ORIGINAL

In The
SUPREME COURT OF OHIO

Ohio Partners for Affordable Energy, Ohio Consumers' Counsel and Ohio Manufacturers' Association, and The Kroger Company,	:	Case No. 14-328
Appellants,	:	On appeal from the Public Utilities Commission of Ohio, Case Nos. 12-1685-GA-AIR, *et al.*, *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

Colleen L. Mooney (0015668)
Counsel of Record
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839
614.488.5739 (telephone)
419.425-8862 (fax)
cmooney@ohiopartners.org

Counsel for Appellant,
Ohio Partners for Affordable Energy

Michael DeWine (0009181)
Ohio Attorney General

William L. Wright (0018010)
Section Chief

Thomas W. McNamee (0017352)
Counsel of Record
Devin D. Parram (0082507)
Katie L. Johnson (0091064)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
614.466.4397 (telephone)
614.644.8764 (fax)
thomas.mcnamee@puc.state.oh.us
katie.johnson@puc.state.oh.us

Counsel for Appellee,
The Public Utilities Commission of Ohio

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Bruce J. Weston (0016973)
Consumers' Counsel

Larry S. Sauer (0039223)
Counsel of Record
Joseph P. Serio (0036959)
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614.466.8574 (telephone)
614.466.9475 (fax)
sauer@occ.ohio.gov
serio@occ.ohio.gov

Counsel for Appellant,
Office of the Ohio Consumers' Counsel

Robert A. Brundrett (0086538)
Counsel of Record
Ohio Manufacturers' Association
33 North High Street
Columbus, OH 43215
614.629.6814 (telephone
614.224.1012 (fax)
rbrundrett@ohiomfg.com

Counsel for Appellant,
Ohio Manufacturers' Association

Kimberly w. Bojko (0069402)
Counsel of Record
Mallory M. Mohler (0089508)
Carpenter Lipps & Leland
280 North High Street
Suite 1300
Columbus, OH 43215
614.365.4100 (telephone)
614.365.9145 (fax)
bojko@carpenterlipps.com
mohler@carpenterlipps.com

Counsel for Appellant,
The Kroger Company

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INTRODUCTION

Duke Energy Ohio (Duke or the company) faced a large legal obligation. It owned two parcels of land which contained large amounts of toxic waste that had been created years earlier by utility activities. For the first time in decades these properties were to be disturbed and the toxic waste exposed. The law required a cleanup. Duke did the responsible thing, proactively investigated the extent of the toxic problem, and developed and implemented a plan to address it. It did so in a way that was cost-effective.

Duke then turned to the Public Utilities Commission of Ohio (Commission) seeking an order that would allow it to collect its costs from the ratepayers who benefitted

from the service originally and who benefit from a comprehensive, cost-effective cleanup as well. The Commission correctly determined that these cleanup costs were costs of Duke doing business as a utility and allowed recovery from customers. This order was correct, logical, fair, and in keeping with law. The Commission should be affirmed.

STATEMENT OF THE FACTS AND CASE

In the days before natural gas was available, Duke's predecessor still provided gas service to its customers. This gas was manufactured using various processes involving heating coal in the absence of air to drive off gasses that could be used for lighting and other domestic purposes. This was a relatively common practice in the days before natural gas (and later electricity) were available. Duke's predecessor carried on these activities at two locations (the East End and West End sites referred to in the Orders below). These sites are referred to as manufactured gas plants (MGP). Activities at these sites continued until 1928 at the West End site and 1963 at the East End site. *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case Nos. 12-1685-GA-AIR, *et al.* (*In re Duke Energy Ohio*) (Opinion and Order at 25) (Nov. 13, 2013), J.A. App. at 96.[1]

By today's standards the processes used to produce artificial gas were very dirty, producing large amounts of coal tar and other items that are today viewed as toxic con-

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[1] References to the appellee's attached appendix are denoted "App. at ___;" references to the joint appellants' (Ohio Consumers' Counsel, Kroger Company, Ohio Manufacturers' Association, and Ohio Partners for Affordable Energy) appendix are denoted "J.A. at ___."

taminants. In keeping with the standards of the time however these wastes were disposed of on the sites and there they remained for decades after the facilities were closed. *Id.* For many years, even after the enactment of various pollution control laws, there was no reason to disturb this situation. The waste, although toxic, was on sites that had no public access, did not effect any water supply used by people, and were essentially capped by asphalt, concrete or soil. *Id.* at 25-26, J.A. App. at 96-97.

This situation began to change when Congress enacted a series of laws requiring remediation. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601, *et seq.*) (CERCLA). There is no dispute in this case that CERCLA imposes strict liability on Duke for the remediation of the two MGP sites at issue in this case. *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case Nos. 12-1685-GA-AIR, *et al.* (*In re Duke Energy Ohio*) (Opinion and Order at 49) (Nov. 13, 2013), J.A. App. at 118. Duke began its efforts to remediate the sites utilizing a program under the auspices of the Ohio EPA termed the Voluntary Action Program (VAP). There is no dispute in this case that using this state program is an appropriate means for responsible entities to use when remediating contaminated sites in Ohio. *Id In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case Nos. 12-1685-GA-AIR, *et al.* (*In re Duke Energy Ohio*) (Opinion and Order at 25) (Nov. 13, 2013). The program is less expensive and more flexible than acting under CERCLA directly. *Id.* at 30-31, J.A. App. at 101-102. So long as the sites remained untouched, CERCLA did not require remediation.

The situation on the ground began to change as well. A new bridge was planned to cross the Ohio River that would disturb the West End site. Additionally a residential development was planned on a site adjoining the East End site. The possibility existed that the pollution at the East End site had or would migrate to this adjoining property. *Id.* at 54, J.A. App. at 125. Because these sites might now be disturbed, the environmental obligations under CERCLA became current. To deal with these changes, Duke began its efforts to determine the extent of the pollution and to determine the steps necessary to remediate it. Duke developed a plan and implemented it.

To deal with the costs associated with the ongoing remediation work at the sites in 2009 Duke sought, and received, accounting authority from the Commission to defer its costs for consideration in a later case. *Id.* at 26, J.A. App. at 97. This approval allowed the company to preserve the issue of the recoverability of these expenditures for a future rate case. The decision below is that case.

On July 9, 2012 Duke Energy Ohio (Duke or the company) filed an application for an increase in its gas rates. *Id.* at 3, J.A. App. at 74. A stipulation was submitted which resolved all issues in the case with the exception of the recoverability of the remediation costs at Duke's two MGP sites. Hearing on the reserved MGP issue began on April 29, 2013 and continued until May 2, 2013. Briefs were submitted and the Commission issued its opinion and order on November 13, 2013. Rehearing applications and an entry on rehearing was issued in due course. This appeal ensued.

ARGUMENT

Proposition of Law No. I:

> **Costs to environmentally remediate sites that were used to produce gas service is properly included in a utility's revenue requirement. R.C. 4909.15(A)(4), App. at 7.**

The lone issue in this case is whether costs of environmental remediation of sites formerly used to serve utility customers are properly included in a utility revenue requirement? The Commission answered this question in the affirmative and ratemaking law supports this finding.

A. The Ratemaking Formula

There are two general sorts of expenditures that can be included in a utility's revenue requirement. These are rate base and operating expense.[2] These are governed by R.C. 4909.15(A)(1) and (A)(4) respectively and are subject to different legal requirements.

The rate base is a measurement of the utility's investment and, as the investment level varies from time to time, it is measured at a particular point in time called the "date certain". The test that applies to these sorts of items is whether a particular item invested in is "used and useful in rendering the public utility service" on that particular date. R.C. 4909.15(A)(1), App. at 5-7. The total historic cost of those items, less depreciation, that meets this test is then multiplied by the rate of return determined to be reasonable by

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[2] The rate base has a subcategory of Construction Work in Progress that is not relevant for current purposes.

the Commission. R.C. 4909.15(A)(3), App. at 7. This is the first part of the revenue requirement calculation. It is not involved in the case below. *In re Duke Energy Ohio* (Opinion and Order at 54) (Nov. 13, 2013), J.A. App. at 125.

The second component of the revenue requirement covers operating expenses. Expenses accumulate over time (or may arise because of activities that occur over time, i.e. taxes) and thus are measured over a 12-month period called the "test year" or "test period". An operating expense is defined as:

> The cost to the utility of rendering the public utility service for the test period less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code during the test period.

R.C. 4909.15(A)(4), App. at 7.

The question presented here is whether Duke's expenditures to environmentally remediate pollution at two former artificial gas producing sites meet this definition. For base rate recovery, these expenditures must constitute a "cost to the utility of rendering the public utility service."

Expenditures that meet the operating expense test are added to the product of rate base times rate of return to create the "revenue requirement," the amount of money that the utility must be offered an opportunity to earn through its rates. R.C. 4909.15(B), App. at 8. This is termed the "rate making formula," (rate base X rate of return) + operating expense = revenue requirement. If the revenue requirement, calculated in this way, is larger than the amount generated by the rates already in place, a rate increase is ordered.

The difference between expenses and investment is significant. An analogy may be helpful. One's home is an investment. The purchase price represents an amount of money that the homeowner has tied up for a relatively long term. This may be loosely compared to a utility's investment in its rate base. It is this value that the utility earns a return on. The cost of mowing the lawn is an expense. It adds up every time the grass is mowed. If a homeowner wants to understand her cost of having shelter (or a utility wants to determine its revenue requirement) she must look to these two different components. She would look to her total expenses (as is done through R.C. 4909.15(A)(4) and add an amount to reflect a portion of her investment in the property (as is done for utilities through R.C. 4909.15(A)(1) and (3)). The two kinds of costs have different characteristics and the law logically treats them differently as a result.

B. Duke's expenditures for environmental remediation do not violate the test year.

It has been argued that Duke's expenditures to clean up the toxic waste at its two manufactured gas sites violate the test year concept included in R.C. 4909.15(C). This is a misunderstanding of accounting. The time when an expense is recorded is a matter of accounting. The Commission has complete control of the accounting practices of a utility. R.C. 4905.13, App. at 4-5. The Commission in an earlier case permitted Duke to defer the costs associated with its environmental remediation for a later review as to recoverability:

> In 2009, once the environmental investigations began at the East and West End sites, Duke filed an application seeking Commission approval to defer cleanup costs at the sites in *In*

> *re Duke Energy Ohio, Inc.,* Case No, 09-712-GA-AAM (Duke Deferral Case) (Duke Ex. 21 at 9). By Order issued November 12, 2009, in the Duke Deferral Case, the Commission approved Duke's application to modify its accounting procedures to defer the environmental investigation and remediation costs for potential recovery in a future base rate case (Staff Ex. 1 at 30). In its January 7, 2010 Entry on Rehearing in the Duke Deferral Case, the Commission stated that it will make the necessary determinations regarding recovery of the deferred costs at such time as Duke files a request for recovery (Staff Ex. 1 at 32).

In re Duke Energy Ohio (Opinion and Order at 26) (Nov. 13, 2013), J.A. App. at 97. The effect of an accounting deferral is to effectively shift the time when an expenditure is recorded. *See* discussion in *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 8. The Commission frequently uses this accounting authority to avoid multiple rate cases. The situation below, for example, was a four year project. *In re Duke Energy Ohio* (Opinion and Order at 12) (Nov. 13, 2013), J.A. App. at 83. For Duke to have obtained a recovery determination for all of its expenditures, in the absence of this deferral authority, it would have had to have filed at least four rate cases. A deferral avoids this by shifting the time that the expenditure is recognized for recovery purposes, an approach that has been approved and accepted by this Court. *See, Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 117 (1979). The Commission's consideration of these deferred costs during the test-year below was proper as a matter of regulatory accounting and does not violate the test-year requirements of R.C. 4909.15.

C. Duke's environmental remediation expenditures are operating expenses.

The Commission properly determined that Duke's environmental remediation expenditures are operating expenses. The Commission explained its rationale thusly:

> 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.

In re Duke Energy Ohio (Opinion and Order at 58-59) (Nov. 13, 2013), J.A. App. at 129-130. The Commission determined that these expenditures were recoverable because they were a current, legally-imposed obligation that was necessary for the good of the communities served and to maintain the properties themselves for other future public uses.

This standard is consistent with the record evidence and with the relevant precedent, because environmental remediation is not the only current, legally-imposed obligation imposed on utilities that provides for social and public benefits. Taxes are also current, legally-imposed obligations that provide for social good. It has long been held that validly-imposed taxes are recoverable. *Cincinnati v. Pub. Util. Comm.,* 153 Ohio St. 56 (1950); See also *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 106 Ohio St. 266 (1922); *Gen. Tel. Co. v. Pub. Util. Comm.*, 174 Ohio St. 575 (1963) (syllabus). The logic applies

equally well to the instant situation. When a cost is imposed on a utility by a competent authority (in this case the U.S. Congress) to achieve a public good (environmental clean-up), or, in the case of taxes, to provide funds for public operations, those costs should be recoverable through rates.

Not all utility expenditures are recoverable in rates. Taxes and these environmental cleanup costs can be distinguished from charitable deductions. The Court has rejected the recovery of charitable deductions because they are an involuntary levy on ratepayers which benefits the company. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258 (1982). While taxes and environmental cleanup costs are also an involuntary levy, they are imposed by government action, not by the utility's choice and benefit the public at large not the utility itself. It is therefore logical to allow recovery of the environmental cleanup costs and taxes but to deny the recovery of charitable donations.

Opponents argue that the environmental clean up costs are a one time expense and should not be built into permanent rates. *Cincinnati v. Pub. Util. Comm.*, 161 Ohio St. 395 (1954). While this is a correct statement of law, it is irrelevant here. The correct thing to do when a utility has a one-time expense, one that is necessary and ordinary but not recurring, is to amortize or spread that expense over a period of time. *Hardin-Wyandot Lighting Co. v. Pub. Util. Comm.*, 108 Ohio St. 207, 215 (1923); *See* also *Cincinnati v. Pub. Util. Comm.*, 161 Ohio St. 395 (1954). That is exactly what the Commission did with these environmental costs to mitigate recovery impact upon Duke's cus-

tomers. *In re Duke Energy Ohio* (Opinion and Order at 68) (Nov. 13, 2013), J.A. App. at 139.

Opponents also argue that these environmental remediation costs are not tied to current service. Even if this were correct[3], it is not relevant. Costs need not be tied to current service to be recoverable. For example, mine closure costs are recoverable even though the mine is no longer producing coal currently, and therefore not providing current service, where the *obligation to pay is current. Consumers' Counsel v. Pub. Util. Comm.*, 24 Ohio St.3d 149 (1986). It is the *obligation* to pay that must be current. And the Commission found, as a matter of fact, that Duke's obligation to remediate *is current. In re Duke Energy Ohio* (Opinion and Order at 59) (Nov. 13, 2013), J.A. App. at 130. This rule is logical in that deferrals may certainly be recoverable but, by definition, they are never tied to current service.

Thus it is clear that the environmental remediation costs pass the test and are recoverable under R.C. 4909.15(A)(4) and consistent with important jurisprudence of the Court. The Commission's order should be affirmed.

D. Duke's environmental remediation costs are recoverable under R.C. 4909.15(A)(4) under any analysis the Court has ever used.

The Court has examined other operating costs over the years and applied various tests to them. The costs at issue below pass all of them.

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[3] And it is not. To continue to provide service to customers Duke must comply with federal law.

Congress has determined that the remediation efforts of the sort that Duke has undertaken to provide benefits to everyone; that is the basis of CERCLA.[4] The Commission recognized this. *In re Duke Energy Ohio* (Opinion and Order at 58-59) (Nov. 13, 2013), J.A. App. at 129-130. Broad societal benefits are not necessary for recovery however. While utility costs to prosecute a rate case provide no great benefit to customers, it is well-settled that rate case expenses are properly recoverable in rates. *Canton v. Pub. Util. Comm.*, 63 Ohio St.2d 76 (1980); *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535 (1993). These costs are recoverable because they are ordinary and necessary, not because they benefit ratepayers. Compliance with federal environmental laws is certainly an ordinary and necessary part of Duke's operating obligation as a utility company. While this specific instance of compliance may be unique, Duke's reconciliation of its two MGP sites fulfills legal mandates in effect today. Under this standard Duke's remediation costs are recoverable.

Similarly the Court has considered stock issuance, registration, transfer and such costs. *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 371 (1949). These kinds of costs are naturally incurred by corporations and are unavoidable, they were, therefore, seen as incident to supplying gas to customers and recoverable. It is certainly natural that corporations comply with legal requirements that are unavoidable. The costs considered below are of just this sort. Environmental cleanup is *required*. All corporations must do

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4 State law requirements exist as well. R.C. Chapters 3734 and 6111. *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case Nos. 12-1685-GA-AIR, *et al.* (*In re Duke Energy Ohio*) (Opinion and Order at 46) (Nov. 13, 2013), J.A. App. at 117.

it if they have impacted facilities. It is something that Duke must do if it is to continue to operate and provide service to the public. Therefore the Commission properly allowed recovery of these costs below and its decision should be affirmed.

General community development can be a sufficient basis for recovery. This Court has considered the recovery of Chamber of Commerce dues. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123 (1992). These dues were found to be recoverable under R.C. 4909.15(A)(4) because they were necessary and ordinary and they provided for community development that inured to the benefit of consumers. Duke's environmental remediation costs are necessary and ordinary as discussed above. Further, the purpose of the environmental remediation was to protect the public from toxic waste, allowing for better community development. This certainly inures to the benefit of consumers. After all it is the public that is being protected, an important factor that the Court should consider in affirming the Commission's order.

Advertising expenses have been treated in a more complicated way. By their nature, advertising expenditures can benefit the public or they can benefit the company itself. The Court has recognized this reality and determined that advertising expenditures are only recoverable where there is a direct primary benefit to customers. *Cleveland v. Pub. Util. Comm.*, 63 Ohio St.2d 62 (1980). As applied to the case below it is clear a direct and certainly primary benefit derived from the environmental cleanup accrues to the public. Duke is not benefitted by cleaning up the toxic material, the public is. The environmental cleanup costs are, therefore, recoverable from ratepayers.

In sum, regardless of the test the Court chooses to apply to the costs considered below, the environmental remediation costs are recoverable. They are necessary, ordinary, unavoidable, incident to doing business, naturally occurring, provide benefit to the community, and allow community development. The Commission's orders should be affirmed.

E. Used and Useful and R.C. 4909.15(A)(4)

The appellants demonstrate confusion regarding the significance of the "used and useful" test found in R.C. 4909.15(A)(1) and R.C. 4909.15(A)(4). That test does not by its own terms apply to R.C. 4909.15(A)(4). The words "used and useful" simply do not appear in R.C. 4909.15(A)(4). The Commission properly determined this. *In re Duke Energy Ohio* (Opinion and Order at 53) (Nov. 13, 2013), J.A. App. at 124. As the Commission did not make any "used and useful" finding, the test is not a relevant criterion in this case. Appellants' attempt to engraft an (A)(1) requirement into (A)(4) contradicts plain statutory language and should be rejected.

It can be useful in some situations however. In trying to determine if a particular expenditure is recoverable under R.C. 4909.15(A)(4), that determination can be easily resolved if the expenditure was made to support an asset that is itself "used and useful". For example the labor of a security guard protecting a rate-based facility is quite clearly recoverable, not under R.C. 4909.15(A)(1) but rather under R.C. 4909.15(A)(4). The guard is not "used and useful" but the facility is. The guard's labor supports this "used and useful" asset and is thus recoverable, not under R.C. 4909.15(A)(1) but rather under

R.C. 4909.15(A)(4). In this way an expense is "matched" with a rate-based asset. The Court has found that operating expenses can be based on the management of property that is "used and useful." *East Ohio Gas Co. v. Pub. Util. Comm.*, 133 Ohio St. 212, 233 (1938). A "used and useful" determination can be, therefore, indirectly informative under R.C. 4909.15(A)(4). For many types of expenditures this kind of relationship does not exist as is certainly true for the advertising, rate case, stock issuance, chamber of commerce dues, and tax expenses the Court has determined to be recoverable as discussed previously. The expenses below are of this sort, that is to say, not tied to a rate base asset and so, this test, although useful in many circumstances, is not involved in this decision. The tests that are relevant are discussed above.

F. Summary

In conclusion the expenditures incurred by Duke in environmentally remediating its two MGP sites were properly accounted for and could be considered for recovery in this case. They constitute recoverable operating expenses for ratemaking purposes under any applicable test that this Court has ever used for making this assessment. The Commission so found and its decision should be affirmed.

Proposition of Law No. II:

> **It is the duty of this Court to decide actual controversies where the judgment can be carried into effect, not to give opinions upon moot questions, or abstract propositions, or to declare principles or rules of law which cannot affect the matter at issue in the case before it. *Verizon North, Inc. v. Pub. Util. Comm.*, 101 Ohio St.3d 91, 2004-Ohio-44, 801 N.E.2d 456; *Travis v. Pub. Util. Comm.*, 123 Ohio St. 355, 175 N.E. 586 (1931).**

Appellants have chosen, strangely, to ask this Court to pass on the Constitutionality of R.C. 4903.16. This Court should decline for the very simple reasons that the question of a stay is moot, the issue in the case is the legality of the Commission's rate order (not the stay), and Appellants' arguments are legally incorrect. Each of these reasons will be discussed below.

A. The stay is moot.

This Court has already acted. It has granted a stay without bond. There is, therefore, nothing left to be done. There is no question left to resolve. This Court has noted that it will not "...give opinions upon moot questions, or abstract propositions, or to declare principles or rules of law which cannot affect the matter at issue in the case before it." *Verizon North, Inc. v. Pub. Util. Comm.*, 101 Ohio St.3d 91, 2004-Ohio-44, 801 N.E.2d 456; *Travis v. Pub. Util. Comm.*, 123 Ohio St. 355, 175 N.E. 586 (1931). Appellants ask this Court to violate this standard. Whether the Court agreed with Appellants' argument or not, it would have no effect on this case, there would be a stay in either event. It simply makes no difference as a matter of fact in this case.

Further it could not make a difference in *any* case. R.C. 4903.16 allows the Court to issue a stay with a bond set at whatever level the Court chooses. Appellants' argue that this is unconstitutional as a limitation on the Court's inherent power and the Court has the inherent power to issue a stay without a bond. Either can lead to exactly the same outcome. As is shown quite clearly in this very case. It just does not matter. The distinction is entirely academic and this Court does not decide academic questions. Appellants' arguments should be rejected.

B. The issue in the case is the legality of the Commission decision.

By statute, this case is a proceeding to reverse, vacate, or modify a final order of the public utilities commission. This is revealed by the standard of review which provides that:

> 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.

R.C. 4903.13, App. at 4. It is the legality of the Commission order that is presented to this Court for determination. The constitutionality, or not, of R.C. 4903.16 simply has nothing to do with the validity of the Commission orders. The purpose of the case is not to test the Court's powers, it is to test the Commission's actions. Although the Appellants would like to change the scope of this case, they cannot. The scope of the case is determined by statute. It does not include the constitutional issue Appellants attempt to raise and the Court should reject Appellants' arguments.

C. R.C. 4903.16 is constitutional.

Appellants argue that R.C. 4903.16 is unconstitutional under a separation of powers theory. One Appellant, Ohio Consumers' Counsel, has presented this argument on three previous occasions. *In re Application of Duke Energy*, Case No. 2008-1837; *Consumers' Counsel v. Pub. Util. Comm.*, Case No. 2009-1547; and *In re Application of the East Ohio Gas Co.*, Case No. 2009-0314. On each occasion, the Court denied the stay. *In re Application of Duke Energy*, 121 Ohio St.3d 1491, 2009-Ohio-2514, 907 N.E.2d 316 (Table); *Consumers' Counsel v. Pub. Util. Comm.*, 124 Ohio St.3d 1490, 2010-Ohio-670, 922 N.E.2d 226 (Table); and *In re Application of East Ohio Gas Co.*, 122 Ohio St.3d 1500, 2009-Ohio-4233, 912 N.E.2d 106 (Table). The arguments raised by Appellants here have been presented to the Court multiple times without success.

There is very good reason that the Court has not adopted the Appellants' argument; it is wrong as a matter of settled law. *Hocking Valley Ry. Co. v. Pub. Util. Comm.*, 100 Ohio St. 321, 126 N.E. 397 (1919). In 1913, the General Assembly enacted essentially the current appeals process which included the stay process.[5] This was very quickly challenged as violative of the Ohio and United States constitutions. In *Hocking Valley*, the Court decided that:

> Section 544 *et seq.*, General Code, enacted pursuant to the provision in the judicial article of the Ohio Constitution as amended in 1912, that this court shall have such revisory jurisdiction of the proceedings of administrative officers as

---

[5] It appears today in the Revised Code as Section 4903.16 as a result of the 1953 recodification of the General to the Revised Code. 103 Ohio Laws 804, 815 (Sec. 37), App. at 1-3.

> may be conferred by law, provide for full judicial review of the proceedings and final orders of the Public Utilities Commission and do not violate the guaranties of the federal or state Constitution.

Hocking Valley Ry. Co. v. Pub. Util. Comm., 100 Ohio St. 321, 126 N.E. 397 (1919) (syllabus). Thus, R.C. 4903.16 is constitutional. Appellants' challenge is simply wrong as a matter of law.

In sum, R.C. 4903.16 is constitutional.[6] Appellants' argument should be rejected.

CONCLUSION

Appellants ask this Court to do two things, both improper legally.

First they ask this Court to reverse the Commission's allowance of recovery of Duke's remediation costs of its MPG sites. As has been shown, the costs incurred by Duke to remediate these sites meet every test the Court has used for recovery of operating costs under R.C. 4909.15(A)(4). The Commission order was legally correct.

Second Appellants ask this Court to take up the question of the Constitutionality of R.C. 4903.16 regarding the issuance of stays of Commission orders. This matter is moot (the Court having issued a stay already), the validity of a stay is not at issue in this case (the validity of the Commission order being the issue in the case pursuant to R.C. 4903.13), and the statute is Constitutional as determined by precedent long ago.

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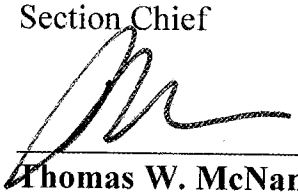
[6] This observation is itself academic. The same result obtains whether the Court acts under some inherent authority or the statute.

In sum, the Commission's order should be affirmed.

Respectfully submitted,

Michael DeWine (0009181)
Ohio Attorney General

William L. Wright (0018010)
Section Chief

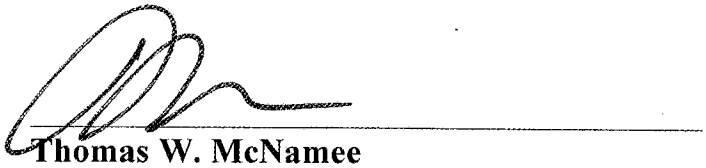


Thomas W. McNamee (0017352)
Counsel of Record
Devin D. Parram (0082507)
Katie L. Johnson (0091064)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
614.466.4397 (telephone)
614.644.8764 (fax)
thomas.mcnamee@puc.state.oh.us
katie.johnson@puc.state.oh.us

Counsel for Appellee,
The Public Utilities Commission of Ohio

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Contra Appellants' Joint Motion for a Stay, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 2nd day of July, 2014.



Thomas W. McNamee
Assistant Attorney General

Parties of Record:

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839

Robert A. Brundrett
Ohio Manufacturers' Association
33 North High Street
Columbus, OH 43215

Larry S. Sauer
Joseph P. Serio
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485

Kimberly w. Bojko
Mallory M. Mohler
Carpenter Lipps & Leland
280 North High Street
Suite 1300
Columbus, OH 43215

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THE OHIO

LEGISLATIVE ACTS

PASSED

AND

JOINT RESOLUTIONS

Adopted

BY THE

EIGHTIETH GENERAL ASSEMBLY

At Its Regular Session

WHICH BEGAN JANUARY 6, 1913.

VOLUME CIII

Springfield, Ohio:
The Springfield Publishing Company,
State Printers.
1913.

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Public Utilities Commission

shall not take effect until the first day of March, 1914. This act shall in all other respects take effect and be in force from and after the second Monday of October, 1913.

The sectional numbers as the margin hereof are designated as provided by law.
THOMAS S. HOGAN,
Attorney General.

C. L. SWAIN,
Speaker of the House of Representatives.
HUGH L. NICHOLS,
President of the Senate.

Passed April 18th, 1913.
Approved May 6th, 1913.

JAMES M. COX,
Governor.

Filed in the office of the Secretary of State May 10th, 1913.
314 G.

[HOUSE BILL No. 832.]

AN ACT

To create the public utilities commission of Ohio, to prescribe its organization, its powers and its duties, and to repeal sections 487 to 499 inclusive, sections 548 to 551 inclusive, sections 614, 614-24, 614-25, 614-26, 614-69, 614-70, 614-80, 614-81 and 614-83 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

Section 487.

The public utilities commission of Ohio; appointment, term, vacancies.

SECTION 1. There shall be and there is hereby created a public utilities commission of Ohio and by that name the commission may sue and be sued. The public utilities commission shall consist of three members, who shall be appointed by the governor with the advice and consent of the senate, and shall possess the powers and duties herein specified as well as all powers necessary and proper to carry out the purposes of this chapter. Immediately after this act shall take effect, the governor shall, with the advice and consent of the senate, appoint a member whose term shall expire on the first day of February, 1915; another whose term shall expire on the first day of February, 1917, and another whose term shall expire on the first day of February, 1919; and thereafter each member shall be appointed and confirmed for a term of six years. Vacancies shall be filled in the same manner for unexpired terms. One of such commissioners, to be designated by the governor, shall, during the term of the appointing governor, be the chairman of the commission. Not more than two of said commissioners shall belong to or be affiliated with the same political party.

Section 488.

Removal; filing record of proceedings and decision.

SECTION 2. The governor may remove any commissioner for inefficiency, neglect of duty, or malfeasance in office, giving to him a copy of the charges against him and an opportunity to be publicly heard, in person or by counsel, in his own defense, upon not less than ten days' notice. If such commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and

warranted, or should be changed, the commission may abrogate, change or modify the same. An order or decision made after such rehearing, abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

Section 544. SECTION 33. A final order made by the commission shall be reversed, vacated or modified by the supreme court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable. Order may be reversed.

Section 545. SECTION 34. The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the supreme court, by any party to the proceeding before the commission, against the public utilities commission of Ohio, setting forth the errors complained of. Thereupon unless the same is duly waived, a summons shall issue and be served, as in other cases, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-petition in error. Proceedings in error.

Section 546. SECTION 35. Upon service or waiver of the summons in error the commission shall forthwith transmit to the clerk of the supreme court a transcript of the journal entries, original papers or transcripts thereof and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of, which shall be filed in said court. Transcript.

Section 547. SECTION 36. No proceeding to reverse, vacate or modify a final order of the commission shall be deemed commenced unless the petition therefor is filed within sixty days after the entry of the final order complained of upon the journal of the commission. When proceeding commenced.

Section 548. SECTION 37. No proceeding to reverse, vacate or modify a final order rendered by the commission shall operate to stay execution thereof unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, shall allow such stay, in which event the plaintiff in error shall be required to execute an undertaking, payable to the state of Ohio, in such a sum as the court may prescribe, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the plaintiff in error of all damages arising from or caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm or corporation for transportation, transmission, produce, commodity or service in excess of the charges fixed by the order complained of, in the event such order be sustained. Stay of execution.

4903.13 Reversal of final order - notice of appeal.

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. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

4903.16 Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

4905.13 System of accounts for public utilities.

The public utilities commission may establish a system of accounts to be kept by public utilities or railroads, including municipally owned or operated public utilities, or may classify said public utilities or railroads and establish a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. Such system shall, when practicable, conform to the system prescribed by the department of taxation. The commission may prescribe the forms of accounts, records, and memorandums to be kept by such public utilities or railroads, including the accounts, records, and memorandums of the movement of traffic as well as of the receipts and expenditure of moneys, and any other forms, records, and memorandums which are necessary to carry out Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code. The system of accounts established by the commission and the forms of accounts, records, and memorandums prescribed by it shall not be inconsistent, in the case of corporations subject to the act of congress entitled "An act to regulate commerce" approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, with the systems and forms established for such corporations by the interstate commerce commission. This section does not

affect the power of the public utilities commission to prescribe forms of accounts, records, and memorandums covering information in addition to that required by the interstate commerce commission. The public utilities commission may, after hearing had upon its own motion or complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Where the public utilities commission has prescribed the forms of accounts, records, or memorandums to be kept by any public utility or railroad for any of its business, no such public utility or railroad shall keep any accounts, records, or memorandums for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, except such accounts, records, or memorandums as are explanatory of and supplemental to the accounts, records, or memorandums prescribed by the commission. The commission shall at all times have access to all accounts kept by such public utilities or railroads and may designate any of its officers or employees to inspect and examine any such accounts. The auditor or other chief accounting officer of any such public utility or railroad shall keep such accounts and make the reports provided for in sections 4905.14 and 4907.13 of the Revised Code. Any auditor or chief accounting officer who fails to comply with this section shall be subject to the penalty provided for in division (B) of section 4905.99 of the Revised Code. The attorney general shall enforce such section upon request of the public utilities commission by mandamus or other appropriate proceedings.

4909.15 Fixation of reasonable rate.

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

(1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such

funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion

shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(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.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under sec-

tion 4905.30 of the Revised Code. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C)

(1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas, water-works, or sewage disposal system company, not later than the end of the test period.

(D) A natural gas, water-works, or sewage disposal system company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas, water-works, or sewage disposal system company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual

charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.