

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates.	)	Case No. 12-1685-GA-AIR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 12-1686-GA-ATA
	)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	)	Case No. 12-1687-GA-ALT
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 12-1688-GA-AAM
	)	

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

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On July 9, 2012, Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) filed its Application in the above-captioned proceedings requesting recovery, among other things, of approximately \$65.3 million attributable to remediation of former manufactured gas plant (MGP) sites.

On January 4, 2013, the Staff of the Public Utilities Commission of Ohio (Staff) filed its Report of Investigation (Staff Report) in these matters, which noted *inter alia* the following:

The Staff's determination of the reasonableness of the MGP-related expenses was limited to verification and eligibility of the expenses for recovery from natural gas distribution rates. The Staff did not investigate or make any finding or

recommendations regarding necessity or scope of the remediation work that Duke performed.<sup>1</sup>

On February 4, 2013, OCC filed objections to the Staff Report related to recovery of MGP site remediation costs. OCC's objections included the following:

**OBJECTION 26:** OCC objects to the limited scope of the Staff's investigation of the MGP sites. The Staff's investigation was limited to verification and eligibility of the expenses for recovery from natural gas distribution customers. The Staff did not investigate or make any finding or recommendations regarding necessity, urgency or scope of the remediation work that Duke performed. . . . The Staff should have expanded the nature of its investigation to include the urgency, scope and necessity of the remediation activities for both the West End and East End MGP Sites. OCC objects that the Staff did not find that Duke's remediation activities were excessive (and too costly for customers to pay).

Subsequent to filing its objections, on February 25, 2013, OCC filed the Direct Testimony of James Campbell (OCC Witness Campbell), which addresses issues such as Ohio Environmental Protection Agency's Voluntary Action Program (VAP) Rules<sup>2</sup> and an evaluation of the propriety of the Company's remedial actions under his interpretation of the VAP Rules. OCC Witness Campbell's testimony recommends that the Commission deny recovery the Company's recovery of these amounts.

On April 2, 2013, Duke Energy Ohio, Staff, OCC, and other parties entered into a Stipulation and Recommendation (Stipulation) in the above-captioned matters which, if approved by the Public Utilities Commission of Ohio (Commission), will resolve all issues in the cases except for MGP-related cost recovery.

On April 4, 2013, the Commission issued a procedural Entry in these proceedings that established the date for the evidentiary hearing for the litigation of the recovery of the Company's MGP remediation expenses and established other procedural dates. The Entry stated, in pertinent part:

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<sup>1</sup> Staff Report at 40.

<sup>2</sup> Ohio Revised Code (O.R.C.) Chapter 3746 and Ohio Administrative Code (O.A.C.) Rule 3745-300.

*(5) Upon consideration of the joint movants' request, the attorney examiner finds that the motion for an extension of the hearing date should be granted. Accordingly, the attorney examiner finds that the parties should adhere to the following procedural schedule:*

*(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.***

(Emphasis added.)

On April 22, 2013, in accordance with the Commission's April 4 Entry, Duke Energy Ohio filed additional expert testimony of three witnesses: Shawn S. Fiore, Gary J. Hebbeler, and William Don Wathen, Jr. Notably, other parties also filed additional testimony on this date. For example, Staff and Kroger both filed additional testimony on MGP issues.

On April 24, 2013, the OCC and OPAE filed a "Joint Motion to Strike Duke's New Expert Testimony." In their Motion, OCC and OPAE argue that: (1) Duke's filing of its April 22, 2013 testimony does not comply with Commission rules and procedures; (2) the April 4 Entry did not allow for the filing of additional testimony on MGP issues; (3) the other parties are prejudiced by Duke's filing of testimony on April 22; and (4) Duke's April 22 testimony is improper rebuttal testimony. The OCC and OPAE are wrong on all counts, and their motion to strike should be denied, for the following reasons.

**A. The Commission's April 4 Entry Clearly Invited Additional Testimony on MGP Issues; and the Commission's Rules and Procedures Allow for Such.**

OCC and OPAE contend that the April 4 Entry did not allow for additional testimony to be filed on MGP issues, and that the filing of additional testimony on April 22 violates Commission rules and procedures. In support of their first argument – that the April 4 Entry

does not mean what it actually says – they argue that “the allowance for any additional expert testimony one week before the scheduled evidentiary hearing was clearly intended to allow testimony regarding the Stipulation. . . .” A plain reading of the April 4 Entry indicates otherwise. The Entry simply and clearly establishes an April 22 deadline for, among other things: “Staff and all parties shall file any additional expert testimony.” Moreover, to the extent the Entry as a whole provides context, that context is the litigation of the MGP issues, not support of the Stipulation. For example, the other two deadlines established in the April 4 Entry relate to identifying objections, witnesses and testimony that will be the subject of litigation at the April 29 Evidentiary Hearing – *i.e.*, the MGP issues.

The April 4 Entry clearly invites additional testimony on MGP issues, and the Commission is well within its rights to invite such additional testimony. While the Commission’s Rules generally prescribe the timing and type of testimony to be filed, the Commission retains the authority and ability to change those rules as it sees fit. For example, Rule 4901-1-38(B) provides that “The Commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case.” Additionally, with regard to expert testimony, Rule 4901-1-29(A) simply provides that such testimony must be “reduced to writing and filed and served prior to the time it is offered.” And Rule 4901-1-29(A)(1)’s generic deadlines for filing testimony in certain types of cases contains an overall exception: “unless otherwise ordered by the commission, the legal director, the deputy legal director, or any attorney examiner.”<sup>3</sup>

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<sup>3</sup> The Commission’s Rules also provide that additional testimony may be filed with respect to “matters raised for the first time in the staff report.” Rule 4901-1-38(A)(6)(c)(i). Although the Company’s initial case-in-chief testimony discussed MGP remediation expenses, the Staff Report’s novel position – that a substantial portion of the

**B. Duke Energy Ohio's April 22, 2013, Testimony Is Not Improper Rebuttal Testimony.**

OCC and OPAE also assert that Duke Energy Ohio's April 22 testimony should be stricken because it is "improper rebuttal testimony." However, a review of the testimony indicates that all three of the testimonies offer additional information on pertinent MGP issues, such as: the current use of the properties that are being remediated; background information on the Ohio VAP program and the role of Certified Professionals; and the financial and ratemaking implications of denying recovery of prudent MGP remediation expenses. As such, the April 22 testimonies do not constitute improper rebuttal.

**C. Other Parties Are Not Prejudiced by Duke Energy Ohio's April 22 Filing.**

OCC and OPAE complain that they will be prejudiced due to a lack of time to conduct discovery with respect to the April 22, filed testimony. However, on April 24, OCC noticed the depositions of two of the April 22, Duke Energy Ohio witnesses (Messrs. Fiore and Hebbeler), and Duke Energy Ohio promptly made them available for deposition. Both of those depositions, along with a production of documents, took place on April 25. Accordingly, the complaints of prejudice are without merit.

**D. The Commission Will Be Well Served By Allowing the Additional Testimony on MGP Issues.**

The issues to be litigated in this case, centering around the recovery through rates of MGP remediation expenses, are important issues that have not been addressed under Ohio regulatory law to date. The Commission's resolution of these issues will have important financial ramifications for the Company, and perhaps for other Ohio utilities, as well. These

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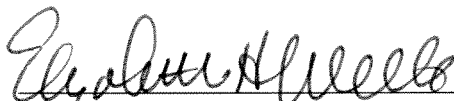
Company's MGP remediation expenses should be denied because they allegedly pertain to property which is not "used and useful" – arguably presents a matter raised for the first time in the staff report.

issues present important public policy and fundamental ratemaking issues. The Commission was wise to invite additional testimony on these important issues, and the Commission will be well served by allowing this additional testimony to become part of the record in these proceedings.

In conclusion, and as supported by the arguments set forth above, Duke Energy Ohio respectfully requests that the Commission to deny OCC and OPAE's "Joint Motion to Strike Duke's New Expert Testimony."

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

  
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Summary: Memorandum Duke Energy Ohio's Memorandum Contra Joint Motion to Strike Expert Testimony electronically filed by Ms. Elizabeth H Watts on behalf of Duke Energy Ohio, Inc.