

**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
)	

**DUKE ENERGY OHIO, INC.'S REPLY TO MEMORANDA CONTRA FILED BY
STAFF AND OCC TO THE MOTION TO CLARIFY THE SCOPE OF PROCEEDINGS
AND OCC'S MEMORANDUM CONTRA THE MOTION TO STRIKE THE
TESTIMONY OF JAMES R. CAMPBELL**

On July 9, 2012, Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) filed its Application in the above-captioned proceedings requesting recovery, among other things, of approximately \$65.3 million attributable to remediation of former manufactured gas plant (MGP) sites.

On January 4, 2013, the Staff of the Public Utilities Commission of Ohio (Staff) filed its Report of Investigation (Staff Report) in these matters, which noted the following:

The Staff's determination of the reasonableness of the MGP-related expenses was limited to verification and eligibility of the expenses for recovery from natural gas distribution rates. The Staff did not investigate or make any finding or recommendations regarding necessity or scope of the remediation work that Duke performed.¹

¹ Staff Report at 40.

On February 4, 2013, OCC filed objections to the Staff Report related to recovery of MGP site remediation costs. OCC's objections included the following:

OBJECTION 26: OCC objects to the limited scope of the Staff's investigation of the MGP sites. The Staff's investigation was limited to verification and eligibility of the expenses for recovery from natural gas distribution customers. The Staff did not investigate or make any finding or recommendations regarding necessity, urgency or scope of the remediation work that Duke performed. . . . The Staff should have expanded the nature of its investigation to include the urgency, scope and necessity of the remediation activities for both the West End and East End MGP Sites. OCC objects that the Staff did not find that Duke's remediation activities were excessive (and too costly for customers to pay).

Subsequent to filing its objections, on February 25, 2013, OCC filed the Direct Testimony of James Campbell (OCC Witness Campbell), which 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. OCC Witness Campbell testified as follows:

Had the Staff investigated the scope and necessity of the remediation measures implemented by Duke, in my opinion, the recoverable costs would be significantly less. On advice of counsel and my own reading of the provision, I understand that Ohio law (R.C. 4909.154) provides that rates be just and reasonable and that any costs that are determined to be imprudent are not recoverable from customers.³

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 the minimum remediation approach necessary under the VAP Rules as imprudent, and deny recovery the Company's recovery of these amounts.

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

³ *Id.* at 6-7.

On April 2, 2013, Duke Energy Ohio, Staff, OCC, and other parties entered into a Stipulation and Recommendation (Stipulation) in the above-captioned matters which resolved all issues in the cases except for MGP-related cost recovery. On April 16, 2013, the Company filed a Motion to Clarify the Scope of the Proceedings (Motion to Clarify) and a Motion to Strike the Testimony of OCC Witness Campbell (Motion to Strike). On April 19, 2013, Staff filed a memorandum contra the Motion to Clarify. OCC also filed a memorandum contra Duke Energy Ohio's Motions to Clarify and Strike on April 23, 2013.

A. Duke Energy Ohio's Motion to Clarify was timely filed.

OCC contends that the Company's Motion to Clarify should be denied because it is actually a motion to strike OCC's Objection 26 to the Staff Report. OCC's assertion twists the nature of the Motion to Clarify in order to characterize it as untimely filed. As stated in the Company's Motion to Clarify at page 6, "The Commission possesses no powers except such as are conferred by statute."⁴ Duke Energy Ohio filed its Motion to Clarify in order to assist in the identification of issues that may lawfully be examined at the hearing in these matters pursuant to those powers afforded to the Commission by the General Assembly. The Motion to Clarify is most properly identified, therefore, as a jurisdictional motion. It is well settled that jurisdictional questions can be raised at any point during the pendency of a proceeding.⁵ Under this principle, therefore, the Company's Motion to Clarify is timely.

B. Clarification of the scope of the Commission's statutory authority is a jurisdictional, and thus, threshold issue.

⁴ 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).

⁵ See generally *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017 at ¶22 (2012), citing *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218 (1987).

OCC asserts in its memorandum contra the Motion to Clarify and Motion to Strike that the Commission should deny the Company's motions because its success would injure OCC and Duke Energy Ohio's residential customers that OCC represents. OCC further asserts that Duke Energy Ohio's Motion to Clarify is actually an attempt by the Company to modify the terms of the Stipulation. Each of these arguments is without merit. As a threshold matter in response to both of these arguments, as outlined above, the Commission has no power to pass upon those issues outside the realm of its statutory authority. As stated in the Motion to Clarify at 7, the Company filed the motion (as well as the Motion to Strike) in the interests of administrative economy, both at the hearing and arising from the hearing, for all parties involved. Duke Energy Ohio captioned its motion as a Motion to Clarify specifically in order to effectuate that end. It urged the Commission in the motion to provide clarification to the parties that it is not the proper state agency (under statute) to consider and interpret the propriety of the Company's environmental remediation decisions under Ohio EPA's VAP Rules. The Company's remediation decisions and plan are distinguishable and separate from the expenditures incurred in furtherance of those decisions/plan. The Commission has jurisdiction over the determination of whether the expenditures incurred in furtherance of the Company's remediation decisions were prudent and thus recoverable as just and reasonable costs.

C. Admission of testimony on nonjurisdictional issues will prejudicially impact the proceedings.

There is no logical reason for the Commission to receive into the record testimony and opinions on such actions, apart from expenditures incurred to carry out the actions, if the statutory authority to consider the actions has not been provided to the Commission by the General Assembly. Indeed, admitting testimony on nonjurisdictional issues in the course of the proceedings may have a prejudicial impact on the proceedings, as it may displace the true focus

of the proceedings, the question of whether the expenditures made in furtherance of its remediation decisions were just and reasonable. If, as the Company argues, interpretation of the its remediation decisions under the VAP rules is nonjurisdictional for the Commission, examination of those decisions and testimony specifically dedicated to examination of those decisions have no probative value in these proceedings. Accordingly, in the interests of administrative economy and the overall clarity of its record, the Commission should strike testimony on the same.

D. The Commission's statutory authority permits it to examine the prudence of those expenditures Duke has incurred in the implementation of its remediation decisions.

The contentions of OCC and Staff that Duke Energy Ohio is seeking to limit the Commission's statutory authority are misguided and significantly mischaracterize the nature of the Company's argument. The Company has merely asked the Commission to clarify that its examination of the prudence of MGP remediation costs is limited to the scope of the Company's expenditures pursuant to its decision to remediate. The Commission's authority does not dictate the manner in which the Company decides to take remediation action. It extends to a review of the prudence of the expenditures undertaken in furtherance of its decision, and necessarily, to a review of the prudence of such items as the selection of contractors and vendors and the reasonableness of the contracts entered into for the remediation projects. Given the nature of this authority, the Company requests for the Commission to clarify that the scope of its examination at hearing extends to those expenditures undertaken pursuant to the method of remediation upon which it decided.

In view of these circumstances, as supported by the arguments set forth above, Duke Energy Ohio respectfully requests for the Commission to grant its Motion to Clarify the Scope of the Proceedings and its Motion to Strike the Testimony of OCC witness James Campbell.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 26th day of April, 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 Reply to Memoranda Contra Motion to Clarify and Motion to Strike electronically filed by Ms. Elizabeth H Watts on behalf of Duke Energy Ohio, Inc.