

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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) Case No. 12-1687-GA-ALT
Service.)

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

**MOTION TO STRIKE
CERTAIN OF DUKE OBJECTIONS TO THE PUCO STAFF REPORT
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility consumers of Duke Energy Ohio, Inc. ("Duke" or "Utility"), moves¹ to strike two of Duke's objections to the Report by the Staff ("Staff Report") regarding Duke's application ("Application")² in the above-captioned cases. Specifically, OCC moves to strike the following two objections filed by Duke on February 4, 2013:

¹ Ohio Adm. Code 4901-1-12 and Ohio Adm. Code 4901-1-28(B).

² *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., Application (July 18, 2007).

(6) Manufactured Gas Plant Deferral;³ and

(15) Facilities Relocation Tariff (Rider FRT).⁴

The grounds for OCC's Motion to Strike are more fully set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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³ Duke Objections to the Staff Report at 4-7 (February 4, 2013).

⁴ Id. at 11.

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**MEMORANDUM IN SUPPORT
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Staff Report in the above-captioned cases was issued on January 4, 2013. Pursuant to R.C. 4909.19, Objections to the Staff Reports were submitted by parties on or before February 4, 2013. Duke, as well as other parties, submitted Objections. An Entry dated January 18, 2013 provided that Motions to Strike Objections to the Staff Report should be filed by February 19, 2013.⁵ The OCC moves to strike two of Duke's Objections.

⁵ Entry at 5, ¶10 (January 18, 2013).

II. ARGUMENT

A. Duke's Objections Should Be Stricken Because They Lack Specificity, In Violation of Ohio Adm. Code 4901-1-28(B).

Both of Duke's Objections identified above in OCC's Motion to Strike address certain of Staff's recommendations in the Staff Report, but lack the specificity required by the Commission's rules; and therefore, should be stricken.

Ohio Adm. Code 4901-1-28 (B) states:

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. (Emphasis added).

This Commission has interpreted the rule stating:

Objections to the staff report should be filed in accordance with *Section 4909.19, Revised Code*. The parties are reminded that Rule 4901-1-28(B), *Ohio Administrative Code* (O.A.C.), requires that all objections must be specific. Any objection which is not specific enough to convey what is actually being placed at issue will be struck pursuant to the above rule. Some hypothetical examples of objections which would be deemed not specific enough to satisfy the requirements of Rule 4901-1-28(B), O.A.C., are: **"the staff incorrectly calculated test year labor expense"; "the staff unreasonably determined rate case expense"; "the staff unreasonably eliminated certain advertising costs"; and "the comments of the Consumers' Services portion of the report are unreasonable, inaccurate, and misleading"**. Those hypothetical examples could be improved so that they would be deemed specific enough to satisfy the O.A.C. requirements: "the staff incorrectly calculated test year labor expense because it failed to use estimated end-of-test-period employee levels and wage rates in its calculation"; "the staff unreasonably determined

rate case expense because it failed to include the cost of publishing the required legal notice of the local hearing and because it amortized the expense over a three-year period instead of a one-year period"; "the staff unreasonably eliminated \$15,375 of advertising costs which it deemed promotional because such advertising should have been classified as informational"; and "the statement in the Consumers' Services portion of the report that claims the company fails to respond to out-of-service reports in a timely manner is inaccurate."⁶

The hypothetical objections provided by the Attorney Examiner in the Gem Beach Case offer good illustrations of the lack of specificity that can result in objections being stricken for lack of specificity. A similar lack of specificity can be found in the following two Objections to the Staff Report filed by Duke in these cases:

1. Objection (6): Manufactured Gas Plant Deferral

Duke's Objection (6), and all subparts thereto -- (a) through (i) -- should be stricken for lack of specificity. Under Objection (6), Duke argues:

Duke Energy Ohio objects to Staff's recommendations with respect to the Company's request for recovery of costs for environmental investigation and remediation of its two former Manufactured Gas Plant (MGP) sites, East End and West End, and particularly with the **Staff's application of the used and useful standard. Staff makes its recommendation without regard to considering the strict liability placed upon the [Utility] for investigating and cleaning up sites under federal and Ohio environmental laws. Staff further fails to include in its recommended recovery the value of property that is and/or was used and useful in rendering natural gas distribution service to the [Utility's] customers. Specifically, [Duke] objects to Staff's recommendation to divide the relevant parcels of**

⁶ *In the Matter of the Application of Gem Beach Utility Company for an Increase in its Rates and Charges* ("Gem Beach Case"), Case No. 93-1335-WW-AIR, Opinion and Order at 1 (February 3, 1994). (Emphasis added). ⁶, See also, *In the Matter of the Application of the Cincinnati Gas and Electric Company for an Increase in Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR, Entry at 1 (July 15, 1995).

land into segments based upon an arbitrary division of what Staff considers used and useful.⁷

Duke's Objection to the Staff Report is general in nature and does not meet the specificity requirement of the Commission's rule.

For example, Duke's Objection (6) (MGP Deferral) included the following objection to "Staff's application of the used and useful standard." The Staff Report recommendations were specifically tied to facilities that the Staff determined to be used and useful for natural gas distribution service,⁸ but Duke made no specific objection to Staff's recommendations pertaining to the facilities deemed used and useful. Rather, Duke's objection is conclusory and lacks the required specificity that enables interested parties to understand the specific concerns at issue.

Next, Duke states an objection to the Staff Report because "Staff makes its recommendation without regard to considering the strict liability placed upon the [Utility] for investigating and cleaning up sites under federal and Ohio environmental laws." However, Duke fails to explain in its objection how, under R.C. 4909.15, the Commission's rate making formula, strict liability for an environmental liability applies and why the Staff should have considered such costs to be appropriate for collection from customers.

Under R.C. 4909.15, rates must be based on "*costs of rendering utility service*"⁹ and the costs that the Company seeks to collect, from customers, in these cases cannot be tied to rendering any service. The costs the Company is seeking to collect from

⁷ Duke Objections to the Staff Report at 4 (February 4, 2013) (emphasis added).

⁸ Staff Report at 45 (January 4, 2013).

⁹ *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 67 Ohio St.2d 372, 424 N.E.2d 300 (1981).

customers are related the environmental investigation and remediation of former manufactured gas plants. Under 4909.15 (A)(1) these costs must be incurred from property that is currently used and useful, as of the date certain, in rendering public utility service. These costs are neither. The requirements of R.C. 4909.15 (A)(1) have not been satisfied.

Furthermore, if indeed strict liability is imposed on Duke for the MGP-related remediation and investigation costs, collection of these costs from public utility customers does not automatically follow because the strict liability under the applicable environmental regulation arises out of Duke's status as a landowner and not as a public utility.¹⁰ If Duke ceased operating as a public utility today, Duke would still be liable as landowner for the same MGP-related investigation and remediation costs (if Duke is liable at all). The above criticism of Duke's objection points out the fact that it lacks specificity and should be stricken.

In addition, Duke objects to the Staff Report because "Staff further fails to include in its recommended recovery the value of property that is and/or **was used and useful** in rendering natural gas distribution service to the [Utility's] customers."¹¹ To the contrary, Staff's recommendation specifically addressed cost recovery of MGP-related remediation costs associated with natural gas property that is currently used and useful at the MGP sites.¹² What is unclear from Duke's Objection to the Staff Report is what the Staff was supposed to recommend with regard to property that is no longer used and useful or in other words, property which is not providing value and service to Duke's natural gas

¹⁰ 42 U.S.C. 9607 (a).*see also*, R.C. 3746.23 (G).

¹¹ Emphasis added.

¹² Staff Report at 45 (January 4, 2013).

customers. Such property would clearly fall outside of the Commission's rate-making formula, and thus Duke's objection lacks the required specificity, and should be stricken.

Finally, Duke objects to "Staff's recommendation to divide the relevant parcels of land into segments based upon an arbitrary division of what Staff considers used and useful."¹³ The Utility fails to explain in what way the Staff's recommendation was arbitrary. The Staff Report explains the basis for its division of the parcels of property. The Staff explained that it divided the parcels of property to recommend recovery from customers of the sections that were used and useful while not recommending recovery from customers of those parcels of property that were not used and useful. Duke's Objection to the Staff Report does not explain how or why the Staff Report was "arbitrary." Instead, the Objection merely used the general claim of action being arbitrary without any supporting detail. Therefore, the Objection to the Staff Report lacks the required specificity necessary to convey the concern with the issues Duke is objecting to. It should be stricken.

Included within Duke's Objection (6) are numerous subparts that include variations of the above arguments, but generally are also stated with insufficient specificity to meet the requirements of Ohio Adm. Code 4901-1-28 (B).

¹³ Duke Objections to the Staff Report at 4 (February 4, 2013).

Duke's Objection 6a is:

(a) “ * * Staff’s recommendation and determination of what property in the Eastern Parcel of the East End site is, and is not, used and useful is **arbitrary and contrary** to previous Commission decisions with regard to the used and useful standard.”¹⁴*

Not only is Duke's objection vague and overbroad, leaving interested parties with no idea what specific concern Duke is objecting to or how to address it, but the general claim is unsupported by any citation to prior PUCO decisions supporting the Utility's interpretation of "used and useful." The lack of any supporting citation exposes the lack of specificity required by law. Therefore, Objection (6) (a) should be stricken.

Duke's Objection 6b is:

(b) “ * * Staff **arbitrarily, unreasonably, and incorrectly** concludes that none of the remediation expenses for the Western Parcel of the East End site, except those incurred within 50-foot buffer, were incurred to operate, maintain, or repair property, that is used and useful in rendering natural gas distribution service.”¹⁵*

Again, Duke's Objection is overly general and provides no explanation or supporting rationale as to why the Staff's use of the 50-foot buffer with regards to the used and useful standard was inappropriate. The Staff's determination of used and useful in these cases was consistent with prior cases where portions or part of a parcel of property was deemed to be used and useful while other portions of the same parcel was deemed to not be used and useful.¹⁶ There have also been circumstances where the Commission has

¹⁴ Duke Objections to the Staff Report at 4-5 (February 4, 2013) (emphasis added).

¹⁵ Duke Objections to the Staff Report at 5 (February 4, 2013) (emphasis added).

¹⁶ *In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Service Provided in its Entire Service Area*, Case No. 07-1112-WS-AIR, Staff Report at 4 (May 28, 2008).

determined a portion of an office building to not be used and useful.¹⁷ Duke's Objection fails to distinguish this case from those prior cases where the Staff excluded portions of a building or parcel of land that were not used and useful. Duke's objection is vague and overbroad, leaving interested parties with no idea what specific concern Duke is objecting to or how to address it. Therefore, Objection (6) (b) should be stricken.

Duke's Objection 6c is:

(c) “ * * Staff fails to adequately explain its rationale for this recommendation, merely stating that deferred expenses associated with the land purchase should [not] be recovered from customers.”¹⁸*

To the contrary, the Staff Report included the following rationale for Staff's recommendation:

Based on site inspections and review of recent and historical aerial photographs and Company supplied documents, the purchased land was historically a residential neighborhood that was never part of the former East End MGP site. The land now is a large vacant field with no visible structures or underground facilities that are used and useful in providing natural gas distribution service to customers. A 2012 aerial view of the Purchased Property can be seen in Attachment MGP-2. Attachment MGP-8 shows a drawing of the Purchased Property with the former individual property plats shown. Essentially, Duke is requesting to recover from customers the premium it paid to the developer so that it could purchase the land in order to protect itself from future liability arising from the presence of MGP impacts. The Staff recommends that none

¹⁷ *In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Service Provided in its Entire Service Area*, Case No. 09-391-WS-AIR, Opinion and Order at 16 (May 5, 2010). (“Staff has provided sufficient rationale to justify excluding 15 percent of the Marion Corporate Office plant as not being used and useful. Staff noted that there are rooms on the second floor and in the basement that are not used. In addition, Staff testified that the lobby and that the counter area next to the lobby are empty. Accordingly, we find that Staff properly excluded 15 percent of the Marion corporate office plant from rate base.”)

¹⁸ Duke Objections to the Staff Report at 5 (February 4, 2013).

of the deferred expense associated the land purchase should be recovered from customers.¹⁹

As can be seen from the materials quoted above, Staff did explain the rationale for its recommendation. The Utility just did not agree, and filed an objection that failed to explain with the required specificity the specifics of the Utility's disagreement. Duke failed to explain in its Objection how a large vacant field with no visible structures or underground facilities is used and useful in providing natural gas distribution service to customers. Therefore, Objection (6) (c) should be stricken.

Duke's Objection 6d is:

(d) “ * * Staff **unreasonably** applies a very narrow interpretation of the broad used and useful standard set forth in R.C. 4909.15 (A)(1) when rendering its recommendation regarding [West End site, North of Mehring Way].”²⁰*

Duke's Objection fails to provide any support or citation demonstrating that the Staff's interpretation of used and useful was very narrow and not consistent with R.C.

4909.15(A)(1). Duke's objection is vague and overbroad, leaving interested parties with no idea what specific concern Duke is objecting to or how to address it. Therefore, Objection (6) (d) should be stricken.

Duke's Objection 6e is:

(e) “ * * Staff's recommendation **improperly** overlooks the parcels [West End site, South of Mehring Way] usefulness in the provision of natural gas service.”²¹*

Again, Duke provided no explanation of how the West End site south of Mehring Way is used and useful in the provision of natural gas service. Instead the Utility, merely

¹⁹ Staff Report at 43 (January 4, 2013).

²⁰ Duke Objections to the Staff Report at 5 (February 4, 2013).

²¹ Duke Objections to the Staff Report at 5-6 (February 4, 2013).

disagrees with the application of used and useful. Duke's Objection to the Staff Report is vague and overbroad, leaving interested parties with no idea what specific concern Duke is objecting to or how to address it. Therefore, Objection (6) (e) should be stricken.

Duke's Objection 6f is:

*(f) "[Duke] objects to Staff's failure to consider decisions rendered in numerous other jurisdictions which have authorized utility recovery of remediation costs of former MGP sites in rate-making proceedings."*²²

Duke's claim that other jurisdictions have authorized utility recovery of remediation costs is vague in that it does not articulate the basis of the decisions that allowed recovery, how the decisions in other jurisdictions are consistent with Ohio law, and how the Staff's recommendations specifically conflict with those other decisions. Duke also fails to demonstrate the basis for the PUCO being bound by any decisions in other jurisdictions. In fact, Duke provides no citation to support its argument that the PUCO is bound to consider decisions in other jurisdictions.

In addition, the Utility asserted another objection: "[Duke] objects to Staff's failure to consider that the MGP environmental remediation costs are **substantial, extraordinary, and unforeseen** costs that **are related to gas utility operations** and that prompt attention to the MGP sites remediation will likely benefit [Duke's] current gas ratepayers by minimizing environmental litigation or fines, which is a prudent business practice."²³ Duke has failed to articulate how "substantial, extraordinary and unforeseen costs" are specifically allowable for recovery from customers under Ohio's rate-making formula as set forth in R.C. Chapter 49. Duke also failed to explain with any degree of

²² Duke Objections to the Staff Report at 6 (February 4, 2013).

²³ Duke Objections to the Staff Report at 6 (February 4, 2013) (emphasis added).

specificity how these remediation costs are related to gas utility operations. Duke's objection is vague and overbroad, leaving interested parties with no idea what specific concern Duke is objecting to or how to address it -- other than the fact that Duke wants to recover huge amounts of money from customers for services that are not related to the provision of natural gas service to those same customers today. Therefore, Objection (6)(f) should be stricken.

Duke's Objection 6g is:

*(g) "[Duke] objects to Staff's failure to consider that the East End and West End sites have been utilized continuously by the Company for the provision of natural gas distribution service and were therefore, used and useful **during the time period of the MGP operations**, as well as today."*²⁴

As argued previously, the Staff's specifically recommended cost recovery of MGP-related remediation costs associated with natural gas property that is currently used and useful at the MGP sites; however, it is unclear from Duke's objection what the Staff was supposed to recommend with regard to property that was used and useful between 1882 and 1967 (a period of time when the MGP sites were operational).²⁵ If Duke's argument is that the MGP sites were used and useful in 1882-1967, then the Company had the opportunity to recover costs associated with those facilities from customers at that time. Customers today should not be held liable for costs resulting from facilities that were used and useful 46-131 years ago and NOT TODAY. Such property would clearly fall outside of the Commission's rate-making formula and thus Duke's objection lacks the required specificity. Duke's Objection (6)(g) should be stricken.

²⁴ Duke Objections to the Staff Report at 6 (February 4, 2013) (emphasis added).

²⁵ Duke Direct Testimony of Jessica Bednarcik at 5 (July 20, 2012).

Duke's Objection 6h is:

*(h) "[Duke] objects to the Staff's failure to conclude that the cost of delivering utility service reasonably encompasses the current costs of doing business, including the necessary and prudently incurred costs of complying with environmental standards at utility-owned sites."*²⁶

In fact, Duke is incorrect in its assumption -- that prudently incurred costs of delivering utility service do not include compliance with environmental standards at utility-owned sites, if that site or a portion of that site is not used and useful. Duke's mistake in its Objection to the Staff Report is that the Utility is ignoring the Staff's application of the used and useful standard. Duke's Objection fails to explain why the used and useful standard does not apply. Duke's objection is vague and overbroad, leaving interested parties with no idea what specific concern Duke is objecting to or how to address it. Therefore, Objection (6) (h) should be stricken.

Duke's Objection 6i is:

(i) " * * Further. [Duke] objects to Staff's assumptions regarding the calculation of carrying charges."*²⁷

Duke, in its objection fails to specify what it objected to with regard to the Staff's assumptions regarding the calculation of carrying costs. Duke's Objection to Staff's assumptions regarding the calculation of carrying charges failed to adequately notify the parties of the specific concerns at issue. Duke's objection is vague and overbroad, leaving interested parties with no idea what specific concern Duke is objecting to or how to address it. Therefore, Objection (6)(i) pertaining to the Staff's calculation of carrying charges should be stricken.

²⁶ Duke Objections to the Staff Report at 6 (February 4, 2013).

²⁷ Duke Objections to the Staff Report at 6-7 (February 4, 2013).

2. Objection (15) Facilities Relocation Tariff (Rider FRT).

Duke's Objection 15 is as follows, relating to Duke's proposed tariff to allow collection from customers of amounts for such projects as relocating facilities for a streetcar project:

[Duke] objects to the Staff's recommendation to eliminate the proposed Rider FRT. Staff lists several reasons why it believes the Rider should not be approved in these proceedings. 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. As such the Staff's justification in recommending a denial of approval for Rider FRT is unfounded.²⁸

The Staff Report listed five reasons why the PUCO Staff opposes Rider FRT.²⁹ Duke's Objection No. 15 to the Staff Report failed to specifically address, which areas of the Staff's recommendations Duke disagrees with. Duke's Objection is vague and overbroad, thus lacking the specificity required by the Commission's rules.

For example, Duke argues that the Staff's concerns about Rider FRT are misplaced, raise issues that are beyond the jurisdictional capabilities of the Commission to consider and, in some cases, are simply false. But Duke fails to expand on, explain, or support these assertions in any detail. Duke's Objection 15 thus is not specific enough to convey what is actually being placed at issue. Therefore, Objection (15) should be stricken.

²⁸ Duke Objections to the Staff Report at 11 (February 4, 2013).

²⁹ Staff Report at 21 (January 4, 2013).

III. CONCLUSION

Duke's Objections (6) and (15) are vague and overbroad, leaving the PUCO Staff and interested parties with no idea what specific concern Duke is objecting to or how to address it. For the reasons set forth herein, the Commission should strike the two Duke objections, in accordance with Ohio Adm. Code 4901-1-28(B).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Motion to Strike Objections to the Staff Report of Investigation* was served on the persons stated below via electronic service, this 19th day of February 2013.

/s/ Larry S. Sauer

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Summary: Motion Motion to Strike Certain of Duke Objections to the PUCO Staff Report by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.