

**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, 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 Motion to Strike raises 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), claiming that Duke Energy Ohio's objections to the Staff Report regarding Rider FRT are "vague, overbroad, and not specific enough." With regard to Rider FRT, OCC's Motion to Strike asserts the same arguments as those raised by Staff

in its Motion to Strike. However, OCC also contends that a number of Duke Energy Ohio's objections related to Staff's recommendations regarding cost recovery for the Company's manufactured gas plant (MGP) objections should be stricken. 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 an 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

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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).

these requirements.<sup>5</sup> The objections submitted by Duke Energy Ohio in these proceedings were designed with this purpose in mind. The Company's objections relate to findings, conclusions or recommendations in the Staff Report or the failure of the Staff to address the same. Duke Energy Ohio's objections are sufficiently specific and targeted to the Staff Report to allow parties to understand what is actually being placed at issue.

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

The focus of Staff's Motion to Strike is the Company's proposal for Rider FRT. OCC's Motion to Strike simply echoes Staff's Motion to Strike the Company's objections related to 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 policy and legal opinion. Staff's opinions go to the merits of the tariff itself and should be addressed in the hearing, on the merits. Duke Energy Ohio's Objections are designed only to preserve the issue for hearing, consistent with the intent under O.A.C. 4901-1-28(B).<sup>6</sup> Duke Energy Ohio objected to the Staff's reasoning supporting rejection of Rider FRT as flawed and unsupportable for a number of reasons. In its Objections, 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

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

<sup>6</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).

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 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 “(15) 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 the 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>7</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>8</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 that provision should be denied, is false and inaccurate. Indeed, the Rider is designed with some intentional flexibility as to the projects that could be included for recovery.

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 objected to 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 in which a municipality is obligated to pay for facility relocation. Therefore, the Company's objection to

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<sup>7</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>8</sup> Rider FRT, Applicability Section I (emphasis added).

Staff's recommendation should be deemed sufficiently specific and stand, with its merit determined via an evidentiary hearing.

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 that municipality pay for relocation. Staff and OCC may be confused about the proposal, but that alone 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 not be stricken.

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 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." The Company's objections specifically relate to Staff's recommendations as advanced in the Staff Report regarding the Company's Application and supporting testimony in these proceedings. These issues are thus in the case and

should be decided on the merits.<sup>9</sup> The Commission must deny Staff's and OCC's motions to strike them.<sup>10</sup>

#### **IV. OCC Motion to Strike Objections Related to MGP Deferrals**

The predominant issue in OCC's Motion to Strike relates to Duke Energy Ohio's objections to Staff's recommendations on MGP deferrals. The Company has submitted an application in these proceedings that includes a request for recovery of costs related to environmental remediation of MGP facilities that were historically used and useful, and are presently used to serve gas customers in Ohio. The Staff reviewed the Company's application related to this remediation project and provided its own analysis of how Staff believes each property should be parsed, and then proceeded to opine about what is presently used and useful. Based upon this artificial parsing of the lands in question, Staff thereafter recommended a partial recovery of the costs incurred for the environmental remediation. There is no rational basis or precedent for such arbitrary allocations recommended by Staff.

OCC contends that the Company's main objection and each of its more narrow objections on MGP deferrals should be stricken because they lack the requisite specificity required by O.A.C. 4901-1-28(B). OCC's Motion to strike the Company's nearly three pages of MGP-related objections is simply an unlawful attempt to argue the merits of the Company's objections. Duke Energy Ohio's objection to Staff's MGP recommendation, which it supported by means of narrow, specific objections to each of the components of the Staff Report with which it disagrees, are narrowly tailored and meet the threshold for specificity required by O.A.C. 4901-

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<sup>9</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>10</sup> *Id.*



1-28(B). All that is required is the Company's objection be specific enough to convey what is actually being placed at issue, and<sup>11</sup> not to argue the intrinsic merit or lack of merit of any particular objection.<sup>12</sup> That must be dealt with following the evidentiary hearing on the matter, not by striking it prior to that time.<sup>13</sup> Though, time and again OCC moves to strike specific portions of the Company's objections on MGP-related issues as vague and overbroad, at its base, OCC is attempting to use its Motion to Strike to advance its own legal arguments as to the recoverability of the costs sought by Duke Energy Ohio, which is not appropriate at this point in the proceeding.

In its Objections, the Company sets forth, its fundamental MGP Objection (6), namely, the Staff's recommendation with respect to cost recovery for MGP remediation expense and its application of the used and useful standard. The Company goes on to state:

"Staff makes its recommendation without regard to considering the strict liability placed upon the Company 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 Company's customers. Specifically, Duke Energy Ohio objects to Staff's recommendations to divide the relevant parcels of land into segments based upon an arbitrary division of what Staff considers used and useful."<sup>14</sup>

In this objection, the Company clearly and specifically states that its objection to Staff's recommendation is based upon Staff's failure to consider strict liability for clean up on under the law, that Staff failed to include property that is and was used and useful in providing utility service, and its segmentation of parcels of the two MGP sites into what Staff considers used and

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<sup>1111</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>12</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>13</sup> *Id.*

<sup>14</sup> Duke Energy Ohio, Inc's Objections to the Staff Report of Investigation and Summary of Major Issues , (February 4, 2013), at 4.

useful. Thus at issue is: 1) the fact that the Company has an obligation under the law to remediate the sites at issue; 2) that Staff excluded property that both is and was used and useful in rendering utility service; and 3) Staff arbitrarily divided the two MGP sites into segments for recovery based upon an arbitrary determination of what Staff considered to be used and useful. The aforementioned objection alone satisfies the requirements for specificity under O.A.C. 4901-1-28(B). But the Company goes further and provides greater specificity with respect to each of the MGP site segments identified by Staff.

Through its specific objections, set forth in (6)(a) through (i), the Company details the particulars of its Objections. As noted *supra*, objections 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 in order to be sustained. Each of the Company's Objections in (6)(a) through (i) specifically relates to findings, conclusions or recommendations regarding MGP recovery advanced in the Staff Report. Accordingly, they meet the threshold for specificity advanced under Rule 4901-1-28(B), O.A.C.

Duke Energy Ohio's Objection 6(a) expressly and specifically refers to the Staff's recommendation regarding the Eastern Parcel of the East End MGP site.<sup>15</sup> The Company specifically states that it is objecting to Staff's arbitrary determination that only the land 25 feet on either side of the centerline of gas pipelines is eligible for recovery as used and useful.<sup>16</sup> At issue is the other land and facilities at the site that Staff excluded from recovery.

Duke Energy Ohio's Objection 6(b) expressly and specifically refers to Staff's recommendation regarding remediation expenses incurred at the Western Parcel of the East End

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<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.*

site.<sup>17</sup> The Company specifically state that it objects to Staff's limitation to recovery of only a 50 foot buffer around the existing Vaporizing Building in a small area in the north east corner of the parcel. The Company further states that Staff's exclusion of the other remediation expenses on the parcel is arbitrary, unreasonable, and incorrect in that the remainder of the expenses were incurred to operate, maintain or repair property that is used and useful in rendering natural gas delivery service. The Objection leaves no doubt that the expenses incurred at the site and the fact that Staff failed to identify a significant portion of the property as used and useful is at issue.

Duke Energy Ohio's Objection 6(c) expressly and specifically refers to what Staff categorized as purchased property and its exclusion from recovery. The Company objects to Staff's failure to adequately explain its rationale for its recommendation. As previously mention in the Company's Objection No. 6, there is strict liability for remediation which Staff fails to consider.

Duke Energy Ohio's Objection 6(d) expressly and specifically refers to Staff's recommendation related to the West End MGP site North of Mehring Way, and Staff's unreasonable determination of what Staff considers used and useful for purposes of recovery of remediation expense.<sup>18</sup> At issue in this objection is property and facilities located at that site which Staff failed to identify as used and useful.

Duke Energy Ohio's Objection 6(e) expressly and specifically refers to Staff's recommendation at the West End Site South of Mehring Way.<sup>19</sup> Duke Energy Ohio specifically objects to Staff determination that the land is only being used by Duke Energy Ohio for electric service and overlooks the use of the land for natural gas service. At issue is the Staff's exclusion

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<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

of the remediation expense at the property from recovery because it is used for electric service and for Staff's failure to consider the use of the land for gas utility service.

Duke Energy Ohio's Objection 6(f) specifically states that Staff failed to consider decisions rendered in numerous other jurisdictions that have authorized utility recovery of remediation expenses at former MGP sites, that the costs are extraordinary, substantial and unforeseeable and that the remediation of the sites will benefit customers. At issue are the legal precedent for recovery of remediation expenses, and the public policy supporting utility recovery of such costs.

Duke Energy Ohio's Objection 6(g) expressly and specifically states that Staff failed to consider the continuous use of the East End and West End sites for gas utility service both at the time of the MGP operations and today.<sup>20</sup> Thus at issue is the use of the property for utility service continuously over time, including at the present.

Duke Energy Ohio's Objection 6(h) expressly and specifically states that Staff failed to conclude that the cost of delivering utility serve to customers reasonably includes current costs of doing business including costs of complying with environmental regulations. At issue is the fact that Staff failed to find in its Staff Report that Duke Energy Ohio, as a cost of providing service to customers, must comply with environmental regulations, including the costs of remediating the MGP sites at issue. Staff's recommendation in this regard denies the Company its ability to recover its prudently incurred costs of doing business in providing utility service.

Duke Energy Ohio Objection 6(i) expressly and specifically refers to Staff's recommendation regarding the Company's pursuit of insurance coverage for the MGP remediation sites. Staff's recommendation fails to consider:

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<sup>20</sup> *Id.* at 6.

- Such coverage may not exist;
- Any coverage that exists, may not cover all remediation expense;
- The pursuit of insurance coverage is costly and must be netted against any recovery;

Further, the Company objects to Staff's calculation of carrying charges for any insurance proceeds to be flowed back to customers.

Thus at issue with this Objection is the fact that Staff's recommendation failed to consider that such coverage may not be present, that it may not be sufficient to cover 100 percent of remediation costs, and that pursuing the coverage is costly. Duke Energy Ohio should be permitted to recover its costs to pursue such coverage, especially if Staff is recommending the Company to share the proceeds with customers in proportion to what is permitted for rate recovery. Moreover the Company clearly took issue with Staff's recommendation to include carrying costs to customers benefit for any insurance proceeds that may flow back to customers.

OCC contends that the Commission has provided examples of the sort of specificity that is required in objections filed in response to staff reports. The only explicit requirement in O.A.C. 4901-1-28(B) is that the objection "*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.*"<sup>21</sup> The OCC ignores more recent entries and rulings finding that the level of specificity needed in an objection to comply with broad specificity requirement in 4901-1-28(b) is merely that which is necessary to convey what is actually being placed at issue.<sup>22</sup> Each of the

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<sup>21</sup> O.A.C. 4909.1-28(B). *Emphasis added.*

<sup>22</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). See also; *In the Matter of the Application of Ohio American Water Company to Increase Its Rates for Water and Sewer Service*, Case No. 11-4161-WS-AIR, (Entry) (February 1, 2012); "Any objection that is not specific enough to convey what is actually being placed at issue will be struck pursuant to the above-cited rule".

Company's MGP-related objections relates to findings, conclusions and recommendations, or the failure of Staff to make certain findings in its Staff Report. Nonetheless, OCC's argument is equally flawed on other grounds.

The Company's objections to Staff's recommendations were submitted in the first instance, in broad overview form, and then specifically delineated thereafter in parts a. through i. Subparts a. through i. were submitted precisely to give notice that the Company specifically disagreed with the Staff's findings, conclusions and recommendations with respect to each of the parcels set forth in the Staff Report and the application of the used and useful standard as perceived by Staff. After reading the Company's objections, it is abundantly obvious what issues are in contention. Indeed, the Commission's Staff seems to have had no problem in understanding the issues raised, as OCC is the only party in these proceedings that claims not to be able to understand them. OCC also understands the issues, but has chosen to use its Motion to Strike as a vehicle for advancing its legal arguments as to the merits of the Company's objections and recoverability of these costs.

OCC first claims that the Company's objection to Staff's application of the "used and useful" standard and the Company's reference to strict liability for remediating the contamination associated with its previous gas operations are both vague and nonspecific. However, OCC then goes on to cite the Commission's ratemaking authority under R.C. 4909.15 and claims that the Company has not adequately explained its objections as pertaining to this legal requirement. It is not necessary for the Company to set forth its entire legal argument in its objections, but rather to simply give notice of the existence of the issues.<sup>23</sup> OCC must have

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<sup>23</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).

sufficient notice with respect to relevant issues as it honed in immediately on the legal analysis that will be framed in the case, namely the Commission's ratemaking authority under 4909.15 and its application with respect to Staff's arbitrary determination as to MGP property being remediated that Staff considers to be used and useful, to the exclusion of other property at the MGP sites. The applicable standard for "used and useful" is relevant and part of the case. This is especially true considering the Commission itself granted the Company's request for deferral of MGP remediation expenses by Order dated November 12, 2009, in Case No. 09-712-GA-AAM, more than three years ago. Staff's arbitrary determination of used and useful, more than three years later, in its Staff Report fails to recognize the historic nature of the use of the sites in providing gas production, storage, distribution and other utility service. Engaging in legal argument on these topics is far astray of what should occur at the objection stage of the proceedings. The legal arguments will be developed as the case evolves. The identification of the dispute is sufficient for purposes of objections.

Next, OCC addresses the Company's Objections as to Staff's arbitrary division of the property in question. OCC states that the Company failed to explain what was arbitrary about Staff's delineations. Again, OCC's motion to strike in this regard is seeking to attack the merits of the Company's Objections, which is not appropriate prior to the hearing in these proceedings. The fact that the Company points out that the Staff's findings were arbitrary is sufficient to give notice that the Company does not agree with the parsing of the properties as per the Staff's recommendations. Thus, the particular pieces of property, what is on them, and how they are used, will be in contention in the case. The use of these properties and their status as used and useful, now and in the past, will be debated. The specific facts in dispute are myriad in detail and will require supporting exhibits and an understanding of the layout and geographic qualities

of the environmental remediation that is presently underway. None of this information is capable of being distilled into sentences or even short paragraphs. It is sufficient for Staff and interested parties to know that the Company disagrees with Staff's lines of demarcation and will be contesting these findings at hearing. The Company's Objections provide adequate notice of these issues and are certainly detailed such that OCC can discern the need to prepare for argument with respect to the used and useful nature of all of these parcels of land and the legal application of used and useful analysis as it applies in this case.

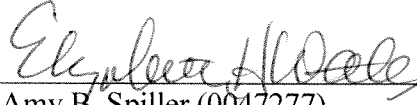
It is apparent that OCC seeks to engage in legal argument in advance of the hearing with respect to the Company's application for recovery for environmental remediation. The Company will provide ample factual and legal support for the application for recovery of costs related to this project. The objections submitted refer to specific parcels of land as discussed in the Staff Report, indeed, down to feet and inches where applicable, and provide adequate notice to the parties that the legal questions related to the application of the used and useful standard will be raised.

## **V. 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.



Respectfully submitted,  
DUKE ENERGY OHIO, INC.

A handwritten signature in cursive script, appearing to read "Amy B. Spiller", written over a horizontal line.

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