

**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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**MOTION OF DUKE ENERGY OHIO, INC.,  
TO STRIKE THE TESTIMONY OF JAMES R. CAMPBELL**

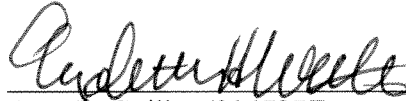
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Now comes Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company), in accordance with Rule 4901-1-12, Ohio Administrative Code (O.A.C.) and hereby submits to the Public Utilities Commission of Ohio (Commission) a Motion to Strike the Testimony of Office of the Ohio Consumers' Counsel's (OCC) witness James R. Campbell (OCC Witness Campbell), which was filed in the above-captioned cases. The Company further requests an expedited ruling from the Commission on this issue. The testimony introduced by OCC Witness Campbell impermissibly broadens the scope of matters to be considered by the Commission when assessing rates in these proceedings. The matters set forth in OCC Witness Campbell's testimony are outside the scope of the Commission's jurisdiction. For this reason, and the reasons set forth in the accompanying memorandum in support, Duke Energy Ohio requests that the Commission grant its Motion to Strike the Testimony of OCC Witness Campbell. The

Company further respectfully requests that the Commission grant this Motion in an expeditious manner.

Respectfully submitted,

DUKE ENERGY OHIO, INC.



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Amy B. Spiller (0047277)  
Deputy General Counsel  
Elizabeth Watts (0031092)  
Associate General Counsel  
Duke Energy Business Services, LLC  
139 East Fourth Street  
1303-Main  
Cincinnati, Ohio 45202  
(Telephone) 513-287-4359  
(Facsimile) 513-287-4385

Kay Pashos  
Ice Miller LLP  
One American Square  
Suite 2900  
Indianapolis, IN 46282

Kevin N. McMurray (0043530)  
Frost Brown Todd LLC  
3300 Great American Tower  
301 East Fourth Street  
Cincinnati, Ohio 45202  
(Telephone) 513-651-6160  
(Facsimile) 513-651-6981

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**MEMORANDUM IN SUPPORT OF DUKE ENERGY OHIO, INC.'S  
MOTION TO STRIKE THE TESTIMONY OF JAMES R. CAMPBELL**

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**A. Background**

On July 9, 2012, Duke Energy Ohio filed its Application in the above-captioned proceedings. In its Application, the Company requests 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 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's testimony is dominated by the discussion of Ohio EPA's Voluntary Action Program (VAP) Rules<sup>2</sup>, Staff's limitation of its testimony to verification and eligibility of the expenses for recovery from natural gas distribution rates, and an evaluation of the propriety of the Company's remedial actions under his interpretation of the VAP Rules. He contends that reviewing the scope and necessity of the remediation work that Duke Energy Ohio completed at its former MGP sites is "an important step in ascertaining the prudence of the dollars spent by Duke[.]"<sup>3</sup> OCC Witness Campbell further testifies as follows:

Had the Staff investigated the scope and necessity of the remediation measures implemented by Duke, in my opinion, the recoverable costs would be significantly less. On advice of counsel and my own reading of the provision, I understand that Ohio law (R.C. 4909.154) provides that rates be just and reasonable and that any costs that are determined to be imprudent are not recoverable from customers.<sup>4</sup>

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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.

<sup>3</sup> Direct Testimony of James R. Campbell at 6.

<sup>4</sup> *Id.* at 6-7.

OCC Witness Campbell's testimony asserts that the Company's remediation approach was excessive under Ohio EPA's VAP Rules and, as such, the Commission should deem the costs attributable to any efforts beyond his opinion of the minimum remediation approach necessary under the VAP Rules as imprudent and deny recovery the Company's recovery of these amounts.

**B. Argument**

As noted by the Company in its simultaneously-filed Motion to Clarify the Scope of Proceedings, OCC Witness Campbell's testimony assumes that the Commission, through Staff, has the authority to interpret the Ohio VAP statute and Rules, and to evaluate the Company's environmental remediation decisions under the Ohio VAP Rules. As mentioned *supra*, the Ohio VAP Rules were established and are administered by Ohio EPA. Moreover, under Ohio Revised Code § 3746.11 and the VAP Rules, only persons who are "certified professionals" pursuant to Ohio Administrative Code § 3745-300-05 may issue "no further action letters" determining that property complies or will comply with applicable standards under the VAP in accordance with Ohio Administrative Code § 3745-300-13. Ohio EPA is the state agency statutorily responsible for promulgating the VAP Rules and in which authority to evaluate remedial efforts under the VAP Rules resides. Ohio EPA is also statutorily charged to evaluate and audit no further action letters issued by certified professionals concerning compliance with the applicable standards under the Ohio VAP. According to Ohio EPA's website, which contains a list of all "certified professionals" under the VAP, OCC Witness Campbell is not a certified professional under the VAP and, therefore, OCC Witness Campbell is not qualified to make determinations whether applicable standards have been met under the VAP. Similarly, the Commission is not vested

with either the power to interpret the VAP statute and Rules, or the power to evaluate the propriety of utilities' environmental remediation decisions under the VAP Rules.

It is well settled that the Commission "possesses no powers except such as are conferred by statute."<sup>5</sup> The statutory scheme and regulations setting forth the Commission's ratemaking responsibilities do not confer upon the Commission the ability to pass upon actions taken by a utility under another agency's purview. Thus, it is not for the Commission or its Staff to opine on the proper interpretation of the Ohio VAP statute or Rules, or whether Duke Energy Ohio's remediation activities exceeded the approach demanded by the Ohio VAP Rules. Further, the Ohio Revised Code specifically designates the Ohio EPA as the agency tasked with environmental enforcement and administration throughout the state<sup>6</sup> and determining if the Ohio VAP Rules have been satisfied.<sup>7</sup> Given that there is no mention of the Commission sharing these responsibilities, it would be improper for the Commission to interpret the VAP Rules or to determine a utility's compliance with the provisions and programs supervised by the Ohio EPA.

Although it did not explicitly state so in the Staff Report, Staff's "failure" to evaluate the necessity or scope of the Company's environmental remediation projects appears to have been a calculated (and reasonable) decision based upon the Commission's lack of jurisdiction over such matters. In light of this circumstance and the delegation of the administration of the VAP Rules to Ohio EPA via Ohio statutes and regulations, the filing of OCC Witness Campbell's testimony regarding the propriety, scope, and necessity of the Company's environmental remediation

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<sup>5</sup> See generally *Cincinnati v. Public Util. Comm.*, 96 Ohio St. 270, 117 N.E. 381 (1917); *Sylvania Home Tel. Co. v. Public Util. Comm.*, 97 Ohio St. 202, 119 N.E. 205 (1918); *Interurban Ry. & Terminal Co. v. Public Util. Comm.*, 98 Ohio St. 287, 120 N.E. 831 (1918); *Mahoning & Shenango Ry. & Light Co. v. Public Util. Comm.*, 98 Ohio St. 303, 120 N.E. 835 (1918); *Toledo, Bowling Green & Southern Trac. Co. v. Public Util. Comm.*, 98 Ohio St. 305, 120 N.E. 835 (1918); *Zanesville Term. R.R. v. Public Util. Comm.*, 100 Ohio St. 225, 126 N.E. 56 (1919); *Lima v. Public Util. Comm.*, 100 Ohio St. 416, 126 N.E. 318 (1919); *Ashtabula Gas Co. v. Public Util. Comm.*, 102 Ohio St. 678, 133 N.E. 915 (1920); *New Bremen v. Public Util. Comm.*, 103 Ohio St. 23, 132 N.E. 162 (1921); *Cleveland Provision Co. v. Public Util. Comm.*, 104 Ohio St. 253, 135 N.E. 612 (1922); *Akron, Canton & Youngstown R.R. v. Public Util. Comm.*, 106 Ohio St. 655, 140 N.E. 940 (1922); *Commissioners v. Public Util. Comm.*, 107 Ohio St. 442, 140 N.E. 683 (1923).

<sup>6</sup> See, e.g., Sections 3745.01 and 3745.011, Ohio Revised Code.

<sup>7</sup> See Ohio Revised Code Chapter 3746.

decisions is but an inappropriate attempt to circumvent the fact that the Commission does not have jurisdiction over these matters and to convince the Commission otherwise.

Because the Commission has no subject matter jurisdiction over the matters specifically discussed in OCC Witness Campbell's testimony, his testimony is irrelevant to the matters under the Commission's consideration in these cases, and should therefore be stricken. Even if it was relevant, which it is not, OCC Witness Campbell is not a certified professional under the Ohio VAP and is not qualified to express an opinion concerning compliance with applicable standards under the VAP. Given that the testimony provides no material upon which the Commission can pass jurisdictionally, it strictly serves to confuse other parties and the Commission and obfuscate the issues at the heart of the MGP site remediation portion of the cases. The issues associated with recovery of costs stemming from the environmental remediation of the former MGP sites are complicated enough without the additional distraction posed by OCC Witness Campbell's testimony. Therefore, the Commission should strike the testimony and, as contended in the Company's Motion to Clarify the Scope of Proceedings, eliminate the arguments criticizing the propriety of the scope and necessity of the Company's environmental remediation decisions under the Ohio VAP Rules.

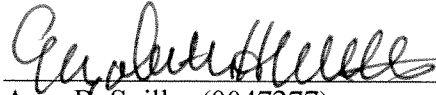
### **III. Conclusion**

Based upon the Commission's lack of jurisdiction over environmental remediation efforts under the Ohio VAP Rules, the complete dedication of OCC Witness Campbell's testimony to discussing the propriety of the Company's remediation decisions in comparison to standards set forth in VAP Rules, and the resulting irrelevance of the witness's testimony to resolution of the issues under consideration in these cases, Duke Energy Ohio requests that the Commission strike the testimony of OCC Witness Campbell. Additionally, given that the

hearing on these matters is quickly approaching, the Company respectfully requests that the Commission grant this Motion in an expedited manner.

Respectfully submitted,

DUKE ENERGY OHIO, INC.



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Amy B. Spiller (0047277)  
Deputy General Counsel  
Elizabeth Watts (0031092)  
Associate General Counsel  
Duke Energy Business Services, LLC  
139 East Fourth Street  
1303-Main  
Cincinnati, Ohio 45202  
(Telephone) 513-287-4359  
(Facsimile) 513-287-4385

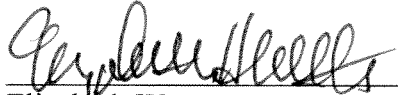
Kay Pashos  
Ice Miller LLP  
One American Square  
Suite 2900  
Indianapolis, IN 46282

Kevin N. McMurray (0043530)  
Frost Brown Todd LLC  
3300 Great American Tower  
301 East Fourth Street  
Cincinnati, Ohio 45202  
(Telephone) 513-651-6160  
(Facsimile) 513-651-6981



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 14<sup>th</sup> day of April, 2013, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.

  
\_\_\_\_\_  
Elizabeth Watts

Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
tobrien@bricker.com

**Counsel for the City of Cincinnati**

A. Brian McIntosh  
McIntosh & McIntosh  
1136 Saint Gregory Street  
Suite 100  
Cincinnati, Ohio 45202  
brian@mcintoshlaw.com

**Counsel for Stand Energy Corporation**

Joseph P. Serio, Counsel of Record  
Larry S. Sauer  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
serio@occ.state.oh.us  
sauer@occ.state.oh.us

**Attorneys for the Ohio Consumers'  
Counsel**

Vincent Parisi  
Matthew White  
Interstate Gas Supply, Inc.  
6100 Emerald Parkway  
Dublin, Ohio 43016  
vparisi@igsenergy.com  
mswhite@igsenergy.com

**Attorneys for Interstate Gas Supply, Inc.**

Colleen L. Mooney  
Ohio Partners for Affordable Energy  
231 West Lima St.  
Findlay, Ohio 45839-1793  
cmooney2@columbus.rr.com

**Counsel for OPAE**

Douglas E. Hart  
441 Vine Street, Suite 4192  
Cincinnati, Ohio 45202  
dhart@douglasshart.com

**Attorney for The Greater  
Cincinnati Health Council and the  
Cincinnati Bell Telephone Company**

Thomas McNamee  
Devin Parram  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad St., 6<sup>th</sup> Floor  
Columbus, Ohio 43215  
Thomas.mcnamee@puc.state.oh.us  
Devin.parram@puc.state.oh.us

**Counsel for Staff of the Commission**

Edmund J. Berger  
6035 Red Winesap Way  
Dublin, Ohio 43016  
berger@occ.state.oh.us

**Attorney for the Ohio Consumers'  
Counsel**

Joseph M. Clark  
21 East State Street, Suite 1900  
Columbus, Ohio 43215  
joseph.clark@directenergy.com

**Attorney for Direct Energy Services,  
LLC and Direct Energy Business, LLC**

Andrew J. Sonderman  
Kegler, Brown, Hill & Ritter LPA  
Capital Square, Suite 1800  
65 East State Street  
Columbus, Ohio 43215

**Attorney for People Working  
Cooperatively, Inc.**

Kimberly W. Bojko  
Mallory M. Mohler  
Carpenter Lipps & Leland LLP  
280 North High Street #1300  
Columbus, Ohio 43215  
Bojko@carpenterlipps.com  
Mohler@carpenterlipps.com

**Attorneys for The Kroger Co.**

J. Thomas Siwo  
Matthew W. Warnock  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
tsiwo@bricker.com  
mwarnock@bricker.com

**Attorneys for Ohio Manufacturers'  
Association**

M. Howard Petricoff, Trial Counsel  
Stephen M. Howard  
52 East Gay Street  
P. O. Box 1008  
Columbus, Ohio 43216-1008  
mhpetricoff@vorys.com  
smhoward@vorys.com

**Attorneys for Interstate Gas Supply, Inc.**