

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)	
Duke Energy Ohio, Inc., for an Increase in)	Case No. 21-887-EL-AIR
Electric Distribution Rates.)	
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Tariff Approval.)	Case No. 21-888-EL-ATA
In the Matter of the Application of Duke)	
Energy Inc., for Approval to Change)	Case No. 21-889-EL-AAM
Accounting Methods.)	

**MEMORANDUM CONTRA DUKE’S MOTION TO STRIKE OCC’S
OBJECTIONS
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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I. INTRODUCTION

This is a time of soaring energy prices, rising inflation, and increases in prices for other essentials needed by Ohio families. So it's really bad timing by Duke Energy Ohio, Inc. ("Duke") that it is seeking a \$54.7 million or 32% annual increase in its monthly bills for electric distribution service to 640,000 Cincinnati-area consumers. For a typical residential consumer (using 1,000 kWh per month), the monthly distribution charge will increase from \$37.48¹ to \$49.44.² That's an additional \$144 per year in distribution charges for these families. But OCC expects to recommend a rate *decrease* for Duke consumers of at least \$1.4 million. OCC's rate decrease proposal will be based on various ratemaking adjustments.

¹ The amount is calculated from a current \$6 in Consumer Charge and \$0.031482/kWH in energy charge. See Application Schedule E-4.1.

² This amount is calculated from \$12 in Consumer Charge and \$0.037438/kWH in Energy Charge proposed in the Application. *See* Application Schedule E-4.1.

Further, OCC is recommending a \$4.5 million bill-payment assistance program for at-risk Ohioans in Duke's service area. Incredibly, Duke claims in its motion that OCC's proposal is "irrelevant" to Duke's rate increase request and that the PUCO should deny OCC its right to present the proposal at the hearing.³ Duke's proposal to deny OCC its opportunity to be heard on consumer assistance is as unlawful as it is heartless. Shame on Duke.

The PUCO Staff recommends a rate increase between \$1.9 million and \$15.3 million. The PUCO Staff's calculation is based on allowing Duke a profit of between 8.84% to 9.85%.

Now Duke seeks to strike from consideration in this case several of OCC's consumer protection Objections to the PUCO's Staff Report. Duke is seeking to prevent the PUCO from even hearing OCC's proposals for consumer protection. Duke's Motion to Strike is a baseless misuse of the process and should be rejected.

The Staff of the Public Utilities Commission of Ohio ("PUCO") filed its Report of Investigation ("Staff Report") in this case May 19, 2022. On June 21, 2022, OCC filed Objections to the Staff Report. Duke moves to strike OCC Objections Nos. 5, 16, 20, 26, 27, 28, and 29. However, OCC's Objections fully comply with R.C. 4909.19 and O.A.C. 4901-1-28(B), and they are issues to be dealt with at hearing and through briefing, not through a motion to strike the objection.⁴

Indeed, R.C. 4909.19 requires the PUCO to respond to objections by "tak[ing] all the testimony with respect to the application and objections which may be offered by any

³ Duke Motion to Strike at 8.

⁴ See also *In the Matter of the Application of Water and Sewer LLC for an Increase in its Rates and Charges*, Case No. 08-227-WS-AIR, Opinion and Order, ¶ 6 (April 14, 2009).

interested party.” Thus, Duke’s motion to strike OCC’s objections is a violation of law that would wrongly deny OCC its rightful opportunity to be heard. Moreover, the PUCO’s rule on objections is subordinate to the statute.

Duke’s motion to strike is, in essence, a request that the PUCO prejudice the merits of the issues in OCC’s objections. Duke seeks to silence OCC’s advocacy for important consumer protection issues relevant to Duke’s application to increase the rates consumers pay. Duke’s Motion to Strike should be denied.

II. RECOMMENDATIONS

The PUCO should deny Duke’s Motion to Strike OCC’s objections to the Staff Report. Under O.A.C. 4901-1-28(B), “objections may relate to the findings, conclusions, or recommendations contained in the report, or to the failure of the report to address one or more specific items. All objections must be specific.”⁵ Objections that fail to meet this requirement *may* be stricken.⁶ Thus, as the PUCO has previously explained, “the only requirement as to objections are that they must related to findings, conclusions, or recommendations in a staff report, or must relate to the failure of the staff report to address an item and must be specific. The intrinsic merit, or lack of merit, of any particular objections must be dealt with following the evidentiary hearing on the matter, not by striking it prior to that time.”⁷

⁵ Ohio Admin. Code 4901-1-28(B).

⁶ *Id.*

⁷ *In the Matter of the Application of Water and Sewer LLC for an Increase in its Rates and Charges*, Case No. 08-227-WS-AIR, Opinion and Order, ¶ 6 (April 14, 2009); *In the Matter of the Application of Water and Sewer LLC for an Increase in its Rates and Charges*, Case No. 03-318-WS-AIR, ¶ 11 (November 10, 2003).

This precedent was recently affirmed in the Ohio Power Company (“AEP”) rate case, when the Attorney Examiner denied similar motions to strike, stating that the issues “should be resolved by the [PUCO] following an opportunity for the parties to offer evidence in briefs.”⁸

OCC’s Objections plainly satisfy the standards in O.A.C. 4901-1-28(B). And tellingly, Duke does not seek to strike OCC’s objections on the grounds that they lack specificity in violation of O.A.C. 4901-1-28(B). Section II.A. of Duke’s motion addresses the O.A.C. 4901-1-28(B) specificity requirement and moves to strike only objections by the Retail Energy Supply Association (“RESA”), One Energy Enterprises, Inc. (“One Energy”), and the City of Cincinnati (“City”).⁹

Duke instead wrongly claims that OCC Objection Nos. 5, 26, 27, 28, and 29 to the Staff Report are irrelevant to Duke’s application to increase the rates consumers pay.¹⁰ Additionally, Duke seeks to strike OCC Objection Nos. 16 and 20, on the novel (and erroneous) ground that they provide improper support for the Staff Report.¹¹ These arguments have no merit.

OCC’s specific objections that Duke seeks to strike are as follows:

- OCC Objection No. 5: “The Staff Report harms consumers by failing to reflect gains on the disposition of property”;
- OCC Objection No. 26: “The Staff Report harms consumers because it fails to require Duke to provide shopping customers’ billing information to show a comparison to what they would pay under a standard service offer. The Staff Report also fails to perform an analysis of the consumer contact

⁸ *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 20-585-EL-AIR, et al., Evidentiary Hearing Transcript, Vol. I, 23:3-5 (May 12, 2021) (Attorney Examiner ruling denying Joint Motion to Strike of OMAEG and Kroger).

⁹ Duke Motion to Strike, at 5-8.

¹⁰ *Id.* at 8-12, 19.

¹¹ *Id.* at 20-21.

information that is collected through its call center, and the supplier rate information it collects on the Energy Choice Ohio website to determine if improvements in Duke's Choice Program are necessary to help consumers reduce their energy costs";

- OCC Objection No. 27: "The Staff Report harms consumers by failing to recommend that Duke provide consumers with more options to opt-out of having their personal account information included on eligible customer lists provided to competitive retail electric service ("CRES") providers";
- OCC Objection No. 28: "The Staff Report potentially harms consumers by failing to evaluate the sufficiency of Duke's Data Privacy Policy in protecting consumers' personal information from unauthorized or inadvertent disclosure";
- OCC Objection No. 29: "The Staff Report fails to protect Duke's consumers by not proposing adequate consumer protections, including bill-payment assistance for energy justice and equity, that can make electric services more affordable for all consumers and protect at-risk, low-income, working poor, and fixed-income senior Ohioans from potential loss of electric services";
- OCC Objection No. 16: "The Staff Report harms consumers by failing to recommend that Duke be prohibited from modifying its existing riders or proposing new riders as part of this base distribution rate case"; and
- OCC Objection No. 20: "The Staff Report harms consumers by failing to recommend that Duke make every available effort with its authorized vendors to reduce the level of the convenience fees charged to consumers. The PUCO should ideally prohibit charging convenience fees to consumers."

A. OCC's objections should not be stricken as they relate to Duke's application to increase rates to consumers, and they should be considered in this case through testimony and the evidentiary hearing, consistent with R.C. 4909.19.

Duke claims that OCC's objections would improperly expand the scope of this rate case by injecting irrelevant or "extraneous" issues.¹² To support its motion to strike OCC's objections, Duke relies on the Supreme Court of Ohio's ("Court") decision in

¹² *Id.* at 8-9.

CEI.¹³ In *CEI*, the PUCO ordered changes to various regulations in the company's existing tariff, which had not been placed in issue by the company in its application.¹⁴ The Court held that "when considering an application for a rate increase filed by a public utility, the Public Utilities Commission may not extend its inquiry into 'matters not put in issue by the applicant and not related to the rates which are the subject of the application.'"¹⁵ Duke's reliance on *CEI*, however, disregards more recent Court precedent, which overruled in part, the *CEI* ruling.

In *IEC*, the Court disagreed with the PUCO's reliance on *CEI* when it reversed a PUCO order striking objections and testimony that related to rates in the application.¹⁶ The Court found that "[b]y seeking an increase in full service rates in its application, the company necessarily sought to increase partial service rates, and thus placed the latter at issue. Because partial service rates were placed at issue, IEC was permitted to object to the rates, pursuant to R.C. 4909.19, and the commission was required to consider the merits of the objection at hearing. Thus, it was error for the examiner to strike IEC's objection and related pre-filed testimony."

Although both cases stand for the proposition that objections should "relate[] to the rates which are subject to the application."¹⁷ As noted above, this case concerns Duke's request to increase rates to consumers. Residential consumers, who face a 32%

¹³ *Cleveland Electric Illuminating Company v. Public Utilities Commission of Ohio*, 42 Ohio St.2d. 403, 330 N.E.2d 1 (1975) ("*CEI*").

¹⁴ *Id.*

¹⁵ *Id.* at 420.

¹⁶ *Industrial Energy Consumers v. Public Utilities Commission*, 63 Ohio St.3d 551, 553-54, 589 N.E.2d 1289 (1991) ("*IEC*").

¹⁷ *Id.*

increase to their electric distribution rates under Duke's proposal, are suffering from the financial consequences of a once-in-a-lifetime pandemic, and soaring inflation, food, and gas costs. OCC's objections are all directly relevant to Duke's proposed rate hikes in the application and serve to protect consumers in these difficult times.

R.C. 4909.19 *requires* the PUCO to respond to objections by "tak[ing] all the testimony with respect to the application and objections which may be offered by any interested party." Thus, Duke's motion to strike OCC's objections is a violation of law that would wrongly deny OCC its rightful opportunity to be heard. Moreover, the PUCO's rule on objections is subordinate to the statute. Accordingly, Duke's motion to strike OCC's objections should be denied.

B. OCC Objection No. 5: "The Staff Report harms consumers by failing to reflect gains on the disposition of property."

OCC Objection No. 5 relates to the matters (specifically, the adjustment to operating income) in Duke's application for a rate increase, and it is appropriate for consideration in this case. As an initial matter, Duke flatly mischaracterizes OCC's objection by suggesting it concerns only property gains from 2016.¹⁸ That is wrong. OCC's Objection No. 5 addresses gains from Dukes disposition of property in 2016 *through* 2021.¹⁹ Duke's motion to strike OCC Objection No. 5 should be denied.

¹⁸ Duke Motion to Strike, at 19.

¹⁹ OCC Objections to Staff Report, at 11-12.

- C. **OCC Objection No. 26: “The Staff Report harms consumers because it fails to require Duke to provide shopping consumers’ billing information to show a comparison to what they would pay under a standard service offer. The Staff Report also fails to perform an analysis of the consumer contact information that it collects through its call center, and the supplier rate information it collects on the Energy Choice Ohio website to determine if improvements in Duke’s Choice Program are necessary to help consumers reduce their energy costs.”**

Duke claims that OCC Objection No. 26 should be stricken because it was “not addressed by the Staff Report because it is not relevant.”²⁰ To begin, Duke’s argument makes no sense, as O.A.C. 4901-1-28(B) expressly states that “objections may relate to the findings, conclusions, or recommendations contained in the report, *or to the failure of the report to address one or more specific items.*” (Emphasis added). Therefore, OCC’s objection based on the Staff Report’s failure to address an item is appropriate.

As mentioned earlier, the Court has already held that where service rates are at issue, the PUCO is required to consider the merits of the objection at hearing.²¹ Here, OCC’s Objection No. 26 is also directly relevant to the impact of Duke’s proposal in the application to significantly increase the electric distribution rates consumers will pay. It is directly relevant to the Staff Report’s discussion of the consumer service audit completed by PUCO Staff,²² and recommendations the PUCO could (and should) have made. OCC’s Objection is also relevant to what the PUCO should do to ensure the availability of adequate, safe, efficient, nondiscriminatory, and reasonably priced retail electric service under R.C. 4928.02(A). Duke’s motion to strike OCC Objection No. 26 should be denied.

²⁰ Duke Motion to Strike, at 9.

²¹ *IEC* at 554.

²² Staff Report, at 43.

D. Objection No. 27: “The Staff Report harms consumers by failing to recommend that Duke provide consumers with more options to opt-out of having their personal account information included on eligible consumer lists provided to competitive retail electric service (“CRES”) providers.”

The PUCO should deny Duke’s motion to strike Objection No. 27. Duke again baldly claims that the objection is not relevant to the application. However, this objection relates to the PUCO Staff’s investigation of Duke’s application, and discussion in the Staff Report regarding service monitoring and enforcement issues.²³ As mentioned in subsection C, above, O.A.C. 4901-1-28(B) expressly states that “objections may relate to the findings, conclusions, or recommendations contained in the report, *or to the failure of the report to address one or more specific items.*” (Emphasis added). Here, OCC’s objection addresses recommendations the PUCO Staff failed to make in the Staff Report. OCC’s Objection is also relevant to what the PUCO should do to ensure the availability of adequate, safe, efficient, nondiscriminatory, and reasonably priced retail electric service under R.C. 4928.02(A). Furthermore, OCC’s objection is directly relevant to rights that consumers have under R.C. 4928.10(G) to control disclosure of personal consumer information. Finally, protection of consumer information is one of the functional areas that Staff examined as part of its Management Performance Practices (“MPP”) review in the rate case. Duke’s motion to strike OCC Objection No. 27 should be denied.

²³ *Id.*

E. Objection No. 28: “The Staff Report potentially harms consumers by failing to evaluate the sufficiency of Duke’s Data Privacy Policy in protecting consumers’ personal information from unauthorized or inadvertent disclosure.”

OCC Objection No. 28 specifically concerns the Staff Report’s discussion of protection of consumer information.²⁴ Duke claims that this “is not a valid basis for an objection” under O.A.C. 4901-1-28(B).²⁵ That is not correct. As noted above, O.A.C. 4901-1-28(B) permits objections as to failures of the Staff Report to address certain issues. OCC’s objection that the PUCO Staff did not fully address Duke’s Data Privacy Policy is proper, and Duke cites no authority to the contrary. In fact, protection of consumer information was identified by Staff as a functional area that would be considered as part of the rate case. Duke’s motion to strike OCC Objection No. 28 should be denied.

F. Objection No. 29: “The Staff Report fails to protect Duke’s consumers by not proposing adequate consumer protections, including bill-payment assistance for energy justice and equity, that can make electric services more affordable for all consumers and protect at-risk, low-income, working poor, and fixed-income senior Ohioans from potential loss of electric services.”

Duke claims that OCC Objection No. 29 is irrelevant to Duke’s application to increase rates to consumers. Duke’s argument should be rejected. OCC’s objection relates to the Staff Report’s failure to recommend measures to assist consumers who will be harmed by the rate increases Duke proposes.²⁶

²⁴ *Id.* at 46.

²⁵ Duke Motion to Strike, at 10.

²⁶ See *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, Case No. 21-637-GA-AIR, et al., Objections to the PUCO Staff’s Report of Investigation by Northeast Ohio Public Energy Council and Office of the Ohio Consumers’ Counsel (May 6, 2022), at 32-33.

Furthermore, the protection of at-risk populations and consumers is specifically required under R.C. 4928.02(L) in the provision of retail electric service. Similarly, the law requires consumers to be provided adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service. The availability of additional bill payment assistance to help at-risk consumers can be consideration in considering just and reasonable rates.

Further, Duke's assertion that OCC Objection 29 would result in an unreasonable regulatory taking has no legal merit and Duke cites no authority for its claim. And even if Duke's argument had legs (it doesn't) that would be no reason to strike OCC's objection. Indeed, the legality and merit of this issue should be determined through the evidentiary hearing, and not through premature, pretrial motion to strike.²⁷

G. Objection No. 16: "The Staff Report harms consumers by failing to recommend that Duke be prohibited from modifying its existing riders or proposing new riders as part of this base distribution rate case."

Duke claims that OCC Objection No. 16 is an "improper brief in support" of the Staff Report.²⁸ Duke's argument makes no sense. OCC argued in its objections that the Staff Report *failed* to recommend that Duke be prohibited from modifying existing riders and adopting new riders until the next case to consider Duke's electric security plan.²⁹ Duke does not explain how OCC's objection to the Staff Report's failure to make this

²⁷ *In the Matter of the Application of Water and Sewer LLC for an Increase in its Rates and Charges*, Case No. 08-227-WS-AIR, Opinion and Order, ¶ 6 (April 14, 2009); *In the Matter of the Application of Water and Sewer LLC for an Increase in its Rates and Charges*, Case No. 03-318-WS-AIR, ¶ 11 (November 10, 2003).

²⁸ Duke Motion to Strike, at 20.

²⁹ OCC Objections, at 17.

recommendation somehow constitutes a “brief in support” of the PUCO Staff. Duke’s motion to strike OCC Objection No. 16 should be denied.

H. Objection No. 20: “The Staff Report harms consumers by failing to recommend that Duke make every available effort with its authorized vendors to reduce the level of the convenience fees charged to consumers.”

Duke does not like OCC’s proposal in Objection No. 20 that Duke’s shareholders’ cover the costs of convenience fees for consumers.³⁰ But that is no reason to strike the objection from consideration in this case. To the contrary, Duke’s arguments as to the merits of OCC’s proposal should be considered through testimony and the evidentiary hearing, not through a summary motion to strike. As Duke itself notes, this objection relates directly to the Staff Report’s recommendation that convenience fees continue to be charged to consumers.³¹ Thus, OCC Objection No. 20 should not be stricken.

Duke also appears to argue that Objection No. 20 is somehow improper because OCC agrees with the Staff Report’s recommendation that convenience fees be excluded in base rates.³² However, as stated in OCC’s Objections, convenience fees should not be permitted to be charged to consumers, which is contrary to the PUCO Staff’s position. Thus, any claim by Duke that OCC Objection No. 20 is somehow an improper “endorsement” of the Staff Report is baseless and does not justify Duke’s motion to strike.

³⁰ *Id.* at 20.

³¹ Duke Motion to Strike, at 21.

³² *Id.*

III. CONCLUSION

Duke's Motion to Strike OCC's objections is nothing more than a premature attack on the merits of OCC's objections to the Staff Report. OCC's objections fully comply with O.A.C. 4901-1-28(B). OCC's objections relate to the Staff Report and are specific enough to inform the parties of OCC's area of concern in order to protect Duke's consumers. Accordingly, Duke's Motion to Strike should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Duke's Motion to Strike Objections has been served upon those persons listed below via electronic service this 8th day of July 2022.

/s/ Ambrosia Wilson

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Summary: Memorandum Memorandum Contra Duke's Motion to Strike OCC's
Objections by Office of the Ohio Consumers' Counsel electronically filed by Ms.
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