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
COLUMBIA GAS OF OHIO, INC.'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

On June 6, 2013, 122 days after the deadline for parties to file a Motion to Intervene in this case,[1] Columbia Gas of Ohio, Inc. ("Columbia") asked to enter its own legal arguments in this Duke Energy case that affects Duke's customers. This Duke case is about Duke's request to increase its customers' rates (and not Columbia's rates) by $63 million for cleanup of its (Duke's) long-closed manufactured gas plants ("MGP"). Columbia moved for leave to file an Amicus Curiae Brief and Reply Brief. Columbia has filed both briefs while it awaits a ruling by the Public Utilities Commission of Ohio

[1] Entry at 3 (January 10, 2013).

("Commission" or "PUCO"). The PUCO should hear (and will hear) Columbia's arguments when Columbia files a case to charge its customers for MGP costs. Additionally, Columbia began to address its circumstances on this issue in Columbia's accounting deferral case.

Through the filing of its Amicus Curiae Briefs, Columbia is attempting to influence the decision in a case involving a different utility (Duke) and the different utility's customers. Columbia has taken the unusual step of interjecting itself in the Duke case because of what Columbia perceives as the potential precedent that the current Duke case could have on a future Columbia rate case. Columbia stated:

> **Columbia's future ability** to recover those deferred environmental investigation and remediation costs is now threatened by the extraordinary and erroneous legal positions that the Commission Staff has taken in this case. (Emphasis added)[2]

Columbia's justification for the Amicus Curiae Briefs also includes the claim of:

> Columbia's **strong interest** in the Commission's determination of the recoverability of deferred environmental remediation expenses, (Emphasis added).[3]

In the similar context of intervention, the PUCO has ruled that the claimed interest of protecting against the setting of precedent was not sufficient grounds for granting intervention in a case. For example, Columbia filed a Motion to file an Amicus Brief in a Vectren Energy Delivery of Ohio ("Vectren") Gas Cost Recovery ("GCR") proceeding. The PUCO denied Columbia's Motion.[4]

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[2] Columbia Motion at 3 (June 6, 2013).

[3] Columbia Motion at 4 (June 6, 2013).

[4] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Delivery of Ohio, Inc. and Related Matters*, Case No. 02-220-GA-GCR, Entry on Rehearing at 3 (August 10, 2005) ("Vectren GCR Case").

Like the current case, the Vectren GCR Case (where Columbia filed the similar Motion) involved an argument of whether an issue had been or would be resolved in a prior case and if the issue was ripe for review in the then-current case. In the Vectren GCR Case, Columbia argued that the issue of a propane sale, reserve margin and asset management should have been argued in an earlier Long Term Forecast Report ("LTFR") case. Columbia's position was that absent a positive finding to the contrary, the PUCO must have found that Vectren's earlier LTFR cases were reasonable and thus addressed the propane, reserve margin and asset management issues.[5]

Columbia's position in the Vectren case is similar to the argument raised by Duke in this case that the PUCO's granting a deferral for MGP-related investigation and remediation costs in the Duke Deferral case meant that the issue had been resolved. The PUCO denied Columbia's Motion in the Vectren GCR Case. And the PUCO rejected all of Columbia's arguments, in part, because of the late stage of the proceeding (at the rehearing stage).[6] The same reasoning applies here. This case has been pending over 12 months, and with the filing of Reply Briefs is now ripe for a PUCO decision.

Similarly, in a FirstEnergy standard service offer case, Duke filed for intervention. Duke included in its Motion that it was interested in the potential precedent that might be established in that case.[7] In Duke's Reply to OCC's Memorandum Contra, Duke also stated an additional interest in the case that warranted the PUCO granting

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[5] Id.

[6] Id.

[7] *In the Matter of the Application of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply*, Case No 09-906-EL-SSO, Duke Motion to Intervene at 3 (November 13, 2009).

Duke's intervention. While granting Duke's intervention, the PUCO Entry stated: "**Although OCC is correct that an interest in potential precedent alone is insufficient grounds for intervention**, Duke has stated a sufficient interest as a potential market participant in any auction resulting from this proceeding."[8] Here, Columbia is only appearing in these cases to protect precedent. Thus, the PUCO prior rulings against participation to simply protect against precedent should be applied to deny Columbia's participation as an amicus filer.[9]

In addition to this precedent that supports denial of Columbia's Motion, there are other reasons to deny Columbia's Motion. First, Columbia erroneously claims that its future ability to recover deferred environmental investigation and remediation costs is 'now' threatened. In making this claim, Columbia seems to be implying that its ability to recover those costs was somehow not previously at risk. Such an assumption is wrong. Columbia has always and will continue to be at risk for recovery of MGP-related environmental investigation and remediation costs until such time as the PUCO reviews their recoverability in a future rate case. In its deferral accounting Entries, the PUCO has been quite clear on this point to Duke and, as follows, to Columbia:

> (10) Since the requested authority to change Columbia's accounting procedures does not result in any increase in rate or charge, the Commission approves this application without a hearing. **The recovery of the deferred amounts will be addressed in Columbia's next base rate case proceeding**. As the

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[8] *In the Matter of the Application of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply*, Case No.09-906-EL-SSO, Entry at 3 (December 11, 2009). (Emphasis added).

[9] *In the Matter of the Application of Columbus Southern Power for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand (October 3, 2011).

> Supreme Court has previously held, deferrals do not constitute ratemaking. See, e.g., Elyria Foundry Co. v. Pub. Util. Comm., 114 Ohio St.3d 305 (2007).
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> ORDERED, **That nothing in this Entry shall be binding upon this Commission in any subsequent investigation or proceeding** involving the justness or reasonableness of any rate, charge, rule, or regulation. [10] (Emphasis added).

The PUCO should also deny Columbia's Motion because granting the Motion would prejudice OCC, OPAE, the PUCO Staff, and other parties in this Duke rate case. Granting Columbia's Motion would enable Columbia to participate in the proceeding without being subject to the same scrutiny that other parties were subjected to. For example, while parties to the Duke rate case were subjected to discovery, including depositions of subject matter experts and witnesses, as a non-party Columbia was not. Had Columbia moved to intervene in a timely manner or made known its request to file an Amicus Brief with earlier timing, then Columbia personnel may have been deposed (as a party or non-party). OCC and other parties could have elicited information about what would be Columbia's opinions and positions and what facts Columbia had in connection with those opinions and positions that now would affect the potential for Duke to collect $63 million (and more later) from Duke's (not Columbia's) customers. For example, information regarding Columbia's ownership of the Duke MGP sites from 1909 to 1946[11] (and Columbia's liability) could have been further explored, among other things.

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[10] Columbia Deferral Case, Entry at 3 (September 24, 2008).

[11] OCC Ex. No. 7 (OCC INT No. 15-577).

Additionally, the PUCO denied a motion to file an Amicus Curiae Brief in a case under similar circumstances to Columbia's filing. In that case, First Energy Solutions requested the right to file an Amicus Curiae Brief. The PUCO denied the motion because the movant raised no issues that had not been raised by other parties.[12]

Similarly, Columbia's Motion should be denied because Columbia has offered nothing new or different than the arguments made by Duke. Columbia argues that the Staff incorrectly interpreted R.C. 4909.15(A)(1) and R.C. 4909.15 (A)(4).[13] Columbia argues that R.C. 4909.15 (A)(1) is subject to a different standard than R.C. 4909.15 (A)(4). Columbia argues that expenses under R.C. 4909.15 (A)(4) only need be prudently incurred and that they are not subject to the used and useful standard.[14] These are the same argument that Duke makes in its Brief. Thus, Columbia adds nothing to the record and its participation should be denied.

Further, the PUCO stated in its deferral accounting Entry for Columbia that the recoverability of Columbia's environmental investigation and remediation costs will be determined in Columbia's next rate case.

Finally, if there was to be an allowance of Amicus Briefs, then the amicus process should have been noticed to all Ohio stakeholders interested in this issue. There are a number of customer organizations with concerns about MGP costs. They may have been interested in an opportunity to comment on the Duke case for purposes of affecting the outcome as that outcome may apply in Columbia's (or other utilities') future cases on

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[12] *In the Matter of the Application of Columbus Southern Power for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand (October 3, 2011).

MGP costs. That process didn't happen, in part because Columbia waited until the day briefs were due in these Duke cases before it moved for leave to file its Amicus Curiae Briefs.

For all these reasons, Columbia's motion to submit its Amicus Curiae Brief and Reply Brief should be denied in this case where Duke's customers are subject to Duke's request (not Columbia's request) to charge them $63 million for the clean-up of manufactured gas plants built in the 1800s and closed for service decades ago in the 1900s.

Respectfully submitted,

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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 21st day of June 2013.

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Summary: Memorandum Memorandum Contra Columbia Gas of Ohio, Inc.'s Motion for Leave to File Amicus Curiae Brief and Reply Brief by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Serio, Joseph P. Mr.