

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Increase in) Case No. 22-507-GA-AIR
Natural Gas Rates.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 22-508-GA-ALT
Alternative Form of Regulation.)

In the Matter of the Application of)
Duke Energy Ohio, Inc., for Tariff) Case No. 22-509-GA-ATA
Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 22-510-GA-AAM
Accounting Methods.)

**MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S
MOTION TO STRIKE OBJECTIONS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

Duke Energy Ohio, Inc. (“Duke”) seeks to raise its revenues by \$48,745,468,¹ which would increase the amount that consumers pay for natural gas distribution service by approximately ten percent.² The Staff of the Public Utilities Commission of Ohio (“PUCO”) filed its report of investigation (the “Staff Report”) in this case on December 22, 2022. The PUCO Staff recommends a lower revenue increase, between \$23,662,353 and \$36,434,162.³ The PUCO Staff’s recommendations would give consumers important protections. But the Staff Report does not go far enough to protect consumers.

¹ PUCO Staff Report of Investigation (“Staff Report”), at 7, Schedule A-1.

² *Id.*

³ Staff Report, Schedule A-1.

Accordingly, the Office of the Ohio Consumers' Counsel ("OCC") asserted 26 objections to the Staff Report seeking additional consumer protections.⁴ Duke has moved to strike 11 of them.⁵ The PUCO should reject each of Duke's arguments. OCC's objections are specific and relevant and provide adequate notice of issues it seeks to litigate at hearing. Accordingly, OCC's objections are consistent with governing Ohio law and rule.⁶ The PUCO should deny Duke's motion to strike OCC's objections.

II. RECOMMENDATIONS

A. **OCC's objections provide timely and specific notice of the claims it seeks to advance at hearing and demonstrate a sufficient nexus to the application and staff report.**

R.C. 4909.19 and Rules 4901-1-28 govern Duke's motion. R.C. 4909.19 allows interested persons to file objections to the Staff Report. Rule 4901-1-28 further clarifies the procedure, stating that objections must be filed within thirty days of the issuance of the Staff Report. It continues that the "objections may relate to the findings, conclusions, or recommendations contained in the report, *or to the failure of the report to address one more specific items*. All objections must be specific, and objections which fail to meet this requirement may be stricken." (Emphasis added.) The PUCO has explained that "the *only* requirements as to objections are that they must relate to findings, conclusions, or recommendation in a staff report, or must relate to the failure of the staff report to address as items, and must be specific."⁷

⁴ Objections to the PUCO Staff's Report of Investigation (Jan. 20, 2023).

⁵ Duke Energy Ohio, Inc.'s Motion to Strike Specific Intervenor Objections to Staff Report (Jan. 30, 2023).

⁶ R.C. 4909.19; O.A.C. 4901-1-28.

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 ¶ 5 (Apr. 14, 2009) (emphasis added).

Because the purpose of objections is to place parties on notice of issues that will be raised concerning the application and Staff Report, the objections cannot be properly struck on substantive grounds. In a case involving a request to increase rates by a water company, for example, the PUCO rejected an attempt by the applicant to strike objections on the ground that the issue had been addressed in another case.⁸ Other grounds for deciding a matter are left to the hearing and briefing.

B. Each of OCC's consumer protection objections Duke moves to strike properly gives notice of the issue to be litigated, consistent with Ohio law and rule.

1. Duke's Motion to strike certain consumer protection objections for lacking specificity should be rejected.

Duke asserts that OCC objection 8 should be stricken because it purportedly lacks specificity.⁹ OCC's objection 8 states:

Objection No. 8: The Staff Report erred to consumers' detriment by proposing a too-high rate of return (including based on an inappropriate capital structure) than is fair and reasonable under R.C. 4909.15(A)(2) and other authority, which will result in unjust and unreasonable rates and charges to consumers.

This objection clearly gives Duke, the PUCO Staff, and all parties notice that OCC will litigate the rate of return, for reasons including that it is based on an inappropriate capital structure. The objection also explains that the proposed rate of return is more than is fair and reasonable under R.C. 4909.15(A)(2) and other authority, which will result in unjust and unreasonable rates and charges to consumers.

Duke would have the PUCO impose additional burdens on OCC at the objection stage – before intervenor testimony is even filed.¹⁰ It says that OCC, in

⁸ *In the Matter of the Application of Water and Sewer LLC for an Increase in its Rates and Charges*, supra, Opinion ¶ 7.

⁹ Duke's Motion at 7.

¹⁰ Entry (Jan. 20, 2023) (intervenor testimony is due Feb. 24, 2023).

addition to providing notice, must also explain “what about the proposed capital structure is inappropriate for ratemaking, and what capital structure OCC believes would be appropriate.”¹¹ OCC clearly gives notice that the proposed capital structure is inappropriate because it results in a rate of return that is more than is fair and reasonable under R.C. 4909.15(A)(2) and other authority, which will result in unjust and unreasonable rates and charges to consumers. Additional detail will be provided in testimony, which will be filed consistent with the Attorney Examiner’s January 20, 2023 Entry.¹² That detail is not required at the objection stage. The objection itself clearly gives notice of the issue to be litigated – inappropriate capital structure.

As such, the additional requirement Duke would have the PUCO impose on OCC – to say what the appropriate capital structure should be – is without merit and should be rejected. Notice is all that is required, which OCC’s objection provides.¹³

Duke asserts that OCC objection 23 lacks specificity, too.¹⁴ OCC’s objection 23 states:

OCC Objection 23: The Staff Report erred to consumers’ detriment by failing to reject Duke’s proposal for a November automatic approval process for the CEP charge.

OCC explains that the automatic approval process is “vague and undefined.”¹⁵ Accordingly, Duke, the PUCO Staff, and the parties clearly have notice that OCC will

¹¹ Duke’s Motion at 7.

¹² See note 12, *supra*.

¹³ Duke also points out a typographical error in the explanation of the objection (not the objection itself). Duke’s Motion at 7. We should have used “inappropriate” rather than “appropriate” in the last line of the objection’s explanation. In any event, the objection itself states clearly that the proposed capital structure is inappropriate. Duke’s Motion itself demonstrates that it has *actual* notice that OCC asserts that the capital structure is inappropriate. For example, it begins its argument on objection 8 by saying: “OCC asserts that the Staff Report adopts an *inappropriate* capital structure, . . .” *Id.* (emphasis added).

¹⁴ *Id.* at 7-8.

¹⁵ OCC’s Objection 23.

litigate the November automatic approval process for the CEP charge because it has not been defined.

Once again, Duke would have additional burdens placed on OCC at the objection stage – before intervenor testimony is even filed.¹⁶ Not only does OCC have to object that the process is vague and undefined, according to Duke, it also must explain why.¹⁷ But OCC placed at issue the matter it intends to litigate – the vague, undefined automatic approval process – in its objection. That is consistent with Ohio law and rule. It will explain the why in testimony, consistent with the governing Attorney Examiner Entry.¹⁸

Duke also asserts that OCC objection 24 lacks specificity.¹⁹ OCC's objection 24 states:

OCC Objection 24: The PUCO Staff erred to consumers' detriment by setting the proposed residential rate cap on annual increases for Duke's CEP at too high a level.

This objection gives clear notice that OCC intends to litigate the residential rate cap on annual increases for Duke's CEP because the rate cap is too high. In its explanation of the objection, OCC states that the cap should be \$1.00, rather than \$1.50 as proposed by the PUCO Staff.²⁰ Duke takes issue with this because "OCC does not point to citations, examples, studies, or other reasoning in support of its objection."²¹

¹⁶ Entry (Jan. 20, 2023) (intervenor testimony is due Feb. 24, 2023).

¹⁷ Duke's Motion at 8.

¹⁸ See note 18, *supra*.

¹⁹ Duke's Motion at 8.

²⁰ See *id*.

²¹ *Id*.

But evidence is not required of objections. Notice is, and OCC's objection provides it. OCC will provide additional details in testimony, consistent with the Attorney Examiner's Entry.²²

2. Duke's Motion based on OCC's consumer protection objections being irrelevant should be rejected.

In its fifth objection, OCC asserts:

OCC Objection 5: The PUCO Staff erred to consumers' detriment in recommending a ten-year amortization period for charging consumers the deferred asset from the propane plant retirement.

Duke says that the objection is irrelevant because "it relies on testimony filed in a separate case over ten years ago."²³ Yet OCC's explanation of the objection demonstrates that it relies on much more than "testimony filed in a separate case over ten years ago." The explanation says:

OCC objects that the PUCO Staff erred in recommending a ten-year amortization period for charging consumers for the deferred asset from the propane plant retirement. The ten-year amortization period is too short for this asset and, because of it, consumers will pay higher, unreasonable rates. In Duke's 2012 rate case, Duke depreciation witness John Spanos recommended an average service life of 45 years for purposes of calculating the annual deprecation rate accrual. The propane facility was retired in March 2022, almost 34 years prior to the average service life proposed by Mr. Spanos in the 2012 Duke rate case. OCC recommends that the stranded investment be charged over a twenty-year amortization period. This would result in a more equitable period of collection from consumers for this long-lived asset compared to the ten years proposed by the PUCO Staff.²⁴

The testimony to which Duke refers is only *part* of the explanation for the objection. And it shows what Duke *itself* has said regarding the amortization period. More importantly, the issues raised by Duke in its Motion – changed witness, facts,

²² Entry (Jan. 20, 2023) (intervenor testimony is due Feb. 24, 2023).

²³ Duke's Motion at 15.

²⁴ See OCC Objection 5.

and circumstances – can and should be addressed in testimony and during hearing (including on cross-examination). Duke raises a merits issue, not a notice issue.

Duke also confuses the requirement by law and rule that parties provide notice in their objections with arguments on the merits regarding OCC objection 10.²⁵ OCC’s objection 10 states:

OCC Objection 10: The Staff Report erred to consumers’ detriment by applying an unreasonable risk-free rate in the application of the CAPM model, which will lead to too-high rates and charges to consumers that are unjust and unreasonable.

This objection meets the legal and rule requirements of giving notice about the issue to be litigated – the PUCO Staff report using an unreasonable risk-free rate in the CAPM model. That, in turn, leads to rates and charges to consumers that are too high, unjust, and unreasonable. Duke asserts that OCC has “miscite[d]” the Staff Report and, therefore, that the objection should be stricken.²⁶ OCC stated that the PUCO Staff used a 4.35% 30-day average yield for 30-year U.S. Treasury Bonds through September 1, 2021.²⁷ It should have stated, instead, that the PUCO Staff used a 4.04% average yield through October 31, 2022.²⁸ Still, that is a merits issue, not a notice issue. The objection provides notice that OCC intends to litigate the PUCO Staff’s use of a risk-free rate in the application of the CPM model, which is all that is required. So, the PUCO should not strike the objection.

²⁵ See Duke’s Motion at 16.

²⁶ *Id.*

²⁷ See OCC Objection 10.

²⁸ See Staff Report at 22.

Next, Duke asserts that an objection regarding Duke's low-income weatherization program is irrelevant.²⁹ OCC's objection states:

OCC Objection 20: The PUCO Staff erred to consumers' detriment by failing to require annual PUCO Staff review and audit of the low-income weatherization program.

Duke suggests that this objection is "not related to items put at issue in the Company's application or this rate case."³⁰

But as the PUCO has explained, objections are not limited to those matters put at issue by a utility's application.³¹ Objections may also address matters that the Staff Report failed to address.³² Here, Duke is seeking to charge consumers for low-income weatherization.³³ OCC objected to the PUCO Staff's failure to require that such funds be reviewed and audited. OCC's objection is clearly relevant to Duke's efforts to charge consumers for low-income weatherization and the consumer protection that the Staff Report failed to include – review and audit of those charges.

Duke asks that the PUCO strike OCC's objection 26 as irrelevant.³⁴ Objection 26 states:

OCC Objection 26: Based on the foregoing, the Staff Report is flawed and harms consumers because the PUCO Staff should have recommended an outright rejection of Duke's unjust and unreasonable application.

Duke asserts that "[h]ere, OCC objects to the Commission's accepting Duke Energy Ohio's filing and application in the first place. This is not an objection to the Staff

²⁹ *Id.*

³⁰ *Id.*

³¹ *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 ¶ 5 (Apr. 14, 2009) (emphasis added).

³² *See, e.g., id.*

³³ *See, e.g.,* Staff Report at 20.

³⁴ Duke's Motion at 17.

Report; this is an objection to the Commission's accepting the Company's filing."³⁵

Duke is wrong.

OCC is objecting to the Staff Report – “the PUCO Staff should have recommended an outright rejection of Duke's unjust and unreasonable application.” The rationale underlying the objection is the cumulative rationale of the previous objections. The objection makes this clear, stating “[b]ased on the foregoing, the Staff Report is flawed and harms consumers”³⁶ Duke has apparently simply misread the objection. It addresses the Staff Report's failure to make a specific recommendation, not the PUCO's “accepting Duke Energy Ohio's filing and application in the first place.”

3. Duke's Motion asserting that some of OCC's objections are not really objections should be rejected.

Duke asserts that OCC objection 7 is not really an objection.³⁷ Objection 7 states:

Objection No. 7: The PUCO Staff erred to consumers' detriment in not recommending that, if amortization of Customer Connect costs is permitted, the amortization period should be no shorter than fifteen years.

Duke says that “OCC . . . attempts to disguise this agreement with the Staff Report by indicating that if a different position is taken by the Commission, those costs should be amortized over at least a fifteen-year period.”³⁸

But there is no disguise. And OCC's objection is consistent with the rules. Permissible 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*

³⁵ *Id.*

³⁶ Objection 26 is OCC's last objection.

³⁷ Duke's Motion at 18.

³⁸ *Id.*

items.”³⁹ OCC objects to the Staff Report because it failed to address the specific item of amortization costs in the event Customer Connect costs are permitted (as requested by Duke).

In objection 14, OCC states:

OCC Objection 14: The PUCO Staff erred to consumers’ detriment by not rejecting Duke’s proposed class allocations.

Duke says that the objection is “premised on inaccurate or misinterpreted values.”⁴⁰

Duke also argues that the objection is actually somehow an “agreement” with the Staff Report.⁴¹

The first part of Duke’s assertion is no reason to strike the objection. It goes to the merits of the objection. That can and should be addressed in testimony and at the hearing (through cross-examination, for example). Further, the objection is not premised on inaccurate or misinterpreted values. Duke argues that OCC’s objection to allocation of distribution revenues of 67.815% to the residential class is irrelevant because that number is not mentioned in the Staff Report. But OCC determined this percentage using base distribution revenues excluding miscellaneous revenues, which it took directly from Table 6 of the Staff Report⁴². Values taken from the Staff Report itself are clearly relevant.

Further, the objection cannot be credibly read as agreeing with the Staff Report. OCC objects to the Staff Report’s proposed rate allocation. It has given notice that it intends to litigate the issue. It will file testimony consistent with the Attorney Examiner’s Entry.⁴³ Duke’s arguments should be rejected.

³⁹ O.A.C. 4901-1-28(B) (emphasis added).

⁴⁰ Duke’s Motion at 19.

⁴¹ *Id.*

⁴² Staff Report at 32.

⁴³ Entry (Jan. 20, 2023) (intervenor testimony is due Feb. 24, 2023).

4. Duke's Motion asserting that some of OCC's objections should be stricken as contrary to constitutional law should be rejected.

Duke asserts that two of OCC's objections should be stricken as contrary to constitutional law. The OCC objections at issue are:

OCC Objection 17: The Staff Report erred to consumers' detriment by failing to recommend elimination of fees from being charged to any consumers using a credit or debit card to make a utility payment to Duke.

OCC Objection 19: The PUCO Staff failed to recommend extending shareholder contributions to low-income weatherization programs, to consumers' detriment.

Duke claims that each of these objections violate the United States and Ohio constitutions' prohibitions against takings without just compensation.⁴⁴ According to Duke, a "taking" deprives the property owner of its right to earn a reasonable return on the value of its property, and this rule applies to a variety of private property owners, including utility providers like Duke Energy Ohio. Duke argues that, as a public utility, it has a right to receive just compensation in exchange for "providing safe, necessary, adequate, and reliable natural gas utility service to the public in its service territory."⁴⁵

The basis of Duke's motion clearly goes to the merits and is appropriately considered, if at all, through testimony, hearing (cross-examination), and briefing. It is not a reason to strike objections that are only required to provide notice. Matters such as what is a "reasonable" return on property; what is "just" compensation; and what is "just" compensation for Duke "providing safe, necessary, adequate, and reliable natural gas utility service" are all at the core of this rate case. They should be litigated,

⁴⁴ Duke's Motion at 19-20.

⁴⁵ See *id.*

after notice (which OCC gave in its objections). They are not appropriately stricken before litigation.

III. CONCLUSION

OCC's objections provide specific notice of the issues it intends to litigate as required by Ohio law and rule. Because Duke does not provide a reasoned basis to strike OCC's objections, the PUCO should deny Duke's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra of Office of the Ohio Consumers' Counsel was served on the persons stated below via electronic transmission, this 6th day of February 2023.

/s/ William J. Michael
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Summary: Memorandum Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Strike Objections by Office of the Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Michael, William J.