

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Its Natural Gas Distribution Rates.	:	Ohio Supreme Court Case No. 2014-0328
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In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	:	Appeal from the Public Utilities Commission of Ohio
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In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	:	Public Utilities Commission of Ohio Case Nos. 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, 12-1688-GA-AAM
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In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	:	

**AMICUS BRIEF OF
THE OHIO ENERGY GROUP AND INDUSTRIAL ENERGY USERS-OHIO**

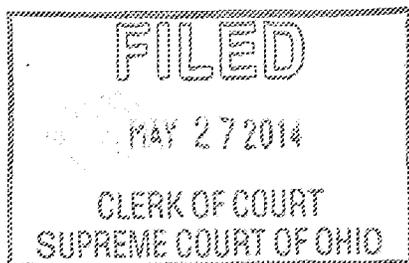
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INTRODUCTION

The issue in this case is whether Appellee, the Public Utilities Commission of Ohio (“PUCO” or “Commission”), erred by allowing Duke Energy Ohio, Inc. (“Duke” or “Company”) to recover approximately \$55.4 million in environmental remediation costs associated with the manufactured gas plants (“MGP”) that have not operated in over fifty years from Duke’s natural gas customers. Amici Curiae respectfully submit that it did.

The Commission “is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.”¹ Its power to establish the rates of a natural gas company such as Duke is governed by R.C. §4909.15, which sets forth a detailed statutory formula for determining “just and reasonable” rates. As part of that statutory formula, R.C. §4909.15(A)(4) requires the Commission to determine “[t]he cost to the utility of rendering public utility service” over a twelve-month test period (the test period for this case was January 1, 2012 through December 31, 2012).² This provision essentially allows a utility the opportunity to recover operating expenses incurred during the test year that are associated with providing natural gas distribution service to customers. The utility is permitted to collect those operating expenses and a “fair and reasonable return” on property that is “used and useful” in providing service to customers as of a date certain (in this case, March 31, 2012).³

The Commission cited R.C. §4909.15(A)(4) as its authority for allowing Duke to recover approximately \$55.4 million in MGP remediation costs from customers in the case below.⁴ But

¹ *Dayton Communications Corp. v. Pub. Util. Comm. of Ohio*, 64 Ohio St. 2d 302, 307, 414 N.E.2d 1051, 1054 (1980) (citing *Penn Central Transp. Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 587 (1973)).

² Opinion & Order, Case No. 12-1685-GA-AIR (November 13, 2013) (“MGP Order”) at 3.

³ MGP Order at 3.

⁴ MGP Order at 58.

MGP remediation costs are not operating expenses recoverable under the plain language of that statute since they are not directly related to the natural gas utility service provided by Duke to customers during the test year of this case. By improperly attempting to broaden the scope of costs recoverable under R.C. §4909.05(A)(4), the Commission fundamentally misapplied that law and exceeded the bounds of its statutory authority.

The \$55.4 million in MGP remediation costs at issue in this case were incurred by Duke to voluntarily clean up environmental contamination that has existed at former MGP sites for decades. Duke conceded that the contamination on the two sites was caused by the existence and operation of the long-closed MGPs and that it has been aware of its potential MGP-related liability since 1988.⁵ Yet Duke only recently decided to remediate this waste in order to facilitate planned property development near the former MGP sites.⁶

While utilities like Duke may choose to incur expenses related to their business during a given test year, not all of those business expenses are recoverable from customers through Commission-authorized rates. For example, charitable contributions and promotional and institutional advertising expenses are generally not costs “of rendering the public utility service” that are recoverable in accordance with R.C. §4909.15(A)(4).⁷ Similarly, the MGP remediation costs at issue in this case are not costs “of rendering public utility service” that are recoverable

⁵ MGP Order at 25.

⁶ MGP Order at 36, 43, and 54 (“for the East End site, a residential development is planned adjacent to the site, and, for the West End site, construction and relocation of facilities resulting from the Brent Spence Bridge Corridor Project is necessary.”).

⁷ *Cleveland v. Pub. Util. Comm.* 63 Ohio St.2d 62, 71-73, 402 N.E.2d 1370, 1379 (1980) (“Applying this same standard to charitable contributions, this court finds that this item also cannot be sustained as a proper operating expense. While we recognize that this holding deviates from our decision in *Cincinnati v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 168, 173, this court is persuaded by the record in the instant cause and by Justice Locher’s well-reasoned dissent in *Cincinnati, supra*, that such contributions are not a cost of rendering the public utility service.”).

from customers since they are unrelated to the provision of natural gas to customers during the test year. Duke could still provide its customers natural gas utility service even if it did not choose to incur those MGP remediation costs in recent years. That Duke recently chose to clean up the MGP waste in order to facilitate property development near the former MGP sites does not justify requiring current natural gas service customers to pay for expenses associated with manufactured gas plants that last served their grandparents. Hence, the Commission erred by allowing recovery of those MGP remediation costs pursuant to R.C. §4909.15(A)(4).

In authorizing the recovery of the MGP remediation costs unrelated to property that is “used and useful” in the provision of utility service, the Commission also abandoned its well-understood precedent. Prior to this case, the Commission required that expenses recoverable pursuant to R.C. §4909.15(A)(4) must be related to (or “matched” with) property that is “used and useful” in providing public utility service to customers. But the majority of the MGP remediation costs at issue in this case were incurred to clean up property owned by Duke that has not been “used and useful” in providing service to customers for over fifty years in the case of the East End plant and for over eighty years in the case of the West End plant.⁸ Indeed, some of the waste that Duke is now cleaning up at the MGP sites was produced even before the PUCO was established in 1911.⁹

In a detailed examination, the Commission’s Staff determined that most of the MGP remediation costs that Duke sought were unrelated to property that was “used and useful” as of the date certain. Staff identified only a few portions of the MGP sites that were currently “used and useful” to customers, including: the central parcel of the East End Site, a 50-foot buffer around the

⁸ MGP Order at 25.

⁹ *Id.* (noting that manufactured gas operations at the East End former MGP site began in 1884 and that manufactured gas operations at the West End MGP site began in 1843).

pipelines on the eastern parcel of the East End site, and the northeastern corner of the western parcel of the East End site that falls within a 50-foot setback from an existing vaporizer building.¹⁰ Given its findings, Staff recommended that Duke be permitted to recover \$6,367,724 in MGP remediation costs since those were the only costs “matched” to property that was “used and useful” to customers.¹¹ Hence, consistent with Commission precedent, the maximum amount of MGP remediation costs that Duke should have been permitted to recover consistent with Commission precedent was \$6,367,724.

Moreover, the Commission’s unlawful decision to require the current customers of Duke to pay for remediation costs of these long-closed MGP plants has broader implications, which could be severe for Ohio utility customers. When the PUCO decided to ignore the express requirements of Ohio law and long-standing principles governing the interpretation of that law, it shifted the responsibility for the environmental clean-up costs to customers that never took service from the MGP plants that cause the contamination. The Commission’s decision has now placed all of Ohio’s utility customers at risk for the costs to remediate dozens of shuttered MGPs that are owned by Ohio’s natural gas and electric distribution utilities.

Accordingly, the Court should reverse and remand the Commission’s decision with instructions to cease authorization of Duke’s recovery of MGP remediation costs from natural gas customers or, at minimum, to authorize recovery of only \$6,367,724 in remediation costs from those customers.

¹⁰ MGP Order at 28.

¹¹ Id.

STANDARD OF REVIEW

R.C. §4903.13 governs this Court's review of PUCO orders. It provides in part: "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable...." As to questions of fact, the Court will not reverse the PUCO unless the PUCO's findings "are manifestly against the weight of the evidence and are so clearly unsupported by the record as to show misapprehension or mistake or willful disregard of duty."¹² On questions of law, however, the Court "has complete, independent power of review."¹³ This case involves questions of law that are subject to *de novo* review.

STATEMENT OF FACTS

The costs at issue in this case arose from Duke's voluntary decision to begin remediating contamination at the sites of two long-closed manufactured gas plants located in Cincinnati, Ohio -- one located at an East End site and one located at a West End site. Manufactured gas operations began at the East End MGP site in 1884 and began at the West End MGP site in 1843. (MGP Order at 25). The gas produced at the MGPs was used for lighting, heating, and cooking. (MGP Order at 24). Manufactured gas production at both sites stopped in 1909 after natural gas arrived in Cincinnati, but was reinstated in 1918 at the West End and 1925 at the East End in order to supplement the city's natural gas supply. (MGP Order at 25). Manufactured gas operations at the West End plant ended in 1928 and the operations at the East End plant ended in 1963. (MGP

¹² *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* 42 Ohio St.2d 403, 415, 330 N.E.2d 1, 10-11 (1975).

¹³ *Office of Consumers' Counsel v. Pub. Util. Comm.* 58 Ohio St.2d 108, 110, 388 N.E.2d 1370, 1373 (1979).

Order at 25). Duke acknowledged that the contamination necessitating remediation on the two sites was due to the existence and operation of the MGPs, which have not served customers in over fifty years in the case of the East End plant and in over eighty years in the case of the West End plant. (MGP Order at 25).

Duke is not required by any order or enforcement action from either a federal or state environmental agency to begin undertaking remediation at the MGP sites in the last few years. (R. 07/20/2012 (Direct Testimony of Jessica L. Bednarcik at 6-7); R. 04/29/2013 (Tr. Vol. I at 139)). While Duke, as the current owner of the MGP sites, is ultimately liable for the contamination at the sites under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) as well as state law (other entities may be liable as well), Duke has been aware of its potential liability for the MGP-related waste at the sites since 1988 (MGP Order at 23 and 25). However, Duke did not begin remediation efforts for the East End site until 2007 and did not begin remediation efforts for the West End site until 2010. (MGP Order at 26). Duke is remediating the East End site now in order to facilitate planned residential development of properties adjoining the site. (MGP Order at 36; R. 1/04/2013 (Staff Report at 32)). It is remediating the West End Site now because the Brent Spence Bridge Corridor Project requires the moving of a large electric substation, transformer bay, underground and transmission lines, and replacement of a transmission tower. (MGP Order at 43; R.1/04/2013 (Staff Report at 32)).

In 2009, Duke sought and received Commission approval to revise the way that it accounted for the MGP remediation costs that it was incurring so that it could defer those costs on its books. (Finding & Order, Case No. 09-712-GA-AAM (November 12, 2009)). Although the Commission allowed Duke to modify the way it accounted for the MGP remediation costs, the Commission added the explicit caveat that “[b]y considering [Duke’s] application, the

Commission is not determining what, if any, of these costs may be appropriate for recovery in Duke's distribution rates." (Id. at 3). The Commission further held that "[t]he recovery of the deferred amounts will be addressed in a base rate case proceeding should Duke ever seek to recover the deferrals." (Id. at 3-4).

On July 9, 2012, Duke submitted an application at the Commission to increase its base distribution rates associated with its provision of natural gas service. As part of that application, Duke requested Commission approval to begin recovering approximately \$65 million in deferred MGP remediation costs from natural gas customers. Duke subsequently reduced the requested recovery amount to \$62.8 million. (MGP Order at 26).

On January 4, 2013, Commission Staff filed its Report in the natural gas rate case, analyzing Duke's application, including its request to recover the deferred MGP costs. Staff provided a detailed analysis of the East and West End sites and broke each site into sub-sites. Staff found that only a few portions of the MGP sites were currently "used and useful" to customers, including: the central parcel of the East End Site, a 50-foot buffer around the pipelines on the eastern parcel of the East End site, and the northeastern corner of the western parcel of the East End site that falls within a 50-foot setback from an existing vaporizer building. (MGP Order at 28). Based on those findings, Staff recommended that Duke be allowed to recover only \$6,367,724 in remediation costs since Staff found that the majority of the remediation costs Duke sought were not associated with facilities that are currently "used and useful" for providing natural gas service to customers as required by R.C. §4909.15. (MGP Order at 28).

On April 2, 2013, a Stipulation and Recommendation was filed in the rate case, resolving all of the issues in the case, except whether Duke could recover the MGP remediation costs. (MGP Order at 12). To address the lawfulness of recovery of the remediation costs, the Commission

conducted an evidentiary hearing April 29 through May 2, 2013. The Commission issued its Order approving the Stipulation and addressing the MGP remediation cost recovery issue on November 13, 2013.

With regard to the MGP remediation cost recovery issue, the Commission concluded (by a 3-2 vote) that Duke should be permitted to recover approximately \$55.4 million in deferred MGP remediation costs from customers. The Commission cited several reasons for approving recovery of the MGP costs, including Duke's liability under CERCLA, that Duke previously had MGP operations on the sites, that limited portions of the site were still used for utility operations, that residential development was planned adjacent to the East End site, and that construction and relocation of facilities is necessary on the West End site due to the Brent Spence Bridge Corridor Project. (MGP Order at 54). The Commission chose not to determine which particular portions of the MGP sites were "used and useful" to customers, stating:

...in light of the circumstances surrounding the two MGP sites in question and the fact that Duke is under a statutory mandate to remediate the former MGP residuals from the sites, the Commission finds that R.C. 4909.15(A)(1) and the used and useful standard applied to the date certain for rate base costs is not applicable to our review and consideration of whether Duke may recover the costs associated with its investigation and remediation of the MGP sites. Therefore, it is not necessary for the Commission to determine if the MGP sites would be considered used and useful under R.C. 4909.15. (MGP Order at 54).

Thus, while the record reflected that the majority of the MGP sites were not "used and useful" in providing natural gas service to customers during the test year (MGP Order at 28), the Commission decided not to issue a specific ruling on that issue.

The three Commissioners who decided to approve recovery of the MGP remediation costs did so pursuant to R.C. §4909.15(A)(4), explaining:

Upon our review of the record in these cases, we find that Duke has supported its claim that the remediation costs incurred on the East and West End sites were a cost of providing utility service. Duke has substantiated, on the record, that the remediation costs were a necessary cost of doing business as a public utility in response to a federal law, CERCLA, that imposes liability on Duke and its predecessors for the remediation of the MGP sites. Not only is Duke legally obligated to remediate these sites as the owner and operator of these sites, but it is undisputed on the record that Duke has the societal obligation to clean up these sites for the safety and prosperity of the communities in those areas and in order to maintain the usefulness of the properties; therefore, these costs are a current cost of doing business. (MGP Order at 58-59).

Two Commissioners disagreed with this legal interpretation and dissented from the Commission's decision, citing limitations on the Commission's authority to approve recovery of the MGP remediation costs under R.C. §4909.15:

...Duke is attempting to obtain relief that we are simply unable to grant as we are limited by the statutory authority given to this Commission under R.C. 4909.15. Specifically, Duke is attempting to recover the expenses for remediation of the subject properties under R.C. 4909.15(A)(4). We decline to extend the statutory language and the established precedent to interpret (A)(4) to include the remediation performed by Duke here, that is, we find that the remediation is not a "cost to the utility of rendering the public utility service" as being incurred during the test year, and is not a "normal, recurring" expense. Further, the public utility service at issue is distribution service, and Duke has failed to demonstrate the nexus between the remediation expense and its distribution service. (MGP Order, Dissenting Opinion of Commissioners Steven D. Lesser and Asim. Z. Haque).

Customers impacted by the charges applied for rehearing of the Commission's MGP Order on December 13, 2013. These applications for rehearing requested the Commission to grant rehearing and reverse its determination that the Commission could lawfully authorize Duke to bill and collect rates to recover the remediation costs for the two MGP sites. The commission denied those applications for rehearing (again, by a 3-2 vote) on January 8, 2014. Parties filed Notices of Appeal in the case on March 5 and 10, 2014.

ARGUMENT

The Commission's November 13, 2013 Opinion and Order and January 8, 2014 Entry on Rehearing in the Commission cases are unlawful, unjust, and unreasonable in the following respects:

Proposition of Law No. 1:

The Commission's decision authorizing the recovery of approximately \$55.4 million in MGP remediation costs from customers pursuant to R.C. §4909.15(A)(4) was unlawful and unreasonable because the remediation costs are not a "cost to the utility of rendering the public utility service" for the test period.

R.C. §4909.15(A)(4) provides:

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

Pursuant to this statute, costs unrelated to the rendering of public utility service over a given test period are not recoverable in customers' rates. For example, certain business expenses incurred by utilities over a given test period, including expenses related to charitable contributions and promotional and institutional advertising costs, are not generally recoverable from customers under R.C. §4909.15(A)(4) because they are not related to "rendering the public utility service."¹⁴ In disallowing such expenses, the Court has examined whether the expenses provide a "direct,

¹⁴ *Cleveland v. Pub. Util. Comm.* 63 Ohio St.2d 62, 71-73, 402 N.E.2d 1370, 1379 (1980) ("Applying this same standard to charitable contributions, this court finds that this item also cannot be sustained as a proper operating expense. While we recognize that this holding deviates from our decision in *Cincinnati v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 168, 173, this court is persuaded by the record in the instant cause and by Justice Locher's well-reasoned dissent in *Cincinnati, supra*, that such contributions are not a cost of rendering the public utility service.").

primary benefit” to customers.¹⁵ The Court has also explained that “the [C]ommission must be particularly cognizant of areas of expense that are not reasonably necessary to provide safe, reliable service to utility customers.”¹⁶

Duke’s incurrence of the approximately \$55.4 million in MGP remediation costs that it is currently recovering from customers is entirely unrelated to its provision of natural gas utility service to those customers. Rather, those remediation costs were incurred by Duke in order to voluntarily address its anticipated liability for environmental contamination generated by long-closed manufactured gas plants. Even though Duke has anticipated that it may be liable for contamination at the sites since 1988, Duke decided to address that liability beginning in 2007.¹⁷ Duke’s choice to clean up the former MGP sites now will help facilitate the residential development planned adjacent to the East End site and the construction and relocation of facilities on the West End site as part of the Brent Spence Bridge project.¹⁸ But these purposes are separate and distinct from the provision of natural gas service to Duke’s customers.

The Commission misapplied R.C. §4909.15(A)(4) when it allowed Duke to recover approximately \$55.4 million in MGP remediation costs from natural gas customers. The MGP remediation expenses are not costs “of rendering the public utility service.” They provide no “direct, primary benefit” to those customers. Indeed, Duke could still provide natural gas service to customers, regardless of whether it incurred the MGP remediation costs or not.

In making its determination, the Commission emphasized that Duke is liable under federal and state law for clean-up of the MGP waste and that Duke’s decision to address its liability now

¹⁵ Id. at 73.

¹⁶ Id. at 74.

¹⁷ MGP Order at 25-26.

¹⁸ MGP Order at 36, 43, and 54.

will benefit society.¹⁹ That generic societal benefits may arise from Duke's decision to begin addressing its liability for the MGP waste under federal and state law, however, does not transform the MGP remediation costs into costs "of rendering public utility service" consistent with R.C. §4909.15(A)(4). Duke's liability stems from one manufactured gas plant that has not provided service to customers in over fifty years and another that has not provided service to customers in over eighty years. And that liability would exist even if Duke no longer provided natural gas service to any customer. Expenses associated with cleaning-up waste produced by facilities that never served current customers nor even the parents of current customers are not the type of costs reasonably contemplated for recovery under R.C. §4909.15(A)(4).

That the General Assembly has not provided the Commission with the requisite statutory authority is further borne out by recent efforts by Duke and other natural gas utilities to secure a legislative fix. Recently proposed legislation would provide the Commission authority to approve the recovery of MGP remediation costs incurred by natural gas utilities.²⁰ Such legislation would be unnecessary, however, if MGP remediation costs were already recoverable as "costs to the utility of rendering public utility service" under the current language of R.C. §4909.15(A)(4).

Proposition of Law No. 2:

The Commission's decision to disregard its own precedent requiring that expenses recovered pursuant to R.C. §4909.15(A)(4) be "matched" with "used and useful" property was unlawful and unreasonable.

This Court has instructed the Commission that it must "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including

¹⁹ MGP Order at 58-59.

²⁰ R. 12/13/2013 (Application for Rehearing by Office of the Ohio Consumers' Counsel, Kroger Company, Ohio Manufacturer's Association, Ohio Partners for Affordable Energy at 6, fn. 15 (citing ASC34689X1 for H.B. 59)).

administrative law.”²¹ If the Commission departs from those precedents, “it must explain why.”²² Additionally, the new course taken by the Commission “must be substantively reasonable and lawful.”²³

Until the Commission permitted Duke to bill and collect the remediation costs for long-closed MGP sites, Commission precedent applying R.C. §4909.15(A)(4) required a utility to demonstrate that an expense associated with utility-owned property was “matched” with property that was “used and useful” at the date certain in the provision of utility service. Based on this “matching” requirement, the Commission in a 1999 Opinion and Order rejected the request of the Ohio Edison Company (“Ohio Edison”) to recover expenses to maintain a plant on “cold standby status” even though the electric utility intended to return the plant to service in the near future (“*Ohio Edison I*”).²⁴ The case record indicated that the plant had been out of service during the test year. The Commission therefore found that “the ‘matching principle’ should be employed in this instance to exclude operating expenses associated with a facility that was not in operation during the test year.”²⁵ The Commission further concluded that it was “not inclined to deviate from the concept of matching test-year expenses to used and useful plant and equipment.”²⁶

Nearly twenty years later, the Commission again rejected a request by Ohio Edison to recover costs unrelated to the provision of service to customers (“*Ohio Edison II*”).²⁷ In that case, Ohio Edison sought recovery of expenses associated with securing and maintaining several retired

²¹ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 523, 2011-Ohio-1788, 947 N.E.2d 655 at ¶52 (quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm. of Ohio*, 42 Ohio St. 2d 403, 431, 330 N.E.2d 1 (1975)).

²² *In re Columbus S. Power Co.*, 2011-Ohio-1788 at ¶52.

²³ *Id.*

²⁴ Opinion & Order, Case No. 89-1001-EL-AIR (August 16, 1990) at 62.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Opinion & Order, Case No. 07-551-EL-AIR (January 21, 2009) at 14.

generation facilities. The Commission refused to authorize recovery, holding “that these generation assets were not used to provide generation service during the test year. Thus, the Commission [found] that these expenses do not reflect costs to the utility of rendering public utility service for the test period in accordance with Section §4909.15(A)(4), Revised Code, and the expenses related to the assets are not recoverable.”²⁸

In this case, the Commission significantly departed from its precedent and allowed Duke to recover expenses associated with MGP plants that have not been “used and useful” in providing public utility service to customers in over fifty years. To explain why it departed from its prior decisions, the Commission alleged that the previous cases were distinguishable, stating:

...we find the Commission’s decision in Ohio Edison I and Ohio Edison II are not dispositive of the resolution of MGP cost recovery issues in these cases, as the facts of the Ohio Edison cases and the instant case are distinguishable. As pointed out by Duke, the issues in both the Ohio Edison I and Ohio Edison II case pertained to the recovery of expenditures for the maintenance of an existing plant that was not providing service to customers and a generating plant that was no longer providing service to customers. Conversely, in the instant cases Duke is requesting recovery for environmental cleanup costs for real property that had been used and useful for the production of manufactured gas for the benefit of the customers of Duke and its predecessors, in compliance with both federal and state rules and regulations.²⁹

According to the Commission, therefore, it could depart from the reasoning of the *Ohio Edison* cases for two reasons: 1) Duke’s MGP expenses are associated with real property that was once “used and useful;” and 2) Duke’s MGP expenses were incurred in compliance with federal and state law. Neither reason provides a logical basis for the Commission’s failure to follow its own precedents.

²⁸ Id.

²⁹ MGP Order at 53-54.

The Commission's first distinction - that the property was "used and useful" at some prior time - does not separate the *Ohio Edison* cases from the Duke MGP case. In both *Ohio Edison* cases, the maintenance expenses that the Commission did not allow Ohio Edison to recover were associated with plant that was previously "used and useful," but not currently used to provide service. The MGP sites are no different. The MGP sites previously produced manufactured gas, but no longer serve that function, and have not for at least fifty years in the case of the East End plant and eighty years in the case of the West End plant. Only a small portion of the two sites provided any benefit to Duke's natural gas customers during the test year. As to the remainder of the two sites, the undisputed record does not distinguish this case from the *Ohio Edison* decisions. The property was not "used and useful" for the provision of utility service during the test year. Thus, the first distinction that the Commission is attempting to draw is flawed.

The second distinction - that the Duke MGP remediation expenses were incurred in compliance with state and federal law - does not comply with the express and plain terms of R.C. §4909.15(A)(4). That statute permits recovery of only "costs to the utility of rendering the public utility service." It does not allow the Commission to create exceptions to that requirement to recover costs unrelated to the public utility service provided to customers. While some environmental remediation costs may be recoverable if related to property that is "used and useful" during the test year to render service to customers, the scope of costs that are recoverable under R.C. §4909.15(A)(4) does not extend to *any* remediation costs that the utility incurred on property it owns or previously owned.

In addition to failing to provide a reasoned and lawful basis for departing from prior precedent, the Commission's decision does not lead to a "substantively reasonable and lawful" result. As discussed in the first assignment of error, the Commission's decision departs from the

plain meaning of the statute. R.C. §4909.15(A)(4) requires the Commission to find that the cost is for the “rendering the public utility service” during the test year. The MGP remediation costs do not meet that requirement. As a result, the result of the Commission’s decision is not lawful.

Nor is the result reasonable. There is no reasonable justification for shifting the utility’s discretionary environmental remediation costs to customers if those costs are not related to the provision of natural gas service to those customers. The East End manufactured gas plant on Duke’s property was closed over fifty years ago and the West End manufactured gas plant was closed over eighty years ago. Current customers did not receive any direct, primary benefit from those plants that would justify holding them responsible under R.C. §4909.15(A)(4) for the associated clean-up costs.

Further, forcing utility customers to pay for the remediation of the MGP sites is inconsistent with the policy reflected in CERCLA. That law identifies the owner and prior owner as the responsible parties for remediation of contaminated sites.³⁰ CERLA does not extend the liability for remediation costs to customers. Nonetheless, the Commission chose to do so.

In holding that customers may be charged remediation costs for the long-closed plants in order to achieve its desired result, the Commission expanded its authority beyond that provided by statute. The Court, however, has held that “the commission may not legislate in its own right.”³¹ It is the function of the General Assembly to identify the costs that a public utility can seek to recover from customers and under what circumstances those costs may be collected. The costs of MGP remediation cannot be converted into ordinary operating expenses associated with the

³⁰ 42 U.S.C. § 9607(a)(1) & (2).

³¹ *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166, 423 N.E.2d 820, 828 (1981).

provision of natural gas service and recoverable pursuant to R.C. §4909.15(A)(4) simply by Commission fiat.³²

If the Commission felt such an outcome was reasonable, “then the commission and the utilities should petition the General Assembly to enact changes in the ratemaking structure...”³³ As this Court has stated in a similar context when the Commission attempted to require customers to pay for the costs of power plants that were not completed, “[a]bsent such explicit statutory authorization...the commission may not benefit the investors by guaranteeing the full return of their capital at the expense of the ratepayers. Under the ratemaking formula now in effect consumers are not chargeable for utility investments and expenditures that are not included in the rate base nor properly categorized as costs.”³⁴

The importance of maintaining the role of legislative guidance is particularly critical in this instance because the scope of the issue that the Commission addressed unlawfully is extensive. Testimony in the case below indicated that there are at least ninety (90) sites in Ohio that manufactured gas and by-products.³⁵ Utilities that currently own those former MGP sites may subsequently seek to clean up the sites on the customers’ dime, using the Commission’s unlawful decision as the basis for their requests. By acting outside the clearly stated and well-understood scope of R.C. §4909.15(A)(4), the Commission has set up a framework that may expose customers statewide to additional remediation costs, as well as substantial litigation costs, without explicit legislative authorization.

³² Id. at 164.

³³ Id. at 167.

³⁴ Id.

³⁵ R. 2/25/2013 (Direct Testimony of Bruce M. Hayes on Behalf of the Office of the Ohio Consumers’ Counsel at 17:18-18:3). That is not to say that remediation costs may be recoverable for property that is currently “used and useful” for the provision of utility service to customers. That determination, however, can be made in individual rate determinations.

Nor is the scope of the decision limited to the remediation costs of natural gas utilities for former MGPs. In February 2014, relying upon the Commission's improper decision to allow Duke to recover \$55.4 million in MGP remediation costs, The Dayton Power and Light Company ("DP&L") sought authorization to recover environmental remediation costs associated with generating plants that may shortly be owned by a third party.³⁶ Apart from any future rate effects, this request has triggered substantial litigation costs for parties, which must now debate the applicability of the Commission's unlawful decision to allow Duke to recover approximately \$55.4 million in MGP remediation costs.

If there is to be some predictability to the law, then the Commission must abide by the statutory formula for setting utility rates and follow its own precedent. When it fails to follow its own precedent, there must be some reasonable basis for changing course. Further, the new course must itself be "substantively reasonable and lawful." In this instance, the Commission failed to follow its own precedent and to find that the majority of Duke's MGP remediation costs were not recoverable from customers since they were not "matched" with property that was "used and useful." The resulting decision was unlawful and unreasonable.

RELIEF REQUESTED

The Court should rule that the Commission erred when it authorized Duke to recover \$55.4 million in MGP remediation costs from customers. The Court should reverse and remand the Commission's decision with instructions to cease Duke's recovery of MGP remediation costs from natural gas customers or, at minimum, to only recover \$6,367,724 in remediation costs from

³⁶ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, Case No. 13-2420-EL-UNC, Supplemental Reply Comments of the Dayton Power and Light Company at 10-11 (Apr. 7, 2014).

those customers since only those costs can be “matched” with property that was “used and useful” to customers during the test year.

CONCLUSION

WHEREFORE, Amici Curiae respectfully submits that the PUCO’s November 13, 2013 Opinion and Order and January 8, 2014 Entry on Rehearing in the Commission cases are unlawful, unjust, and unreasonable and should be reversed. This case should be remanded to the PUCO with instructions to correct the errors complained of herein.

Respectfully submitted,



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May 27, 2014

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by overnight mail this 27th day of May, 2014 to the parties listed below.



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