

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas 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 CONTRA DUKE'S
MOTION TO CLARIFY THE SCOPE OF THESE PROCEEDINGS AND
MOTION TO STRIKE THE OCC TESTIMONY OF JAMES R. CAMPBELL
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Larry S. Sauer, Counsel of Record
Joseph P. Serio
Edmund Berger
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: Sauer – (614) 466-1312
Telephone: Serio – (614) 466-9565
Telephone: Berger – (614) 466-1292
sauer@occ.state.oh.us
serio@occ.state.oh.us
berger@occ.state.oh.us

April 23, 2013

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. PROCEDURAL HISTORY	2
III. ARGUMENT	5
A. Duke's Motions Should Be Denied And The PUCO Should Consider OCC's Evidence To Protect Customers From Paying The Highly Excessive Charges That Duke Seeks.	5
1. Duke's Motion to Clarify was the wrong pleading to file and is in reality an out-of-time Motion to Strike Objections.	5
2. Duke's motions would injure OCC and Duke's consumers that OCC represents.	7
3. Duke's Motions are a unilateral attempt to modify the terms of the Stipulation to favor Duke and disfavor consumers.	8
B. Duke's Motion for Clarification Unlawfully Attempts to Preclude the Commission from a Review of The Scope and Necessity of Duke's Remediation Activities And the Associated Prudence Review that the General Assembly Enacted to Protect Utility Customers.	9
C. Duke's Motion to Strike the Testimony of James R. Campbell is an Unlawful Attempt to Prevent OCC from Presenting Evidence on the Imprudence of Duke's Remediation Costs that It Seeks to Charge Customers.	16
D. Duke's Motions Make No Sense and Should Be Denied.	17
E. The Commission's Order In Duke's MGP Deferral Case Clarified the PUCO's Authority to Conduct a Prudence Review at the time the Utility seeks authority to collect remediation costs from its customers -- and that time is now.	18
IV. CONCLUSION	21

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra with the Public Utilities Commission of Ohio ("PUCO" or "Commission") in response to the Motion to Clarify the Scope of these Proceedings ("Duke Motion to Clarify") and Motion to Strike the Testimony of James R. Campbell (Duke Motion to Strike") (collectively "Duke Motions") filed by Duke Energy Ohio, Inc. ("Duke" or "Utility"), on April 16, 2013.¹ Duke requested an expedited ruling on its Motions.²

Duke filed two Motions for one objective, to deny its 380,000 natural gas customers the evidence OCC will submit on their behalf regarding a \$65 million issue. OCC's evidence -- the evidence that gives customers a voice in these cases -- will demonstrate to the PUCO how Duke is asking its customers to pay for real estate remediation that is far in excess of reasonable costs (if any) for ratemaking, at its manufactured gas plant sites.

As a threshold matter, **Duke filed the wrong pleading. And Duke missed the PUCO's deadline for filing the right pleading.** Duke is seeking to reject OCC's Objection 26, which questions the scope and necessity of Duke's remediation activities. The legal procedure for such a challenge to an objection was to file a motion to strike. That motion was due on February 19, 2013, by Entry.³ Duke did not file the motion to strike. And Duke's due date for such a filing was 56 days before it filed its new Motions. Duke disregarded the Entry's instructions and is out of time in any event. Duke's Motions should be denied.

¹ Ohio Adm. Code 4901-1-12(B)(1).

² Duke Motions at 1.

³ Entry at 6 (January 18, 2013).

II. PROCEDURAL HISTORY

On August 10, 2009, Duke filed an Application with the PUCO to defer environmental investigation and remediation costs.⁴ The Commission granted Duke's Application on November 12, 2009. The Commission stated:

By considering this application, the Commission is not determining what, if any, of these costs may be appropriate for recovery in Duke's distribution rates.⁵

The PUCO's ruling meant that Duke was not being authorized to collect environmental remediation costs from customers. In fact, Duke, in its Memorandum Contra to OCC's Application for Rehearing, agreed with the PUCO that the issue of recovery of investigation and remediation costs should be addressed in Duke's next distribution rate case. Duke stated:

As discussed with regard to the OCC's first ground for rehearing, this is not the time for these arguments. Discussion of recovery is premature. In addition, it should be noted that the Commission's reference to distribution rates was only a statement that it was not making a determination concerning recovery in distribution rates. The Commission did not address the manner in which recovery should be had, if at all. Whether or not the deferred costs are appropriate for recovery through any vehicle or from any particular customers was not determined by the Commission.⁶

On June 7, 2012, Duke filed its Prefiling Notice with regards to its request to increase its natural gas distribution rates. As part of the Company's Rate Case Application, subsequently filed on July 9, 2012, Duke sought the authority to collect from its customers \$65.3 million in investigation, remediation and carrying costs associated

⁴ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM (August 10, 2009).

⁵ *Id.* Finding and Order at 3 (November 12, 2009).

⁶ *Id.* Duke Memorandum Contra Applications for Rehearing at 8 (December 18, 2009).

with the investigation and remediation of environmental concerns at two manufactured gas plant (“MGP”) sites.⁷

On January 4, 2013, the Staff Report of Investigation was filed. On February 4, 2013, OCC, as well as other interested parties, filed Objections to the Staff Report as required by R.C. 4909.19. Included within the 31 Objections filed by OCC were five Objections pertaining to Duke’s request to collect MGP-related costs from Duke’s customers.⁸

On January 18, 2013, the Attorney Examiner issued an Entry that established a procedural schedule for these proceedings. As part of that procedural schedule, February 19, 2013 was established as the deadline for the filing of Motions to Strike Objections to the Staff Report.⁹ Duke did not file a motion to strike any of OCC Objections on February 19, 2013. The January 18, 2013 Entry also separated the filing dates for Objections to the Staff Report (February 4, 2013) from the filing of expert testimony that supports those Objections to the Staff Report (February 25, 2013). As a result of this three week delay in the filing of expert testimony, parties had the opportunity to review the Objections to the Staff Report filed by other parties and to address those issues in their own testimony if they elected to do so.

On February 25, 2013, OCC filed the testimony of a number of expert witnesses in support of its Objections. Included was testimony of James R. Campbell who filed testimony in support of OCC Objection No. 26.¹⁰

⁷ Rate Case Application, Schedule C-3.2 (July 9, 2012).

⁸ OCC Objections to the PUCO Staff Report of Investigation, Objection Nos. 25-29 (February 4, 2013).

⁹ Entry at 5 (January 18, 2013).

¹⁰ Direct Testimony of James R. Campbell at 5 (February 25, 2013).

On April 2, 2013, a Stipulation and Recommendation (“Stipulation”) was entered into between Duke, the PUCO Staff, OCC and other interested parties. As part of the Stipulation, the signatory parties agreed that the issue of MGP-related cost recovery and collection would not be settled as part of the Stipulation, but instead would be litigated.¹¹ The parties agreed to litigate the positions.¹² OCC’s position relative to the MGP issues to be litigated was as stated in its Objections to the Staff Report.¹³

On April 16, 2013, over 10 weeks past the established deadline for filing a motion to strike objections, Duke filed a Motion to Clarify the Scope of these Proceedings. This was the wrong pleading to file, and was filed at the wrong time. Simultaneously, Duke filed a Motion to Strike Jim Campbell’s Testimony. The centerpiece of Duke’s argument in support of both of its Motions is an OCC Objection (Objection No. 26) pertaining to the scope and necessity of Duke’s MGP remediation activities.

Under Ohio law (R.C. 4909.19), the parties’ objections frame the issues in a rate case at the PUCO. OCC’s objections frame the issues, including the issues that Duke now wants out of the case. Duke missed the PUCO’s deadline for seeking to strike OCC’s objections that now frame the issues (and that allow OCC’s testimony). Therefore, Duke should not be heard to argue anything now about the scope of the case on the issues framed by OCC’s objections.¹⁴

¹¹ Stipulation at 8 (April 2, 2013).

¹² Id.

¹³ OCC Objections to the Staff Report at 11-14 (February 4, 2013).

¹⁴ Jessica Bednarcik Deposition, Transcript at 61 (April 10, 2013). (In an extraordinary coincidence, Duke’s Motion to Clarify (to prevent the PUCO’s hearing of evidence on the imprudence and excessiveness of Duke’s remediation under the Ohio EPA’s Voluntary Action Program Rules) comes shortly after Duke witness Bednarcik, its in-house MGP remediation expert, testified that she has no expertise in those Ohio EPA Rules, and no independent knowledge or understanding of those rules. Instead, the witness bases her testimony, for that subject of the Ohio EPA Rules, entirely on the opinions of an individual who has not been presented to testify in these proceedings.)

OCC herein responds to Duke's Motions filed April 16, 2013. The PUCO should deny Duke's Motions.

III. ARGUMENT

A. Duke's Motions Should Be Denied And The PUCO Should Consider OCC's Evidence To Protect Customers From Paying The Highly Excessive Charges That Duke Seeks.

1. Duke's Motion to Clarify was the wrong pleading to file and is in reality an out-of-time Motion to Strike Objections.

On January 18, 2013, the Attorney Examiner established the deadline for the filing of motions to strike objections to be February 19, 2013.¹⁵ On that date, Duke did not file a motion to strike any of OCC's objections. However, on April 16, 2013, Duke filed a Motion to Clarify the Scope of these Proceedings. Duke, through its Motion to Clarify, is attempting to remove from the Commission's consideration in these proceedings the scope and necessity of Duke's clean-up (remediation) activities. Duke's Motion to Clarify is in reality a Motion to Strike OCC's Objection No. 26. Indeed, OCC's Objection No. 26 is featured in Duke's pleading. And the issues framed by Objection No. 26 are what Duke seeks to tear from the case. The Commission should recognize Duke's Motion to Clarify for what it really is -- an "out of time" Motion to Strike Objections -- and the Motion should therefore be denied.

Duke has filed the wrong pleading in these cases, and has filed them out of time. Duke has filed the wrong pleading before in a rate case. In Duke's 2005 Electric Rate Case (Case No. 05-59-EL-AIR, et al.), it filed a Motion to Change the Hearing

¹⁵ Entry at 5 (January 18, 2013).

Schedule.¹⁶ Duke's Motion addressed an October 14, 2005 Attorney Examiner Entry that established a procedural schedule for conducting the local public hearing and the evidentiary hearing.

In that case, OCC and other parties then pointed out that Duke's Motion to Change the Procedural Schedule was the wrong pleading. Instead, Duke should have filed an interlocutory appeal from the Attorney Examiner Entry that established the procedural schedule. Duke's Motion -- filed ten days after the procedural Entry was issued by the Attorney Examiner -- was procedurally improper. The PUCO Attorney Examiner agreed, and issued a subsequent Entry that ruled:

The examiner agrees that, procedurally, [Cincinnati Gas & Electric Company] CG&E's motion should have been filed as an interlocutory appeal. The motion asks for reconsideration of the substance of an entry that was issued ten days before the motion was filed. CG&E cannot avoid the strictures of Rule 4901-1-15, Ohio Administrative Code (O.A.C.), by calling its filing a motion rather than an interlocutory appeal.¹⁷

Consistent with this precedent, the PUCO should find that Duke's Motion to Clarify is procedurally improper, and the correct pleading for Duke to have filed would have been a Motion to Strike Objections. The deadline for such a filing was no later than February 19, 2013.¹⁸ Therefore, the Commission should deny Duke's Motion to Clarify the Scope of these Proceedings. Duke's Motion to Strike, which is dependent on its Motion to Clarify, should also be denied.

¹⁶ *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59-EL-AIR, et al. Motion to Change Hearing Schedule (October 24, 2013).

¹⁷ Id. Entry at 2 (November 3, 2005).

¹⁸ Entry at 6 (January 18, 2013).

2. Duke's motions would injure OCC and Duke's consumers that OCC represents.

In the above-cited ruling from Duke's earlier rate case, where Duke's request was denied based on the Attorney Examiners' ruling that Duke filed the wrong pleading, the Attorney Examiner also noted that an "unreasonable burden" would have been placed on other parties from granting Duke's request.¹⁹ In these cases an unreasonable burden and harm to OCC would occur if Duke's Motions would be granted.

OCC's issues were framed by its Objections to the Staff Report, including Objection No. 26, and were known to Duke at the time of the settlement of these natural gas rate cases. In those settlement discussions OCC based its decision on whether to sign the settlement on circumstances as they existed -- including that the time for striking OCC's objections had passed. Had OCC's objections (and supporting testimony) on Duke's requested \$65.3 million for clean-up of MGP real estate still been at risk when the settlement was under consideration for signature, OCC likely would not have settled or would have made a different settlement proposal. Instead, OCC based its decision in the settlement on what was known at the time. And at that time, OCC knew that Duke had not moved to strike OCC's objections by Examiner Pirik's deadline. And thus, OCC's Objections to the Staff Report that challenge the scope and necessity of Duke's investigation and remediation costs of the MGP sites were intact for determination at the evidentiary hearing.

Therefore, the PUCO should deny Duke's Motion to Clarify the Scope of these Proceedings and deny Duke's Motion to Strike OCC's testimony.

¹⁹ *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Electric Distribution Rates*, Case No. 05-59-EL-AIR, et al. Entry at 4-5 (November 3, 2013).

3. Duke's Motions are a unilateral attempt to modify the terms of the Stipulation to favor Duke and disfavor consumers.

On April 2, 2013, the Parties entered into a Stipulation that provided for the opportunity to litigate their positions with regard to the costs associated with the investigation and remediation of the two MGP sites. Two weeks after the Stipulation was signed by the parties, Duke filed its Motions that are a unilateral attempt by Duke to modify the agreed upon terms in the Stipulation. If granted, Duke's Motions would severely limit OCC's ability to litigate its position to the Commission -- a position that was contemplated under the Stipulation.

OCC's litigation position regarding the scope and necessity of Duke's remediation activities was set forth in its Objections to the Staff Report, long before the settlement was signed. In particular OCC's Objection No. 26 stated:

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. For example, the Staff offers no opinion as to whether in-situ solidification might have been adequate and less costly than excavation and soil replacement in a particular area or that excavation to a depth of 35 feet was sufficient to address MGP impacts as opposed to the 40 feet that Duke determined. (Staff Report at 40.)

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). Specifically, OCC objects that the Staff recommended allowing the Utility to collect from customers certain costs of remediations that were performed on the eastern parcel of the East End MGP site (Staff Report Attachment MGP-5), the western parcel of the East End MGP site (Staff Report Attachment MGP-7) and other infrastructure at the East End MGP site (confidential facilities).

Duke's remediation activities far exceeded what was reasonable under the circumstances. Therefore, OCC objects to the Staff's recommendation supporting the Utility's collection from customers for certain investigation and remediation costs that were not just and reasonable.²⁰

OCC's Objection 26 was supported by the Direct Testimony of James R. Campbell.²¹

Now, suddenly and from left field, two and one-half months after OCC's Objections to the Staff Report were filed -- and 56 days after Objections to the Staff Report were due -- Duke argues that the OCC Objections will broaden the scope of the proceeding.²² But the scope of the proceeding has been set for some time already. OCC filed its Objections to the Staff Report on February 4, 2013, and those Objections reflect the OCC positions that are for litigation per the Stipulation.²³ Duke's Motions should be denied.

B. Duke's Motion for Clarification Unlawfully Attempts to Preclude the Commission from a Review of The Scope and Necessity of Duke's Remediation Activities And the Associated Prudence Review that the General Assembly Enacted to Protect Utility Customers.

The Commission is charged in a rate case with the fixation of reasonable rates.²⁴

In cases, such as these proceedings, where the utility seeks an increase in rates, the Commission makes an investigation. R.C. 4909.19 (C) states:

The commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the

²⁰ OCC Objection to the Staff Report at 12 (February 4, 2013).

²¹ Direct Testimony of James R. Campbell at 5 (February 25, 2013).

²² Duke Motions at 1 (April 16, 2013).

²³ Duke Motions at 4.

²⁴ R.C. 4909.15.

application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

The Commission may also review utility management policies and practices to determine if operating and maintenance expenses have been imprudently incurred. R.C. 4909.154 states:

In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission shall consider the management policies, practices, and organization of the public utility. The commission shall require such public utility to supply information regarding its management policies, practices, and organization. If the commission finds after a hearing that the management policies, practices, or organization of the public utility are inadequate, inefficient, or improper, the commission may recommend management policies, management practices, or an organizational structure to the public utility. In any event, **the public utilities commission shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers imprudent.**

The above statutes outline the regulatory scheme in Ohio and the PUCO's obligation to the public in determining just and reasonable rates. Duke, in filing its Motion to Clarify, is attempting to circumvent the PUCO's obligation to investigate and reach an informed decision on the reasonableness and prudence of costs expended by a utility that the utility seeks to collect from its customers.

Duke argues that there is a limit to the PUCO's jurisdiction and to what the PUCO may review in this case, and bases its argument upon the Staff's decision not to

investigate the scope or necessity of Duke's remediation activities in this case. The Utility states:

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 acknowledgement 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 the rate making function.²⁵

But Duke makes no legal argument in support of its position. What Duke claims to be Staff's acknowledgement of a lack of jurisdiction can be explained by the fact the Staff either did not feel it had the necessary expertise internally or the Staff chose not to retain an expert qualified to opine on the scope and necessity of the MGP remediation work performed by Duke. But that does not mean the Staff could not -- with appropriate expertise -- have rendered such an opinion.

More importantly, the Staff's decision not to review the scope or necessity of Duke's remediation expenditures does not mean that the Commission cannot consider such evidence if presented by another party at the evidentiary hearing. This exact point is stated in the Memorandum Contra that the Staff filed in response to the Duke Motions. The Staff states, "The Commission's ability to examine and question the prudence or reasonableness of Duke's MGP remediation expenses is not somehow diminished by the Staff Report."²⁶ The Staff also states, "The Commission has the authority to examine

²⁵ Duke Motion to Clarify at 6 (April 16, 2013).

²⁶ Memorandum Contra Duke Energy Ohio, Inc.'s Motion To Clarify The Scope Of These Proceedings Submitted On Behalf Of the Staff Of The Public Utilities Commission Of Ohio at 2 (April 19, 2013).

Duke's expenditures and determine what should and should not be included in Duke's rates. The Commission has this authority regardless of Staff's position in this case."²⁷

As noted earlier, Ohio law requires that the Commission find rates to be just and reasonable, and costs to be prudently incurred.²⁸ There is nothing in the law that limits the Commission's ability to review information in order to determine that costs were prudently incurred. A review of the scope and necessity of the Utility's remediation efforts is a necessary step to determining if the MGP-related investigation and remediation costs incurred by Duke were prudent.

To that end, within Duke's Motion for Clarification, the Utility deigns to tell the PUCO what can and cannot be examined with regards to the prudence of Duke's remediation expenditures. Here's what Duke believes the PUCO can look at:

[Duke'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's] remediation expenditures. For example, the Commission may examine: the [Utility'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.²⁹

²⁷ Id.

²⁸ R.C. 4909.154.

²⁹ Duke Motion for Clarification at 7 (April 16, 2013).

Duke can argue what it will in its post-hearing Brief. But it is mistaken in endeavoring to limit what the PUCO can review on this issue that could affect consumers up to \$65 million.

Examination of the scope and necessity of the investigation and remediation activities are crucial to a prudence review. For example, the Commission should examine: which remediation technology(ies) was/were employed, why a certain remediation technology was employed while another was rejected, the cost differences between the various technology options, the extent of the remediation activities that were employed, a review of the Voluntary Action Plan (“VAP”) Rules³⁰ to determine if the rules provide for variances that would have allowed Duke to mitigate its remediation costs, and a review of Duke’s decision making whether or not to take advantage of such variances. These are examples of the type of issues the Commission should review, because these are the issues that are central to the determination of prudence.

The PUCO cannot make an adequate determination of the prudence of the actual MGP remediation expenditures under the limitations that Duke argues the Commission should adhere to in its review. Duke states:

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’s] remediation activities exceeded the approach specified by the Ohio VAP Rules.³¹

It is inconceivable for Duke to be arguing that its remediation activities – which can be connected with Ohio’s VAP Rules -- are not an issue the Commission can consider as part of a prudence review for purposes of determining what customers should pay for

³⁰Ohio Adm. Code 3745-300-01 through 3745-300-14.

³¹ Duke Motion for Clarification at 6 (April 16, 2013).

remediation. There is no statutory or case law precedent limiting the PUCO's authority to review prudence as argued by Duke. Rather, the Duke Motions are nothing more than a last-minute attempt to find ways to prevent a ruling that limits what customers will have to pay to Duke—here by constraining the PUCO's authority. Based upon the Testimony of James R. Campbell, Duke's remediation activities far exceeded the approach specified by the Ohio VAP Rules in the amount of between \$57.3 million³² and \$64.1 million – and utility customers should not have to pay for that even if Duke wants to pay for that.³³

Duke argues that “the statutory scheme and regulation 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.”³⁴ In these cases Duke is suggesting the Ohio EPA administers the VAP Rules and the PUCO is not vested with the power to interpret the Ohio VAP Rules or evaluate the propriety of utilities' environmental remediation decisions under the VAP Rules.³⁵

Duke's arguments do not apply. Examples of considering the impact of other regulations on prudence reviews include the Commission's prior determinations in the investigation of the Perry Nuclear Plant.³⁶ In the Perry case, the Commission initiated a proceeding to evaluate the reasonableness (prudence) of the costs incurred and the management decisions made during the construction of Perry Nuclear Generating Unit 1

³² Direct Testimony of James R. Campbell at 38 (February 25, 2013) (\$65.3 million - \$8 million = \$57.3 Million).

³³ Direct Testimony of James R. Campbell at 32 (February 25, 2013) (\$65.3 million - \$1.2 million = \$64.1 Million).

³⁴ Duke Motion for Clarification at 6.

³⁵ Duke Motion to Clarify at 5 (April 16, 2013).

³⁶ *In the Matter of the Investigation into the Perry Nuclear Station*, Case No. 85-521-EL-COI, Opinion and Order (January 12, 1988).

and common facilities. The investigation covered the period of time commencing with the initial decision to construct the Perry Plant through the date of the fuel load on March 21, 1986.³⁷ The total costs under review were \$4.153 billion, and as a result of the Commission's investigation, it was determined that the accounts and records of Cleveland Electric Illuminating, Toledo Edison and Ohio Edison should be restated to eliminate \$628 million of imprudently incurred or unreasonable construction costs from the asset value of the Perry Plant.³⁸ Interestingly the Commission's regulatory scheme did permit it to investigate and to render a determination on prudence of utility expenditure decisions that were undoubtedly made subject to the purview of another agency -- the Nuclear Regulatory Commission.

At its most absurd, the Utility argues that the scope and necessity of Duke's investigation and remediation activities are too complicated and should not be permitted to bog down the hearing. Duke in its Motion to Clarify states:

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 [Utility] 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 [Utility]. Inquiry into these issues would unnecessarily confuse the regulatory standard for recovery of the costs the [Utility] seeks to recover and, moreover, as stated above, would be outside the limits of the Commission's jurisdiction.³⁹

³⁷ Id. at 57.

³⁸ Id. at 58.

³⁹ Duke Motion to Clarify at 7 (April 16, 2013).

Duke's argument is mere obfuscation. Certainly, the Commission can investigate the prudence of a utility's MGP expenditures just like it had the authority to investigate the prudence of the construction of a nuclear facility.

Therefore, the Motion to Clarify should be denied.

C. Duke's Motion to Strike the Testimony of James R. Campbell is an Unlawful Attempt to Prevent OCC from Presenting Evidence on the Imprudence of Duke's Remediation Costs that It Seeks to Charge Customers.

Duke's Motion to Strike the testimony of James R. Campbell is based upon the same arguments that support its Motion to Clarify. For the same reasons as argued above, the Motion to Strike should also be denied.

An additional argument that Duke makes with regard to Mr. Campbell is that he is not a certified professional ("CP") under the Ohio VAP Rules. Duke states:

According to the 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.⁴⁰

It is true that Mr. Campbell is not a CP under the Ohio VAP Rules. However, Mr. Campbell's education (MS in Civil and Environmental Engineering and Ph.D. in Civil and Environmental Engineering)⁴¹ and over thirty years of environmental remediation experience,⁴² specifically in MGP assessment and remediation, make him more than qualified to render opinions on the scope and necessity of MGP remediation.⁴³ Contrary

⁴⁰ Duke Motion to Strike at 5 (April 16, 2013).

⁴¹ Direct Testimony of James R. Campbell at 1 (February 25, 2013).

⁴² Id.

⁴³ All that Mr. Campbell lacks toward being recognized as a CP is attendance at an 8-hour course (that does not require the attendees to pass any type of test) and paying a \$2,500 fee to the State of Ohio.

to Duke's allegations, Mr. Campbell is more than qualified to make determinations whether applicable standards could and should have been met under the VAP at a significantly lower cost. Mr. Campbell's opinions should be considered by the Commission in rendering its decision on the prudence of Duke's remediation expenditures.

Thus, Duke is arguing for a standard that was not established by the Legislature and instead is nothing more than a self-serving means of precluding review of the utility's actions at the MGP sites. Therefore, Duke's Motion to Strike should be denied.

D. Duke's Motions Make No Sense and Should Be Denied.

The key point from Duke's Motions is that Duke does not want the testimony of James R. Campbell to be admitted into the record of these proceedings. Unfortunately for Duke, the Utility could not find a way to accomplish its goal in a manner which is consistent with Commission Rules and the Attorney Examiner's Entry in this case. And the way that Duke has attempted to accomplish its goal -- through a Motion to Clarify and Motion to Strike -- makes no sense.

As the PUCO Staff points out in its Memorandum Contra to Duke's Motion to Clarify, it is not clear what the utility is asking for. The Staff States:

Although Duke suggests that its main concern is the Commission interpreting the VAP Rules, Duke's proposed "clarification" seems to go well beyond addressing its purported concern. Duke asks "the Commission [to] clarify that the propriety of [Duke's] environmental remediation efforts.... is not proper for consideration by the Commission in the above-captioned proceeding." *Id.* at 1-2. How can the Commission avoid considering "the propriety of [Duke's] environmental remediation efforts" while also "scrutiniz[ing] the prudence and reasonableness of [Duke's] MGP remediation expenditures"? Staff does not

believe the Commission can. More importantly, Duke does not explain how it thinks the Commission can.⁴⁴

Finally, Duke's Motion to Clarify accepts that "the Commission can scrutinize the prudence and reasonableness of [Duke's] MGP remediation expenditures." Thus, Duke's Motion is internally inconsistent and self-contradicting. It should be denied.⁴⁵

E. The Commission's Order In Duke's MGP Deferral Case Clarified the PUCO's Authority to Conduct a Prudence Review at the time the Utility seeks authority to collect remediation costs from its customers - and that time is now.

Duke requested authority to defer environmental investigation and remediation costs for the East end and West End MGP sites on August 29, 2009.⁴⁶ At the same time Duke also requested authority to recover carrying charges on the deferral balance.⁴⁷ Duke supplemented its Application on October 29, 2009. Duke's Supplement was in response to an informal request from the PUCO Staff asking for confirmation that the sites were presently used and useful as set forth in R.C. 4909.15.⁴⁸ However, despite Duke's characterization, in the supplement, the PUCO found that Duke was requesting deferral authority to include the environmental investigation and remediation costs associated with sites that Duke no longer owns, "or where the site is owned by Duke but is no longer used and useful in the rendition of gas service to customers."⁴⁹

⁴⁴ Staff Memo Contra at 4 (April 19, 2013).

⁴⁵ Id.

⁴⁶ *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM, Application (August 29, 2009). ("Deferral Case").

⁴⁷ Id.

⁴⁸ Deferral Case, Duke Correspondence (October 29, 2009).

⁴⁹ Deferral Case, Finding and Order at 1 (November 12, 2009).

The OCC (on November 10, 2009) and Ohio Partners for Affordable Energy (“OPAE”) (on September 9, 2009) filed a Motion to Intervene in the case. The PUCO granted both Motions to Intervene on November 12, 2009.⁵⁰ OPAE also filed a Motion to Dismiss arguing that Duke should not be permitted to defer environmental investigation and remediation costs because those costs are not lawfully recoverable in Duke’s jurisdictional natural gas distribution rates.⁵¹

Along with its Motion to Intervene, the OCC argued that Duke should only be permitted to defer expenses that were proven to be reasonable and lawful.⁵² The OCC also recommended that the PUCO impose limitations on the Duke deferrals similar to limitations that the PUCO imposed on Columbia Gas of Ohio, Inc. (“Columbia”) in a similar MGP remediation deferral request proceeding.⁵³

In response to the arguments raised by the OCC and OPAE, the PUCO stated that the deferrals did not constitute ratemaking.⁵⁴ The PUCO also stated:

By considering this application, the Commission is not determining what, if any of these costs may be appropriate for recovery in Duke’s distribution rates. Therefore, the Commission finds that OPAE’s motion to dismiss this case should be denied.⁵⁵

⁵⁰ Id. at 2.

⁵¹ Id.

⁵² Id.

⁵³ Deferral Case, OCC Motion to Intervene at 4-5 (November 10, 2009). See also *In re Columbia MGP Case*, Case No. 08-606-GA-AAM, Entry at ¶3 (September 24, 2008).

⁵⁴ Deferral Case, Finding and Order at 3 (November 12, 2009).

⁵⁵ Id.

The Commission also found that: **“the recovery of the deferral amounts will be addressed in a base rate case proceeding should Duke ever seek to recover the deferrals.”**⁵⁶

Both the OCC and OPAE filed timely Applications for Rehearing on December 11, 2009 and December 9, 2009 respectively. On December 18, 2009 Duke filed a Memorandum Contra both Applications for Rehearing. In an Entry on Rehearing filed on January 7, 2010, the PUCO denied the Applications for Rehearing in their entirety.

As part of the Entry on Rehearing the PUCO noted that “Duke points out that this is only an application for authority to defer these costs so that their recovery can be assessed at a later point in time; this is not an application for recovery of these costs.”⁵⁷ In response to many of the issues raised by the OCC and OPAE in the Applications for Rehearing, the PUCO repeated its finding: **“that deferrals do not constitute ratemaking and approval of Duke’s application is not a determination of what, if any of these costs may be appropriate for recovery in Duke’s distribution rates.”**⁵⁸

Now over three years later Duke is questioning whether the PUCO has the jurisdiction to investigate the scope and necessity of the inclusion of any MGP site environmental investigation and remediation costs in Duke’s distribution rates. But the PUCO already held, in allowing the Duke’s deferrals, that there would be review of the deferrals in the distribution rate proceedings. That time is now.

Therefore, Duke’s Motions should be denied.

⁵⁶ Id. at 3-4. (Emphasis added).

⁵⁷ Deferral Case, Entry on Rehearing at 2 (January 7, 2010). See also Deferral Case, Duke Memorandum Contra at 2-3 (December 18, 2009).

⁵⁸ Deferral Case, Entry on Rehearing at 3, 4, 5, 6 (January 7, 2010). (Emphasis added).

IV. CONCLUSION

Duke's Motion to Clarify is procedurally improper. Duke's recourse was to file a Motion to Strike Objections on February 19, 2013, if it believed that OCC's Objection 26 frames an inappropriate issue under R.C. 4909.19. Duke failed to do so; therefore, Duke filed the wrong pleading and after the deadline for filing the right pleading. As a result, the Motion to Clarify should be denied by the Commission. And Duke's related Motion to Strike James R. Campbell's Testimony should also be denied.

Furthermore, law and reason provides the bases, as explained above, for denying Duke's Motions. For decades the General Assembly's statutes, including R.C. 4909.154, have provided for expansive review of the prudence of utility operations for purposes of protecting Ohioans from paying for inappropriate utility expenditures. The PUCO should proceed to protect the public in these cases by denying Duke's Motions and considering OCC's evidence that Duke's proposal to collect \$65 million from customers is highly excessive.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Larry S. Sauer

Larry S. Sauer, Counsel of Record
Joseph P. Serio
Edmund Berger
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

Telephone: Sauer – (614) 466-1312

Telephone: Serio – (614) 466-9565

Telephone: Berger – (614) 466-1292

sauer@occ.state.oh.us

serio@occ.state.oh.us

berger@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra* by the Office of the Ohio Consumers' Counsel has been served upon those persons listed below via electronic mail this 23rd day of April 2013.

/s/ Larry S. Sauer

Larry S. Sauer
Assistant Consumers' Counsel

SERVICE LIST

Samuel C. Randazzo
Frank P. Darr
Joseph E. Olier
Matthew R. Pritchard
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, Ohio 43215

Thomas McNamee
Devin Parram
Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street 6th Floor
Columbus, Ohio 43215

Douglas E. Hart
441 Vine Street, Suite 4192
Cincinnati, Ohio 45202

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291

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

Amy B. Spiller
Rocco O. D'Ascenzo
Jeanne W. Kingery
Elizabeth H. Watts
Duke Energy Business Services, LLC
139 East Fourth Street 1303 Main
P.O. Box 961
Cincinnati, Ohio 45201-0960

A. Brian McIntosh
McIntosh & McIntosh
1136 Saint Gregory Street, Suite 100
Cincinnati, Ohio 45202

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister LLP
65 East State Street Suite 1000
Columbus, Ohio 43215

Vincent Parisi
Matthew White
Interstate Gas Supply Inc.
6100 Emerald Parkway
Dublin, Ohio 43016

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
PO Box 1008
Columbus, Ohio 43216-1008

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

Amy.spiller@duke-energy.com
Elizabeth.watts@duke-energy.com
Jeanne.kingery@duke-energy.com
Rocco.dascenzo@duke-energy.com
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com
Thomas.mcnamee@puc.state.oh.us
Devin.parram@puc.state.oh.us
brian@mcintoshlaw.com
dhart@douglasehart.com
cmooney2@columbus.rr.com
tobrien@bricker.com
myurick@taftlaw.com
zkravitz@taftlaw.com
bojko@carpenterlipps.com
mohler@carpenterlipps.com
vparisi@igsenergy.com
mwhite@igsenergy.com
mhpetricoff@vorys.com
smhoward@vorys.com
asonderman@keglerbrown.com

AEs: chris.pirik@puc.state.oh.us
Katie.stenman@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/23/2013 4:36:39 PM

in

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

Summary: Memorandum Memorandum Contra Duke's Motion to Clarify the Scope of these Proceedings and Motion to Strike the OCC Testimony of James R. Campbell by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.