

ORIGINAL

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.)) Case No. 2014-0328)

In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.) Appeal from the Public Utilities Commission of Ohio)

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)

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.) 12-1688-GA-AAM)

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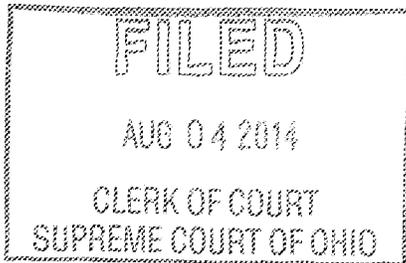
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I. INTRODUCTION

Ohio Partners for Affordable Energy (“OPAE”), an Ohio non-profit corporation advocating for affordable energy policies for low-income residential and small commercial customers in proceedings before the Public Utilities Commission of Ohio (“PUCO”), respectfully requests this Court to reverse, vacate or modify the PUCO’s unlawful decision allowing Duke Energy Ohio, Inc. (“Duke”) to recover from customers \$55.5 million in Manufactured Gas Plant (“MGP”) investigation and remediation costs, which were not costs for rendering public utility distribution service to customers. Herein, OPAE replies to the Merit Briefs of the Appellee PUCO and the Intervening Appellee Duke. OPAE incorporates in this Reply Brief the facts as stated in the Joint Appellants’ Merit Brief filed on May 27, 2014. OPAE is one of the Joint Appellants.

II. ARGUMENT

The Costs To Investigate And Remediate Duke’s Former Manufactured Gas Plant (“MGP”) Sites Should Not Have Been Included in Duke’s Distribution Rates.

Proposition of Law No. 1

- 1. The MGP environmental investigation and remediation expenses, which were not costs of rendering utility service in the test period, may not be included in Duke’s distribution rates.**

The PUCO found that the costs related to investigation and remediation of the MGP sites were recoverable from Duke’s distribution customers as a current, legally imposed obligation that was necessary for the good of the community served and the maintenance of the properties for other public uses. PUCO Merit Brief at 9. The PUCO also believes that the MGP costs need not be tied to current utility service to be recoverable from distribution service customers. PUCO Merit Brief at 11.

The PUCO is wrong. Its arguments are inconsistent with both the law and precedent. Revised Code ("R.C.") 4909.15(A)(4) states:

(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.

R.C. 4909.15(A)(4); Appendix ("App.") at 0001. This ratemaking statute mandates that the PUCO determine the cost to the utility of rendering public utility service for the test period. The MGP investigation and remediation costs simply were not costs of rendering the public utility distribution service for the test period; therefore, the PUCO should not have included these costs in distribution rates to be paid by customers.

The PUCO argues that costs need not be tied to current utility service where the obligation to pay is current. However, this argument is contrary not only to the plain language of the statute but also to Court precedent. The language of the statute, stated above, is clear. As for precedent, the PUCO relies on *Consumers' Counsel v. Pub. Util. Comm.*, 24 Ohio St. 3d 149 (1986), a case in which the Court explicitly stated that the contested issue did not involve the ratemaking statute, R.C. 4909.15(A)(4). The Court found that whether the contested cost would have been recoverable through rates set under R.C. 4909.15(A)(4) was irrelevant. The Court stated:

Nor does this court's decision in *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153 [21 O.O.3d 96], support appellant's argument. There, this court determined that because an investment in terminated nuclear units never provided any service whatsoever, the cost of construction of those units was not properly recoverable

under R.C. 4909.15(A)(4). In contradistinction, the case at bar relates to the actual contract cost of procuring fuel. In the instant analysis, then, it is simply irrelevant whether the cost of the terminated mine would have been recoverable under R.C. 4909.15(A)(4).

Consumers' Counsel v. Pub. Util. Comm., 24 Ohio St. 3d 149 (1986). In this Duke case, however, whether the cost is recoverable under R.C. 4909.15(A)(4) is precisely the issue. Duke filed this case at the PUCO seeking an increase in its distribution rates pursuant to the ratemaking statute, R.C. 4909.15. App. 001. Therefore, the case cited by the PUCO to contend that costs may not be tied to current utility service is irrelevant.

Moreover, contrary to the PUCO's argument, the record in this Duke case demonstrates that Duke had no current obligation to investigate and remediate the MGP sites. Duke has not faced an enforcement action from the U.S. Environmental Protection Agency or the Ohio Environmental Protection Agency ("EPA"). Duke's clean-up activities were conducted under the Ohio Voluntary Action Program. The MGP costs were not current legally imposed obligations. Opinion and Order at 30-31 (November 13, 2013); Joint Appellants' App. 000072, 000101-102.

The PUCO also draws an analogy to environmental remediation costs and taxes to justify the recovery of the MGP costs from customers. PUCO Merit Brief at 9. But the analogy to taxes does not support the PUCO. The PUCO states that validly imposed taxes are recoverable from customers. *Id.* However, there are limitations on the recoverability of validly imposed taxes. Property taxes on property that is not used and useful in providing utility service, while validly imposed on the utility, are not recoverable from utility customers. Taxes on property of a public utility that is not used to render the public utility service may not be charged to operating expenses for

ratemaking purposes. *Cedar Rapids Gaslight Co. v. City of Cedar Rapids*, 144 Iowa 426, 120 N.W. 966 (1909), aff'd, 223 U.S. 655, 32 S. Ct. 389, 56 L. Ed. 594 (1912). In the same way, income taxes on income generated from non-utility operations, while validly imposed on the utility, are not recoverable from utility customers. The limitation on the recovery of taxes from customers is the same as the limitation on the recovery of expenses from customers; the taxes and the expenses must be related to the rendering of the public utility service. R.C. 4909.15(A)(4), App. 0001.

Proposition of Law No. 2

2. The PUCO's authorization of the collection of MGP-related investigation and remediation expenses from Duke's customers was also unlawful because those expenses were not normal and recurring.

In determining whether to include certain costs in customers' rates, the PUCO must determine whether the costs in question are "the cost to the utility of rendering the public utility service for the test period." R.C. 4909.15(A)(4), App. 001. The test year expenses must be reasonably representative of normal utility operations. *Franklin County Welfare Rights Organization v. Pub. Util. Comm*, 55 Ohio St. 2d 1, 1978 Ohio Lexis 606. The test year expenses must be normal and recurring expenses of normal utility operations. The MGP costs are simply not normal and recurring expenses that are reasonably representative of normal utility operations during the test year.

Duke states in its brief that "this distinction [for normal and recurring expenses] is another thinly veiled attempt to rewrite the ratemaking formula expressed in R.C. 4909.15(A)(4)." Duke Merit Brief at 14. Contrary to Duke, the Ohio Supreme Court's interpretation of R.C. 4909.15(A)(4) is that it is "designed to take into account normal, recurring expenses incurred by utilities in the course of rendering service to the public

for the test period.” *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 164, 423 N.E.2d 820 (1981). The Court’s decision in the 1981 *Consumers’ Counsel* case established the “normal and recurring” test to determine if a particular expense is an expense of rendering public utility service. In this Duke case, the MGP-related investigation and remediation costs, in addition to not being costs of rendering utility service, are also not normal and recurring. They were extraordinary and will never occur again. Therefore, the MGP expenses should not be recoverable from customers under R.C. 4909.15(A)(4). App. at 0001.

Duke argues that the Court held in the 1981 *Consumers’ Counsel* case that “[w]hat matters is not whether the cost is normal, recurring, but whether the costs were incurred in the rendering of public utility services during the test year.” Duke Merit Brief at 14. This argument cannot help Duke because the MGP expenses were not incurred in rendering of public utility service. Duke is also wrong in its efforts to invalidate the “normal and recurring” test. Duke argues that the MGP expenses are like specific repair or maintenance costs, which may not be recurring, or expenses associated with an extraordinary storm, which, by definition, is abnormal and seldom recurring. *Id.* at 15.

Duke misses the point of the 1981 *Consumers’ Counsel* case. Normal and recurring expenses are recoverable from customers pursuant to the ratemaking statute if they are incurred in rendering utility service. R.C. 4909.15(A)(4). It is unquestioned that the costs of restoring utility distribution service or rebuilding utility infrastructure that was used to provide utility service after a major storm or an equipment failure would qualify as costs of providing utility service that are normal and recurring even if the specific storm or breakdown was abnormal.

Duke expended significant dollars to clean up pollution at MGP sites that have not been used to provide utility service for 50 years or longer. Duke's remediation expenses can be distinguished from repair and maintenance of facilities that are currently used to provide utility service. Thus, the 1981 *Consumers' Counsel* "normal and recurring" test confirms the need to disallow the MGP remediation costs, because the MGP costs are not normal and recurring expenses and are also not costs of rendering public utility service during the test year.

Therefore, this Court should reverse, vacate or modify the PUCO's Order authorizing Duke to charge MGP-related investigation and remediation expenses to customers. These costs were not lawfully charged to customers under Ohio's ratemaking statute or the Court's precedent.

Proposition of Law No. 3

- 3. The PUCO may not include in Duke's distribution rates MGP investigation and remediation expenses that are not related to the provision of distribution utility service.**

The PUCO Merit Brief does not address the Joint Appellants' argument contained in Proposition of Law 3. Joint Appellants' Merit Brief at 17. This is a crucial argument because two PUCO Commissioners dissented to the PUCO's Opinion and Order on the same points of law being raised by Joint Appellants in their briefs and in Proposition of Law 3. The dissenting Commissioners stated:

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.

Opinion and Order at Dissenting Opinion of Commissioners Steven D. Lesser and Asim Z. Haque, Joint Appellants' Appendix at 000151; *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 PUC LEXIS 259, at 128-29 (Nov. 13, 2013). The dissenting opinion is consistent with the Joint Appellants' interpretation of Ohio's ratemaking law. The MGP-related investigation and remediation costs were not costs to render utility service in the test period, they were not normal and recurring, and they were not costs related to the provision of distribution utility service.

This is a distribution rate case filed under R.C. 4909.15, yet the costs in question have no relationship to Duke's provision of distribution service to current distribution customers during the test year. Only the distribution service is now regulated by the PUCO and is thus the only public utility service. Even if the MGPs were producing natural gas, which they were not and have not for at least fifty years, there is today no utility service for the production of the natural gas commodity because it is now unregulated. Regulated distribution utilities like Duke cannot charge distribution customers for these non-distribution costs.

As the dissenting Commissioners recognized, the cleanup costs relate to facilities that were once used to produce, not distribute, gas. Gas supply is now a competitive service. Charging distribution customers for costs associated with the production of gas supply more than 50 years ago is inconsistent with the current regulatory regime. There is no lawful link between the MGP investigation and remediation costs and the public utility service of distributing natural gas by a natural gas distribution company. It is important to note that the dissent by two PUCO

Commissioners (quoted above) reflects a fundamental disagreement about ratemaking law. The Joint Appellants agree with the two dissenters.

Even though the MGP-related investigation and remediation costs had nothing to do with Duke's provision of distribution utility service, the PUCO allowed Duke to charge these costs to its distribution customers. Duke states in its Merit Brief that the PUCO had established a sufficient nexus between the remediation expenses and its current utility service operations. Duke Merit Brief at 19. However, in reality, as the Joint Appellants and the PUCO dissenters point out, this nexus does not exist between the remediation expenses and distribution service. Therefore, this Court should reverse, vacate or modify the PUCO's Order authorizing Duke to charge MGP-related investigation and remediation expenses to its distribution customers.

Proposition of Law No. 4

- 4. The "used and useful" standard contained in R.C. 4909.15(A)(1) is relevant to the issue of the cost of rendering utility service in the test period.**

The PUCO alleges that the Joint Appellants have demonstrated confusion regarding the significance of the "used and useful" test found in R.C. 4909.15(A)(1), App. 001; PUCO Merit Brief at 14. The PUCO points out that the words "used and useful" do not appear in R.C. 4909.15(A)(4), the part of the statute referring to the cost of providing utility service in the test year. PUCO Merit Brief at 14. R.C. 4909.15(A)(1) provides:

- (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.

This section of R.C. 4909.15 requires a determination that, for the utility to earn a return on utility property, the “property” of the utility must be used and useful as of the date certain and be used to render the public utility service for which rates are being determined. Of course, the MGP property was not used and useful for at least fifty years prior to the test year. Therefore, for ratemaking purposes, granting the utility a return on the MGP property pursuant to R.C. 4909.15(A)(1) was a negligible factor in this case; a utility cannot receive a return on property that is not used and useful. However, this case is about whether the expenses to clean up the property were a part of providing utility service and thus recoverable from customers; and the MGP expenses clearly had nothing to do with providing utility service.

Therefore, the PUCO determined that the “used and useful” analysis was not required in this case. It stated:

Therefore, 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.

Opinion and Order at 54, Joint Appellants’ App. at 000125, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 PUC LEXIS 259, at 128-29 (Nov. 13, 2013). The PUCO recognized that the MGP sites were not used and useful for the rendering of utility service and decided that the payment of a rate of return to the utility on the property pursuant to R.C. 4909.15(A)(1) was therefore irrelevant.

However, the PUCO ignored the fact that the “used and useful” standard of R.C. 4909.15(A)(1) also determines if a particular cost is recoverable under R.C. 4909.15(A)(4) – when a certain cost is “matched” with a utility property. PUCO Merit Brief at 14-15. This “matching” of costs considered under R.C. 4909.15(A)(4) with a utility property under R.C. 4909.15(A)(1) demonstrates that the cost is associated with the provision of utility service. Here, there is no “match” because the MGP costs are associated with property that is not used and useful to provide public utility service.

The PUCO states that for many types of costs the relationship with utility property does not exist. PUCO Merit Brief at 14-15. The PUCO uses the example of a security guard protecting a utility property as being “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” utility property on which the utility will earn a return; the facility is. However, it is obvious that the guard’s labor is an expense that supports a “used and useful” property. There is clearly a relationship between the cost for the labor and the utility property that is used and useful in the provision of the utility service. If the guard worked at an abandoned site that has not been used and useful for the provision of utility service for fifty years, the cost for the guard’s labor would not be recovered from customers because it is not an expense of providing utility service.

The PUCO has made this determination. When a facility was no longer “used and useful,” then labor costs for its security, under PUCO precedent, are not recoverable. *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for*

Tariff Approvals, PUCO Case Nos. 07-551-EL-AIR, et al., Opinion and Order (January 21, 2009). Joint Appellants' App. at 000219 – 000272.

In the instant Duke case, the MGP facilities were not “used and useful”, and thus the remediation expense could not be matched with a utility property that is used and useful for rendering of utility service. The PUCO disallowed \$2,331,580 of costs associated with the purchased parcel located to the west of the East End MGP Site because the purchased parcel had never been used for the provision of manufactured gas or utility service. Opinion and Order at 60, Joint Appellants' App. at 000131, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 PUC LEXIS 259, at 128-29 (Nov. 13, 2013). On that point, the PUCO clearly considered R.C. 4909.15(A)(1), when it noted that the facilities had not been used at any time “past or present” to provide utility service. Nonetheless, the PUCO failed to make the connection that if the MGP property was not used and useful, then the associated costs must be disallowed. This is the contradiction which exposes the illegality of the PUCO's decision regarding the recovery of the MGP expenses.

The proper linkage for matching utility property and a utility service cost associated with it under R.C. 4909.15(A)(1) and 4909.15(A)(4) was not consistently made by the PUCO. When the PUCO disallowed the acquisition costs for the purchased property, it stated: “recovery of costs related to property has not been shown on the record in these cases to provide, either in the past or in the present, utility services that caused the statutorily mandated environmental remediation.” In the case of the MGP expenses, the PUCO decided to ignore that the matching of the property with utility services also did not exist. This is unlawful.

The two MGP sites have not been used and useful in providing utility service to customers in over 50 years. Direct Testimony of Jessica Bednarcik at 5, Joint Appellants' Supplement ("Supp.") at 000052, *Duke Energy Ohio*, Nos. 12-1685-GA-AIR, et al.; see also Supp. at 000104, Tr. Vol. I at 183 (Bednarcik) (Apr. 29, 2013). It is undisputed that the MGP facilities were not used and useful on date certain, March 31, 2012 in these cases. Therefore, the MGP-related investigation and remediation expenses are not linked to property that was used and useful in rendering utility service at date certain.

As the dissenting Commissioners stated again in their dissent to the Entry on Rehearing:

We again dissent from the majority upon rehearing in this case. Duke Energy Ohio, Inc., ("Duke") seeks to recover environmental remediation expenses from customers based upon the statutory language set forth in R.C. 4909.15(A)(4). As Duke should not recover under established precedent interpreting R.C. 4909.15(A)(4), and since they have averred time and again that they do not seek recovery under 4909.15(A)(1), then Duke should not be able to recover its requested environmental remediation expenses.

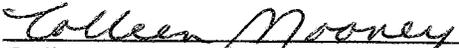
Dissenting Opinion of Entry on Rehearing (January 8, 2014); Joint Appellants' App. 000071. The MGP property was not used and useful, and Duke sought no return under R.C. 4909.15(A)(1). But R.C. 4909.15(A)(1) is relevant to the issue whether the costs to clean up the unused and un-useful property could be recovered from ratepayers under R.C. 4909.15(A)(4). These costs were unrelated to the rendering of utility service.

Thus it was unlawful for the PUCO to have authorized Duke to collect the associated \$55.5 million MGP-related investigation and remediation costs from its customers. This Court should reverse, vacate or modify the PUCO's Order authorizing Duke to charge MGP-related investigation and remediation costs to customers.

III. CONCLUSION

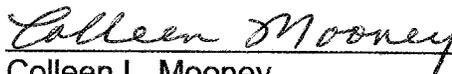
The PUCO has disregarded the ratemaking statute provided by R.C. 4909.15. App. at 0001. Duke was granted authority to collect \$55.5 million from its distribution customers for the cleanup of defunct MGP plants that have not been used to render public utility service to Duke's customers for 50 years and longer. The PUCO has ordered costs to be recovered from distribution customers that are not costs related to the provision of public utility service and are not normal and recurring costs in the test year. The PUCO failed to recognize that the costs are not related to distribution service and also failed to recognize the linkage between the "used and useful standard" of utility properties contained in R.C. 4909.15(A)(1) with the normal and recurring costs for the provision of utility distribution service at R.C. 4909.15(A)(4). App. at 0001. Because the PUCO is a creature of statute, this Court must remedy the PUCO's unlawful actions by reversing, vacating or modifying the PUCO's Order in the instant proceeding to protect Duke's distribution utility customers and to preserve long-standing Ohio ratemaking law. *Canton Storage and Transfer Co. v. Public Util. Comm.*, 72 Ohio St. 3d 1 (1995).

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CERTIFICATE OF SERVICE

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APPENDIX

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 section 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.

Amended by 129th General Assembly File No.199, HB 379, §1, eff. 3/27/2013.

Amended by 129th General Assembly File No.20, HB 95, §1, eff. 9/9/2011.

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