearing or the deadline for filing objections to the staff report of investigation, whichever occurs earlier.

(b) All direct expert testimony to be offered by any other party in a general rate proceeding shall be filed and served no later than the deadline for filing objections to the staff report of investigation.

The PUCO's Rules may be waived for good cause. Accordingly, on January 14, 2013, the OCC, OPAE, the City of Cincinnati, and Kroger filed a Joint Motion for an Extension of Time to File Testimony and Request for Expedited Ruling. Ironically, Duke opposed the Joint Motion on January 16, 2013, stating that Ohio Adm. Code 4901-1-29 (1)(b) required that all direct expert testimony to be offered by any other party in a general rate proceeding shall be filed and served no later than the deadline for filing objections to the staff report of investigation. Duke further argued under a strict constructionist view of the Commission's Rules that "[t]hese are not new rules. Parties have been complying with these rules for many years, and thus, the need to prepare and file testimony and objections at the same time should have been anticipated since the filing of the Company's initial notice in June 2012."¹⁴

On January 18, 2013, the Attorney Examiner granted the intervenors' Joint Motion. The Entry stated:

¹⁴ Duke Memorandum Contra to Joint Motion for Extension of Time at 2-3 (January 16, 2013).

February 25, 2013 – Deadline for the filing of testimony on behalf of Duke and intervenors in the gas rate case, in accordance with Rule 4901-1-29, O.A.C.¹⁵

Accordingly, on February 25, 2013, Duke and other intervenors -- including OCC, filed testimony in support of their objections to the Staff Report. Duke filed the testimony of William Don Wathen (Supplemental), Jessica Bednarcik (Supplemental), Andrew Middleton (Supplemental) and Kevin Margolis (Direct).¹⁶ Portions of the Duke Testimony filed on February 25, 2013, support Duke's litigation position with regards to the MGP-related issues that are the subject of the evidentiary hearing.

The Utility filed its Direct Testimony in support of its case in chief on July 20, 2012, and Supplemental Testimony on February 25, 2013 in support of its objections to the Staff Report. The Commission's Rules and Standard Filing requirements do not provide any other opportunity to file additional direct testimony in a rate proceeding. Therefore Duke's new Testimony filed on April 22, should be stricken.

B. The Testimony Filed On April 22, 2013, Is Improper Rebuttal Testimony and Therefore, It Should Be Stricken.

The filing on April 22, 2013 of William Don Wathen (Third Supplemental) and Gary J. Hebbeler (Second Supplemental) is improper, contrary to Commission procedures, rebuttal testimony. Mr. Wathen's stated purpose of his Third Supplemental Testimony is: "I will recommend a rider for the recovery of such [MGP] costs and the commensurate details associated with such a rider including cost allocation and rate design. Finally I will discuss the recoverability of such deferrals in light of the

¹⁵ Entry at 6 (January 18, 2013).

¹⁶ Duke's Statement as to Relevant Objections and Witnesses (April 22, 2013).

Commission's prior orders."¹⁷ The stated purpose of Mr. Hebbeler's Second Supplemental Testimony is as follows:

. . . will provide and discuss information to assist the Commission in understanding the nature of the MGP property that is undergoing environmental remediation and how it is presently used for ongoing utility services. * * * The [Utility] does not agree that the current use of these sites is relevant for purposes of this proceeding because (1) environmental remediation at these sites is a current cost of business due to the [Utility's] ownership of these properties and liability for historic operations, and (2) these MGP plants were used to serve gas customers in the past. Nevertheless, this testimony is offered to provide an accurate record of how these sites are presently used in the provision of either gas or electric service to existing [Duke] customers.¹⁸

Duke's filing of Mr. Wathen's and Mr. Hebbeler's April 22, 2013 Testimony either repeats testimony filed on February 25, 2013 or includes testimony that could have or should have been filed on February 25, 2013 in support of Duke's objection to the Staff Report, and in either case should not be entered into the record in these proceedings and therefore should be stricken.

The Direct Testimony of Shawn S. Fiore is an even more problematic piece of testimony. The stated purpose of Mr. Fiore's Direct Testimony is as follows:

The purpose of my testimony is to describe Ohio's VAP, [Duke's] compliance with VAP requirements to date and the prudence of the plans developed and actions taken as related to Ohio requirements and practical considerations.

However, Mr. Fiore's "Direct Testimony" is merely a pretext to present as Direct Testimony what is intended to rebut OCC witness Dr. Campbell's testimony – without specifically mentioning Dr. Campbell by name. Specifically, Mr. Fiore's testimony, in

¹⁷ Third Supplemental Testimony of William Don Wathen at 1-2 (April 22, 2013).

¹⁸ Second Supplemental Testimony of Gary J. Hebbeler at 1-2 (April 22, 2013).

addition to attempting to address a gap in Ms. Bednarcik's testimony,¹⁹ specifically responds virtually point-by-point to Dr. Campbell's testimony regarding the scope and necessity of Duke's remediation activities and whether they exceeded the remedy required by the VAP rules.

More specifically, Mr. Fiore responds to Dr. Campbell's testimony in the following respects:

1. General Testimony on VAP standards and their applicability to Duke's Remediation, including soil remediation, groundwater remediation, surface water standards, potable use standards (UPUS), and vapor intrusion: Dr. Campbell (pp.7-20 and 24-25); Mr. Fiore (pp. 5-14).
2. Urban Setting Designation: Campbell (pp. 20-21); Fiore (pp. 14-17).
3. Free Product: Dr. Campbell (pp. 22-24); Mr. Fiore (pp. 18-19).
4. Prudent Evaluation and Remediation of the East End MGP Site: Dr. Campbell (pp. 27-35); Mr. Fiore (pp. 20-24).
5. Prudent Evaluation and Remediation of the West End Site: Campbell (pp. 35-39); Mr. Fiore (pp. 20-24).

Clearly, Mr. Fiore's testimony, while cloaked as direct testimony, is rebuttal testimony to Dr. Campbell. Thus, Mr. Fiore's testimony should be presented as rebuttal, and admissibility should be considered under the standards for rebuttal. Moreover, if it is not merely a pretext to present rebuttal and includes elements of direct testimony, it could have and should have been filed as part of Duke's case in chief with all other such testimony on July 20, 2012. Mr. Fiore echoes arguments made by Jessica Bednarcik in her direct and supplemental testimony, Mr. Margolis in his Direct Testimony and Mr. Middleton in his Direct and Supplemental testimony. Mr. Fiore's testimony is, in many regards, duplicative of those witnesses' testimony, and constitutes an attempt by Duke to fill in evidentiary gaps in its case in chief. It would be unfair for the PUCO to permit

¹⁹ This gap was revealed during Ms. Bednarcik's deposition, where she stated that she was not qualified to address the VAP rules and relied entirely on the Certified Professional in presenting her testimony on the VAP rules. See Jessica Bednarcik Deposition Transcript at 104-105 (April 10, 2013).

Duke to present such late-filed testimony at this late stage of the proceedings to try to make out a prima facie case in support of its claims.

Therefore, the Duke testimony filed on April 22, 2013 is not contemplated under the Commission's Rules and should be stricken.

C. The Attorney Examiner's Entry Permits Additional Testimony, But Not Duke's Out of Time, Late Filed Testimony.

On April 4, 2013, the Attorney Examiner issued an Entry to Modify the Procedural Schedule for these proceedings in light of the Stipulation that was filed on April 2, 2013. The Stipulation settled all issues in these cases except for the issues related to Duke's MGP investigation and remediation activities.²⁰ Those issues were reserved for litigation under the Stipulation and interested parties were provided the opportunity to litigate their positions.²¹ The Entry established April 29, 2013 as the date for the commencement of the evidentiary hearing. The Entry also asked the parties to focus the issues that were not resolved by the Stipulation. The Entry stated:

(a) April 22, 2013 – Deadline for the following:

(i) Each party that filed an objection to the Staff Report shall file a statement identifying which objections pertain to the issues that are not part of the stipulation and will be litigated at the evidentiary hearing.

(ii) Each party that previously prefiled testimony shall file a statement as to whether their witnesses will appear at the evidentiary hearing and, if so, the party shall identify which portions of the witnesses' testimony address the issues that will be litigated at the hearing.

(iii) Staff and all parties shall file any additional expert testimony.²²

²⁰ Stipulation at Para. 6 (April 2, 2013).

²¹ Id.

²² Entry at 2 (April 4, 2013). (Emphasis added).

The Attorney Examiner went to the effort of having the parties file statements to identify which objections to the Staff Report that were filed on February 4, 2013 were not resolved by the Stipulation. The Attorney Examiner also instructed parties to identify, in a Statement filed with the Commission, which portions of previously prefiled testimony address the issues being litigated and which witnesses will appear. These are not unreasonable requests for an Attorney Examiner preparing for an upcoming hearing.

The Entry establishes the deadline for Staff to file testimony, and in proceedings before the Commission it is not unusual for Staff's testimony to be the last testimony filed. However, the allowance for "any additional expert testimony" one week before the scheduled evidentiary hearing was clearly intended to allow testimony regarding the Stipulation, which is customary in PUCO cases. That purpose of this Entry is consistent with the PUCO's Rules and PUCO practice for stipulations. And that purpose would not have completely upset the balance of due process typically guarded by the Commission's rules and procedural orders for a fair process to allow parties to properly prepare for litigation in cases before it.

Instead, Duke apparently has seized on these few words in the Entry, and filed three pieces of new testimony, most of which constitutes rebuttal testimony. To the extent it is not rebuttal testimony, such testimony could have or should have been filed as Direct Testimony on July 20, 2012 (Shawn Fiore, Direct Testimony) or as Supplemental Testimony in support of Duke's Objections to the Staff Report filed on February 25, 2013

(William Don Wathen, Third Supplemental Testimony; and Gary J. Hebbeler Second Supplemental Testimony).

It is unfair and unreasonable for the Utility to attempt to bolster its direct case only one week before the start of the evidentiary hearing with significant testimony that ambushes all other interested parties. The lack of time to permit discovery, including depositions, and the inability to prepare OCC's direct case (which was filed months ago) with knowledge of Duke's testimony places the OCC, OPAE, and other parties at a significant disadvantage and in an unfair process not otherwise allowed by the PUCO's rules for promoting fairness. Because Duke's Testimony filed on April 22, 2013 does not support the Stipulation, or is not testimony advocating a change in a prior position caused by the adoption of the Stipulation, the Commission should grant OCC's and OPAE's Motion to Strike.

D. Duke's Testimony Filed on April 22, 2013 is Highly Prejudicial to OCC, OPAE and Other Interested Parties

Duke's Testimony was filed on April 22, 2013, without any notice prior to its filing, and without an adequate opportunity for OCC and other interested parties to conduct discovery²³ or depose the witnesses.²⁴ Absent the opportunity to conduct discovery pertaining to the testimony filed on April 22, 2013, OCC, OPAE, and other interested parties cannot adequately investigate the claims of the witnesses; OCC, OPAE and other interested parties cannot ascertain the credentials of the expert witnesses; and

²³ Ohio Adm. Code 4901-1-16 Discovery Cut-off: 15 days after the issuance of the Staff Report of Investigation – in these cases January 19, 2013.

²⁴ Entry at 4 (March 8, 2013) granting Duke's Motion to Compel and established a discovery deadline of March 11, 2013 for issuing Notices of Deposition.

OCC, OPAE and other interested parties cannot adequately prepare for cross-examination of these witnesses.

Ohio law provides that parties in a case before the PUCO should be granted ample discovery rights. R.C 4903.082 states:

All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.

The late filing of three pieces of significant testimony by Duke, that could have or should have been filed earlier in these proceedings as previously argued, or which in fact constitutes rebuttal testimony, is highly prejudicial to OCC, OPAE and other interested parties because ample discovery rights do not exist in this limited time before the evidentiary hearing.²⁵

III. CONCLUSION

The new Testimony filed by Duke on April 22, 2013 is inconsistent with the PUCO's Rules, including the PUCO's Standard Filing Requirements, addressing the filing of expert testimony. And much of the new testimony constitutes the improper submission of rebuttal testimony during the direct phase of these proceedings. In

²⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, 2006-Ohio-5789 at ¶ 83. ("The text of Ohio Adm. Code 4901-1-16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 635 N.E.2d 331 ("The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding."))

addition, the Commission's April 4, 2013 Entry was not intended to open the door for the filing of such testimony, and, having been issued in response to a stipulation, was only intended to allow additional testimony regarding the Stipulation. Such additional testimony is common practice in PUCO cases after stipulations are filed but only concerns testimony on the stipulation. Finally, Duke's new Testimony is highly prejudicial and denies OCC, OPAE and other interested parties ample discovery rights and denies a fair process. For all these reasons, the PUCO should grant OCC's and OPAE's Motion to Strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Joint Motion to Strike* was served upon the persons listed below, electronically, this 24th day of April 2013.

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Summary: Motion Joint Motion to Strike Duke's New Expert Testimony by the Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.