

**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
	)	
	)	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	
	)	
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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**REPLY MEMORANDUM  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

On June 6, 2013, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Take Administrative Notice in this proceeding, for allowing additional information to be considered regarding the applicant's request to charge customers \$63 million for the clean-up of 1800's gas plants. On June 11, 2013 Duke Energy Ohio, Inc. ("Duke" or "Utility") filed its Memorandum Contra OCC Motion to Take Administrative Notice ("Memo Contra") and a Motion to Strike. OCC responds to the arguments raised by Duke in its Memorandum Contra. OCC will file a memorandum contra to Duke's Motion to Strike in a separate pleading filed within the timeframe mandated by the Commission's rules.

## II. ARGUMENT

### A. **The Commission Should Take Administrative Notice Of The Information Contained On Duke’s Own Website, to Consider When Ruling on Duke’s Request to Collect \$63 Million from Customers.**

Duke opposes OCC’s Motion because the request by OCC comes 36 days after the conclusion of the evidentiary hearing.<sup>1</sup> Duke’s position lacks support. Indeed, one of the cases cited by Duke is a case where the Court concluded: the evidence must be introduced at hearing **or otherwise brought to the knowledge of the interested parties prior to decision with an opportunity to explain and rebut.**<sup>2</sup> OCC meets those requirements. The Commission has yet to render a decision in this case. And this pleading cycle, and the Reply Brief provides Duke with a reasonable and sufficient opportunity to respond. Therefore, OCC’s Motion is timely.

Duke further noted criteria important to the Court in reviewing PUCO decisions that granted administrative notice. Duke noted what was of importance to the Court by stating: “whether the complaining parties have had an opportunity to prepare and respond to the evidence, and they are not prejudiced by its introduction.”<sup>3</sup> The information Duke is complaining about is information that Duke placed on its own web site to offer responses to frequently asked questions (“FAQ”). This is information that Duke is very familiar with, and will have no problem preparing for and responding to. In fact, Duke has included in its Memo Contra a response to the information contained in its FAQs.<sup>4</sup>

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<sup>1</sup> Memo Contra at 2.

<sup>2</sup> Memo Contra at 3, citing *Allen, DBA J&M Trucking, et al. v. Pub. Util. Comm.* (1988), 40 Ohio St. 3d 184, 1988 Ohio Lexis 439.

<sup>3</sup> Memo Contra at 3, citing *Canton v. Pub. Util. Comm.* (1980) 63 Ohio St. 2d. 76, 407 N.E. 2d. 9.

<sup>4</sup> Memo Contra at 6.

Therefore, Duke will not be prejudiced by the PUCO taking administrative notice of its admissions contained in Duke's FAQs.

Duke's allegation that it has been prejudiced by OCC's Motion cannot be validated. Duke argues that had the information been presented at hearing Duke "may well have offered rebuttal testimony." Interestingly, any such potential rebuttal testimony would have been rebutting Duke's own admissions. And, as Duke acknowledges, a reference to Duke's website was already in Ms. Bednarcik's direct testimony.<sup>5</sup>

"The Commission has routinely limited rebuttal to testimony that a party **could not have presented as part of their direct case.**"<sup>6</sup> Accordingly, it is unlikely that Duke would have been permitted to file rebuttal testimony if Duke's admissions were introduced by OCC at the hearing.

**B. Duke is Not Prejudiced Because It Will Have A Reasonable and Sufficient Opportunity To Explain How The Information On Its Own Website Is Consistent With The Company's Testimony.**

Duke argues that acceptance of this information after the closing of the record would be unfairly prejudicial to Duke.<sup>7</sup> However, a good deal of Section C of Duke's Memo Contra is devoted to Duke's response to the information, and to its attempt at explaining why the information is true as stated.<sup>8</sup> Duke can further explain to the Commission its position on the information obtained in the FAQs in its Reply Brief. The information can then go to the weight of the evidence. Such a result would also be

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<sup>5</sup> Memo Contra at 4.

<sup>6</sup> *In re Ameritech Ohio's Economic Costs*, Case No. 96-922-TP-UNC, 2001 WL 280125 (January 29, 2001 Entry, ¶ 8) (Emphasis added.).

<sup>7</sup> Memo Contra at 5.

<sup>8</sup> Memo Contra at 6.

consistent with the hearings where objections were over-ruled in favor of having an inclusive record before the Commission.<sup>9</sup>

**C. Ohio Rule of Evidence 201 Is Applicable To The Admission Of This Information Because The Information Is Not Subject To Dispute.**

Duke alleges that OCC has not met the elements of Rule 201.<sup>10</sup> Duke asserts that the noticed information is the subject of the dispute in these cases.<sup>11</sup> However, under Rule 201 of the Ohio Rules of Evidence, judicial notice may be taken of any adjudicative fact that is not subject to reasonable dispute.

The question for the PUCO: is the information that is contained in Duke's FAQs, information that is subject to dispute? The answer to that question should be no. Duke prepared this information and placed the information on its own web site. When an adverse party such as OCC then seeks administrative notice, such information is acceptable to notice in the case when the information itself is not in dispute. Duke wants to rewrite the Rule to exclude such information from the record when the information is to be used to resolve the core dispute in the case. Duke's position is mistaken. Accordingly, OCC's Motion should be granted.

**III. CONCLUSION**

The Commission should grant OCC's Motion to take Administrative Notice of the information contained in the Frequently Asked Questions from Duke's own website.

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<sup>9</sup> For example, See Tr. Vol. II at 538 (April 30, 2013); see also Tr. Vol. III at 805-807 (May 1, 2013)..

<sup>10</sup> Memo Contra at 6.

<sup>11</sup> Memo Contra at 6.

Respectfully submitted,

BRUCE J. WESTON  
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, OH 43215-3485  
614-466-1312 (Telephone-Sauer)  
614-466-9565 (Telephone-Serio)  
614-466-1292 (Telephone-Berger)  
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 *Reply Memorandum by the Office of the Ohio Consumers' Counsel* was served via electronic mail upon the following persons on this 18th day of June 2013.

*/s/ Larry S. Sauer*\_\_\_\_\_

Larry S. Sauer  
Assistant Consumers' Counsel

**SERVICE LIST**

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

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

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

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

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

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

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

Kimberly W. Bojko  
Mallory M. Mohler  
Carpenter Lipps & Leland LLP  
280 North High Street  
Suite 1300  
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.com @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  
mswhite@igsenergy.com  
mhpeticoff@vorys.com  
smhoward@vorys.com  
asonderman@keglerbrown

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

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Summary: Reply Reply Memorandum by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.