

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matters of the Applications of	:	Case No. 14-375-GA-RDR
Duke Energy Ohio, Inc., for	:	Case No. 15-452-GA-RDR
Adjustments to Rider MGP Rates.	:	Case No. 16-542-GA-RDR
	:	Case No. 17-596-GA-RDR
	:	Case No. 18-283-GA-RDR
	:	Case No. 19-174-GA-RDR
	:	
In the Matters of the Applications	:	Case No. 14-376-GA-ATA
of	:	Case No. 15-453-GA-ATA
Duke Energy Ohio, Inc. for Tariff	:	Case No. 16-543-GA-ATA
Approval.	:	Case No. 17-597-GA-ATA
	:	Case No. 18-284-GA-ATA
	:	Case No. 19-175-GA-ATA

**INITIAL BRIEF
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**On behalf of the Staff of
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INTRODUCTION

The Commission's order in *In Re Duke Energy Ohio* Case Number 12-1685 (Rate Case Order) limited the kinds of costs that could be included in the MGP rider. Costs related to work in the Ohio River and those associated with the West of west (WOW) parcel were never authorized for inclusion. Staff's investigation was focused on assuring that only properly authorized costs were included for recovery. This effort was greatly hampered by Duke Energy Ohio's (Duke or Company) decision to record costs, not with reference to the parcel where the work was performed as indicated by the Rate Case Order, but rather with reference to a byzantine work plan that even Duke's own witness

found inscrutable. This decision by Duke forced the Staff to allocate costs based on the informed judgment of Staff witness Crocker who was the only participant in the case who reviewed every one of the literally thousands of invoices that were provided over the eight years at issue in these cases. The end result of this exhaustive and exhausting review is the Staff recommendation. It is the only analysis which implements the Commission's Rate Case Order and, as a result, should be adopted by the Commission.

A. The Rate Case Order does not authorize recovery of costs associated with work in the Ohio River or on the WOW parcel.

1. WOW

The order in Duke's last rate case did not authorize recovery of remediation costs associated with the WOW property. The Commission could not have been more clear.

With regard to the WOW property the Commission said:

Thus, when applying the requirement for recovery set forth in R.C 4909.15(A)(4), we are not willing to entertain Duke's unsubstantiated request for recovery of costs related to property has not been shown on the record in these cases to provide, either in the past or in the present, utility services that caused the statutorily mandated environmental remediation.

In re Duke Energy Ohio Case number 12-1685-GA-AIR Opinion and Order November 13, 2013 at 60. (Rate Order). The Commission refused to allow recovery of costs associated with the WOW property. Lest there be any doubt, the Commission said it again:

However, the Commission determines that Duke's request to recover the costs related to the purchased parcel located west of the East End site, the costs incurred in 2008 for the West End site, and all carrying charges should be denied.

Rate Order at 73. Costs associated with the WOW property were denied.

As it happens the specific costs sought for recovery in that instance were acquisition costs to repurchase the property but this is of no consequence. The Commission's point was that the property has never been used to provide service and therefore did not meet that statutory standard for recovery. If a cost is not statutorily permitted for recovery, the utility cannot recover it. That is the situation with the WOW property. Costs associated with the WOW property should never have been deferred. A primary purpose of the Staff's review in these cases was to find improperly included items and remove them. Staff has endeavored, under very difficult circumstances, to just do that.

2. Ohio River

Deferral of remediation costs associated with the Ohio River was never contemplated in the Rate Order. At no point in the seventy-nine pages of the Rate Order does the Commission ever indicate, or even mention the possibility of, recovery of remediation costs in the Ohio River. The only actual reference to the river itself¹ is the Commission's observation that the river is "...adjacent to the sites..." Rate Order at 41. The entire Rate Order is consistent with this. It is observed that the entire central parcel is used for utility service and then there is a discussion of the structures and facilities that

¹ Ignoring the several references to pipelines which pass under the river. *See* Rate Order at 38 and 43 for examples.

are on the land. Rate Order at 34. No mention is made of the river. It was not seen as part of the parcel. Again, when the WOW parcel is discussed it is described as:

Currently, Staff describes the property as a large vacant field with no visible structures or underground facilities that are used and useful in providing natural gas distribution service.

Rate Order at 42. There is no mention of the river because dry land was all that was considered. Similarly, the eastern parcel is described as:

Staff offers that a visual inspection of the eastern parcel reveals that it is a 9.7-acre vacant field without any visible permanent structures, except for a boundary fence.

Rate Order at 38. The description does not mention the river because it was not contemplated that the river was part of the parcel in question. Thus, it is clear that the Commission never authorized, or even considered, recovery of remediation costs associated with the Ohio River.

3. Summary

Thus, the Commission specifically barred recovery of costs associated with the WOW parcel and did not authorize recovery of any work in the Ohio River. These considerations, in large part, formed the structure of the Staff's review.

B. The Staff's Audit.

The Staff faced two significant problems in performing the audit in these cases, one inherent, one artificial.

The basic problem in this case is simply the vast size of the undertaking. The project has continued for many years, generating thousands of invoices. Indeed, the Staff witness appears to be the only individual who has followed the regulatory treatment of this undertaking from the beginning. This complexity is inherent and unavoidable.

The second significant problem was avoidable. The Company did not separately record expenditures for activities associated with WOW or the Ohio River despite having been requested to do so on multiple occasions. Staff Ex. 8 at 4. It appears that initially the Company did remove some WOW costs, see Staff Exhibits 4, 5, and 7, but then stopped doing so. The Company's stated rationale for not recording this information in a way so as to allow a review was that recording the information in this way was impractical. Staff Ex. 8 at 5. The claim is not particularly believable. The Company itself admits that it chose not to segregate these costs. Tr. I at 225. The contractors were simply never asked to record on their invoices if they were performing work on the WOW parcel or in the river. Had this simple request have been made, this case would be vastly simpler. However, this did not happen.

Further complicating the audit in this case was the obtuse language used in the Company's record keeping. WOW on an invoice does not always mean work on the WOW parcel. Tr. I at 271. Examples of the confusing nature of the recordkeeping abound. Tr. I at 196-7, 273-4. Sometimes it is just inexplicable, an iron tar tank isn't iron. Tr. I at 201.

Despite the Company's failure to perform this relatively simple record keeping, the Staff proceeded with its review.

The Staff's review was extremely extensive. In addition to reviewing all of the thousands of invoices and tens of thousands of pages of documentation that were provided, the Staff reviewed vendor contracts, engineering maps and timelines for construction. Staff Ex. 8 at 5.

Regarding the WOW parcel it was sometimes possible to, by examining the types of work being performed, to determine if that work was associated with the WOW parcel. Staff referred to such costs, where a direct relationship to the WOW parcel could be established, as "direct costs". Staff Ex. 8 at 5. Staff was able to do this analysis despite the use of remarkably confusing terminology. TR. I at 273-4. Such circumstances of clear identification were the minority however. Many instances were costs that were incurred that could not be identified with any specific parcel. *Id.* These sorts of expenditures were referred to by Staff as "indirect costs".

The work in the Ohio River presented unique difficulties. Only rarely was work in the river specifically identified. A more common reference was to work that was "off-site". Staff Ex. 8 at 7. Off-site work appeared to almost always be in the Ohio River. *Id.* Although, to add another layer of confusion, in the Company's view, WOW denoted on an invoice does not always mean work was performed on the WOW parcel. Tr. I at 271. With this understanding, the Staff referred to work that could be identified with either the river or off site as direct costs. Recognizing that there were additional costs that impacted

the river but could not be specifically identified, the Staff termed these items “indirect costs” in a similar fashion to the WOW parcel.

To determine its recommended disallowance the Staff needed to total the direct and indirect costs associated with the WOW and Ohio River work. For the direct costs, this was relatively simple. All that was needed was to total the identified costs. For the indirect costs, it was necessary to develop an allocation. Staff did this using informed judgement. Having reviewed all of the costs for all the activities and the various contracts, it was possible to develop an understanding of the nature of the work and create an estimate of the proportion that would have been related to either the Ohio River or the WOW parcel. Staff chose to use this allocation method in an effort to be fair to the Company. The alternative would have been to recommend disallowance of all the costs as being unauditable. This seemed too harsh.

Having discussed the Staff’s analysis, we must now turn to Company witness Bachand’s efforts. The Company witness attempted to perform a similar analysis to the Staff’s. This is somewhat surprising as the witness first indicated that such an analysis was not feasible and then attempted it. Tr. I at 224. The effort was not successful.

Although Company internal costs associated with WOW and Ohio River work existed, they were not considered in the Company analysis. Tr. I at 221. Site wide expenditures, which would have included some impact on the river and WOW, were not considered. Tr. I at 224, 245. Ohio River costs were not identified. Tr. I at 241. 250. Many errors were identified. Tr. I at 204, 257, 260, 262, 265. In sum, the record shows

that the Company witness's analysis cannot be relied upon. It contains both conceptual errors (failure to include costs which must be allocated and any costs associated with the river) and mechanical (simple errors of including items the witness meant to exclude or vice versa). It should not be relied upon.

The Staff does not mean to suggest that the Company witness was in some way not genuine. Rather the nature of the task that the Company witness undertook was simply impossible. The Staff analysis began at the beginning and it had years to cut through the obtuse and inconsistent terminology. The Company witness only came to the situation later and he only had a few months to use. The failure of the Company witness's analysis only serves to underscore the great difficulty created by the company's choice, and it was the Company's choice Tr. I at 225, not to segregate the costs. The shortcoming is not the witness's, it is the result of the situation that the Company created.

In sum the Staff's analysis is the only thorough, reliable audit of the costs at issue here. It was developed over the course of the entire period and is the only analysis which reflects the Rate Case Order. It should be adopted by the Commission.

C. Miscellaneous Matters

While the foregoing discussion covers the bulk of the monies at issue in this case there are several other matters that do not relate to the WOW parcel or the Ohio River. These would be certain disallowances recommended for the western site and the insurance proceeds.

In addition to recommending disallowances for work in the Ohio River at the western site, the Staff also recommends disallowing costs for the relocation of an electric substation. Staff Ex. 1 at 5, Staff Ex 2 at 6. This is not remediation work at all. The construction of this electric plant does nothing in terms of remediating the environmental issues at the site. Rather need for this relocation is driven by the replacement of the Brent Spence bridge. If the bridge were not to be replaced, nothing would need to move. Further it is a capital investment for the electric side of the Company. The regulatory treatment of these amounts should be considered in the Company's next electric base rate case, not here.

The Staff also recommends the disallowance of the cost to dispose of some previously solidified soil. Tr. IV at 968-9. The logic here is compelling. Ratepayers have already paid to remediate. The soil was solidified to achieve the remediation and ratepayers paid for that. Rate payers should not have to pay again to re-remediate this same soil. Once is enough.

The final matter is the disposition of the insurance proceeds. The Company has been successful in obtaining approximately \$55 million net of costs from insurance carriers related to these environmental costs. The Commission has already determined that these funds are to be credited *in toto* to ratepayers. It said:

...any proceeds paid by insurers...for MGP investigation and remediation should be used to reimburse the ratepayers...[which] should be net of the costs of litigation and attorney fees should be reimbursed to customers. The insurance proceeds should not be allocated based on any disallowances.

Rate Order at 67. Thus, it is clear that ratepayers are entitled to all of the money. In Staff's view the ratepayers should be credited for these amounts currently. It is not reasonable to wait for the conclusion of this project. There is simply no way to know when this project will be completed. No estimate is available. As the Staff witness has pointed out, ratepayers have already paid the full deferral authorized in the Rate Order of \$55 million. Staff Ex. 8 at 12. The insurance proceeds should be credited against any recoveries authorized in this case. That is the only way to make the Commission's Rate Case Order meaningful.

CONCLUSION

Staff has presented the only thorough on-going review of the costs sought for recovery in these cases. Staff has reviewed each invoice, every contract, every work timetable across the entire timespan of these cases. Despite the very serious problems created by the way in which the Company maintained its records, the Staff was able to implement the Commission's Rate Case Order and eliminate costs that were not authorized for recovery. The Staff's recommendation should be adopted by this Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Initial Brief**, submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via electronic mail upon the below parties of record this 17th day of January, 2020.

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1/17/2020 2:01:52 PM

in

Case No(s). 14-0375-GA-RDR, 15-0452-GA-RDR, 16-0542-GA-RDR, 17-0596-GA-RDR, 18-0283-GA-RD

Summary: Brief electronically filed by Mrs. Tonneta Y Scott on behalf of PUCO