

**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
)	

**MOTION OF DUKE ENERGY OHIO, INC.,
TO CLARIFY THE SCOPE OF THESE PROCEEDINGS**

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 Clarify the Scope of the Proceedings in the above-captioned cases. The Company further requests an expedited ruling from the Commission on this issue. Testimony introduced by the Office of the Ohio Consumers' Counsel (OCC) has attempted to broaden the scope of matters to be considered by the Commission, namely, the interpretation of Ohio environmental laws and regulations, as well as the propriety of environmental remediation efforts undertaken by the Company, when approving rates in these proceedings. For the reasons set forth in the accompanying memorandum in support, Duke Energy Ohio requests that the Commission clarify that the propriety of environmental remediation efforts, as determined by Ohio laws overseen by the Ohio Environmental Protection

Agency (Ohio EPA), is not proper for consideration by the Commission in the above-captioned proceedings, and in the interest of administrative economy, should be specifically excluded from consideration herein. The Company respectfully requests that the Commission make such clarification in an expedited fashion.



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

**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
)	

**MEMORANDUM IN SUPPORT OF DUKE ENERGY OHIO, INC.'S
MOTION TO CLARIFY THE SCOPE OF THE PROCEEDINGS**

A. Factual 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 the environmental 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.¹

On February 4, 2013, the Office of the Ohio Consumers' Counsel, (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). OCC Witness Campbell's testimony is dominated by the discussion of Ohio EPA's Voluntary Action Program (VAP) Rules², 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[.]"³ 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

¹ Staff Report at 40.

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

³ Direct Testimony of James R. Campbell at 6.

reasonable and that any costs that are determined to be imprudent are not recoverable from customers.⁴

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

OCC Witness Campbell's testimony presupposes that the Commission, through Staff, has the authority to interpret the Ohio VAP statute and rules, and then to evaluate the Company's 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 the 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. The Commission, in contrast, is not vested with the power to either interpret the Ohio VAP Rules or evaluate the propriety of utilities' environmental remediation decisions under the VAP Rules.

⁴ *Id.* at 6-7.

It is well settled that the Commission “possesses no powers except such as are conferred by statute.”⁵ 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 what activities are within or outside of the approach specified by the Ohio VAP Rules, as well as whether Duke Energy Ohio’s remediation activities exceeded the approach specified 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 state⁶ and determining if the Ohio VAP Rules have been satisfied⁷. Given that there is no mention of the Commission sharing these responsibilities, it would be improper for the Commission to determine the scope of the VAP Rules or a utility’s compliance with the provisions and programs supervised by the Ohio EPA.

Although it did not state so outright 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. Staff’s implicit acknowledgment of the boundaries of the Commission’s jurisdiction should impress upon the parties to these matters that there is an extent to which the Commission can actively consider specific items in its ratemaking function. The scope and necessity of the

⁵ 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).

⁶ See, e.g., Sections 3745.01 and 3745.011, Ohio Revised Code.

⁷ See Ohio Revised Code Chapter 3746.

actions Duke Energy Ohio has taken in its environmental remediation efforts are beyond that statutory boundary of authority.

Beyond the statutory limitations on the Commission's powers, the Commission should exclude consideration and discussion of the scope and necessity of the specific remedial actions chosen by the Company for reasons of administrative economy. Testimony and examination on environmental scope and necessity issues would unnecessarily and unlawfully broaden the focus of the proceedings, which already include countless components for the Commission's consideration. Administrative economy strongly urges the Commission to exclude testimony on and inquiry into the scope and necessity of the environmental remediation decisions made by the Company. Inquiry into these issues would unnecessarily confuse the regulatory standard for recovery of the costs the Company seeks to recover and, moreover, as stated above, would be outside of the limits of the Commission's jurisdiction.

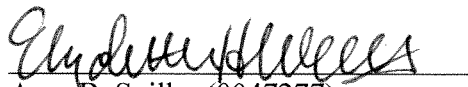
Duke Energy Ohio's requested clarification will not preclude the Commission from examining the prudence of the utility's environmental remediation efforts. Consistent with the Commission's longstanding jurisdiction to scrutinize the prudence and reasonableness of a utility's expenditures prior to reflecting such expenditures in rates, the Commission can scrutinize the prudence and reasonableness of Duke Energy Ohio's MGP remediation expenditures. For example, the Commission may examine: the Company's due diligence and decision-making with respect to its determination that it has an MGP remediation obligation; its due diligence and decision-making in the selection of contractors and vendors for this project; the reasonableness of the contracts entered into for this project; and the reasonableness of the actual MGP remediation expenditures.

III. Conclusion

Because the Commission's lacks authority to interpret the VAP statute and Rules, as well as the lack of authority to consider the necessity of environmental restoration and remediation efforts under the Ohio VAP Rules, and the unnecessary confusion that would result from the introduction of such evidence in the above-captioned matters, Duke Energy Ohio requests for the Commission to clarify that the scope and necessity of its environmental remediation efforts at its East End and West End sites are not permissible areas for inquiry at the hearing. Clarifying the information that is to be developed in the record in this proceeding will make the hearing more efficient and effective and potentially shorten the length of time needed to hear the matters relevant to the Commission's inquiry. Additionally, given that the hearing on these matters is quickly approaching, the Company respectfully requests the Commission to make this clarification in an expedited manner.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

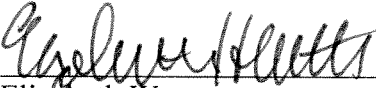

Amy B. Spiller (0047277)
Deputy General Counsel
Elizabeth Watts (0031092)
Associate General Counsel
Duke Energy Business Services, LLC
139 East Fourth Street
1303-Main
Cincinnati, Ohio 45202
(Telephone) 513-287-4359
(Facsimile) 513-287-4385

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 16th 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

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.

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

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima St.
Findlay, Ohio 45839-1793
Cmooney2@columbus.rr.com

Counsel for Stand Energy Corporation

Counsel for OP&A

Joseph P. Serio,
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

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**

**Attorneys for the Ohio Consumers'
Counsel**

Thomas W. McNamee
Devin D. Parram
John H. Jones
Assistant Attorneys General
Public Utilities Section
180 East Broad St., 6th 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
mhpeticoff@vorys.com
smhoward@vorys.com

Attorneys for Interstate Gas Supply, Inc.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/16/2013 3:16:41 PM

in

Case No(s). 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, 12-1688-GA-AAM

Summary: Motion Motion of Duke Energy Ohio, Inc., to Clarify the Scope of These Proceedings electronically filed by Carys Cochern on behalf of Watts, Elizabeth H. Ms.