

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. : Ohio Supreme Court 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, 12-1688-GA-AAM

In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods. :

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

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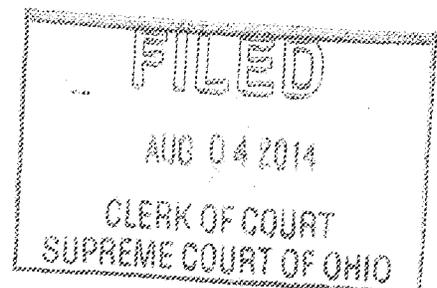
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INTRODUCTION

In a dramatic departure from decades-old interpretation of the statutory ratemaking formula, the Public Utilities Commission of Ohio (“Commission” or “PUCO”) fashioned a new interpretation of R.C. §4909.15(A)(4) under which costs could be recovered from customers if they were merely found to be a “...necessary cost of doing business...”¹ Based upon this new interpretation of the statute, the Commission authorized Duke Energy Ohio, Inc. (“Duke”) to charge today’s customers approximately \$55.4 million in costs associated with manufactured gas plants (“MGPs”) that have never and will never serve them and that were not necessary for the rendering of its public utility service to them during the test year.

The stakes of upholding the Commission’s interpretation of R.C. §4909.15(A)(4) are not insignificant. If upheld, this new interpretation may open the floodgate to a host of claims by other gas and electric utilities. Columbia Gas of Ohio, Inc. participated as Amicus Curiae in the case below and along with The East Ohio Gas Company and Vectren Energy Delivery, Inc. sought intervention in this case. The Toledo Edison Company, The Cleveland Electric Illuminating Company, and Ohio Edison Company have made filings herein as Amici Curiae. This should suggest that these companies, who serve multiple millions of customers, envision applications of the Commission’s new standard that are far-ranging. There are likely more MGPs for which gas companies might elect remediation during test periods for future rate cases. Testimony in the case below indicated that there are at least ninety (90) sites in Ohio that manufactured gas and by-products.²

¹ Opinion & Order, Case No. 12-1685-GA-AIR (November 13, 2013) (“MGP Order”) at 58.

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

Additionally, electric distribution utilities could initiate timely elective remediation for polychlorinated biphenyl, chlorinated solvents, asbestos, and other soil contaminants at no longer producing plant sites, substations, etc. The new standard fashioned by the Commission could be used to qualify many categories of costs for recovery solely because they are arguably “necessary costs doing business” regardless of whether or not they meet the statutory ratemaking standards as established by Commission and Court precedents to date. Commission Staff also warned the Commission of a number of inequitable cross-subsidies which could result from approval of Duke’s requests.³

Amici Curiae, The Ohio Energy Group (“OEG”) and Industrial Energy Users-Ohio (“IEU-Ohio”) are organizations of large utility customers who purchase substantial amounts of regulated distribution and related services from all of the major gas and electric investor-owned utilities in Ohio, including the natural gas service provided by Duke. The availability of fair, just, and reasonable energy rates is critical to maintaining OEG and IEU-Ohio members’ operations, which positively contribute to Ohio’s economy. The implication of the Commission’s new statutory interpretation opens the door for potential consequences that are likely to negatively impact Ohio industry in its ongoing efforts for recovery from the 2008 recession and may unnecessarily impact the decision of businesses to remain, grow, and locate in Ohio. The historical standard for the recovery of business costs in utility rates in Ohio provided some guarantee that customers would pay only those costs that were directly related to providing the utility service to them during the test period used to establish the rates they would pay going forward. Not only is it contrary to well-established legal precedent, but is it contrary to public policy to impose on Ohio utility customers of all classes the burden of costs that are unrelated to the service they receive.

³ Initial Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio, Case No. 12-1685-GA-AIR *et al.* (June 6, 2013) at 2.

Amici Curiae will address below only those matters raised in Merit Briefs that require a response. Failure to address all issues raised by Appellees should not be construed as acquiescence thereto.

ARGUMENT

I. Costs Resulting From Previous Utility Service That Are Not Directly Related To The Rendering Of Current Utility Service Are Not Recoverable Under R.C. §4909.15(A)(4).

Appellees claim that the approximately \$55.4 million in deferred MGP remediation costs that the Commission authorized Duke to recover are comparable to other recoverable operating expenses, including taxes,⁴ rate case expenses,⁵ stock issuance/transfer costs,⁶ Chamber of Commerce dues,⁷ and PUCO/Office of the Ohio Consumers' Counsel funding fees.⁸ These are false comparisons. The types of expenses cited by Appellees are directly related to the rendering of Duke's *current* utility service, which necessitates that those expenses be incurred. In contrast, the deferred MGP remediation costs at issue in this case are the result of *previous* utility service rendered by plants that have not served to customers since 1963.⁹

Moreover, the vast majority of those deferred MGP remediation costs are not directly related to the rendering of current utility service (the only exception may be the \$6,367,724 in remediation costs that PUCO Staff concluded could be "matched" with "used and useful" property under the law).¹⁰ Duke's incurrence of the MGP remediation costs was not necessary to maintain its current utility operations. Indeed, Duke's liability under the Comprehensive

⁴ Merit Brief Submitted on Behalf of Appellee, The Public Utilities Commission of Ohio (July 2, 2014) ("PUCO Brief") at 9-10; Merit Brief of Intervening Appellee, Duke Energy Ohio, Inc. (July 2, 2014) ("Duke Brief") at 13.

⁵ PUCO Brief at 12.

⁶ PUCO Brief at 12.

⁷ PUCO Brief at 13.

⁸ Duke Brief at 13.

⁹ MGP Order at 25.

¹⁰ MGP Order at 28.

Environmental Response, Compensation, and Liability Act has existed since 1980 and it was under no enforcement action by a federal or state agency to remediate the former MGP sites.¹¹ Duke voluntarily chose to incur the MGP remediation costs in preparation for contemplated property development projects of third parties, neither of which had even begun at the time Duke incurred those costs.¹² Hence, the MGP remediation costs are distinguishable from other environmental compliance costs that utilities must incur in order to maintain their current service (e.g. costs resulting from U.S Environmental Protection Agency regulations under the Clean Air Act).¹³ Given that Duke's incurrence of most of the approximately \$55.4 million in MGP remediation costs was: 1) the result of previous utility service; and 2) not directly related to rendering current utility service, the vast majority of those costs are not recoverable under R.C. §4909.15(A)(4).

R.C. §4909.15(A)(4) provides that a utility can only recover its cost “of rendering the public utility service *for the test period....*” The phrase “for the test period” imposes a statutory temporal limitation, restricting recoverable expenses to those necessitated by current utility service. Accordingly, allowing utilities to recover deferred expenses not required for rendering public utility service during the test period, but rather electively incurred and related to utility service provided over fifty years ago, would be a direct violation of the statute as if the “for the test period” constraint were meaningless. Utilities would be able to recover from current and future customers various other deferred costs resulting from service provided decades ago at the direction of the PUCO without regard to the statutory ratemaking formula established by the General Assembly. If costs were deferred and recorded on the utilities' books during the test

¹¹ Duke Brief at 4; R. 07/20/2012 (Direct Testimony of Jessica L. Bednarcik at 6-7); R. 04/29/2013 (Tr. Vol. I at 139)).

¹² MGP Order at 54 (“for the East End site, a residential development is planned adjacent to the site, and, for the West End site, construction and relocation of facilities resulting from the Brent Spence Bridge Corridor Project is necessary.”); MGP Order at 36 and 43.

¹³ 42 U.S.C. §7401 *et seq.*

year, then they would be recoverable from customers, even if the costs had little or nothing to do with providing current utility service. This is unreasonable. Contrary to Appellees' interpretations, the language of R.C. §4909.15(A)(4) requires a direct nexus between the costs to be recovered and the current utility service rendered by the utility.

The precedent cited by Appellees is not applicable in this instance. For example, the mine closure costs cited by the Commission were approved for recovery under a completely different statute, not R.C. §4909.15(A)(4).¹⁴ In fact, the Court stated in that case that "it is simply irrelevant whether the cost of the terminated mine would have been recoverable under R.C. 4909.15(A)(4)."¹⁵ Moreover, while Duke and Amici Curiae cite decisions from other jurisdictions allowing recovery of MGP-related costs,¹⁶ it is the law of Ohio that applies in this instance. And Ohio law does not allow Duke to recover the approximately \$55.4 million in MGP remediation costs pursuant to R.C. §4909.15(A)(4). Finally, Duke alleges that denying recovery of the MGP remediation costs would result in an unconstitutional taking.¹⁷ But because Duke is not entitled to recover the MGP remediation costs under R.C. §4909.15(A)(4), there can be no unconstitutional taking if Duke is ultimately denied recovery of those costs. Additionally, as this Court has recognized, "...a public utility has no constitutional right to recover past and unrecovered costs though present and future rates. *Bluefield W.W. & Improvement Co. v. Public Service Comm.*, (1923) 262 U.S. 6679."¹⁸

¹⁴ PUCO Brief at 11 (citing *Office of Consumers' Counsel v. Pub. Util. Comm.*, 24 Ohio St.3d 149, 493 N.E.2d 1334 (1986)).

¹⁵ *Office of Consumers' Counsel*, 24 Ohio St.3d at 152.

¹⁶ Duke Brief at 23-24; Intervenor's Merit Brief of Columbia Gas of Ohio, Inc. The East Ohio Gas Company d.b.a. Dominion East Ohio, and Vectren Energy Delivery of Ohio, Inc. at 9-11.

¹⁷ Duke Brief at 20-22.

¹⁸ *Columbus & Southern Ohio Electric Company v. Pub. Util. Comm.*, 64 Ohio St. 2d 175, 413 N.E.2d 175 (1980).

II. Contrary To Appellees' Assertions, The *Ohio Edison* Precedent Is Applicable To This Case.

Duke argues that the *Ohio Edison* cases cited by Appellants are distinguishable from this case because the MGP costs “were not discretionary, but were required to comply with federal and state law.”¹⁹ This statement is incorrect. Duke was not mandated to incur the \$55.4 million in MGP remediation costs when it did. There was no enforcement order requiring Duke to remediate the former MGP sites and neither of the contemplated property developments near those sites had even begun at the time the expenses were incurred. Although admittedly, the planned property development near the site may be hampered if Duke had chosen not to remediate the former MGP sites, Duke could have continued to provide natural gas service to customers without incurring the MGP remediation costs. Thus, Duke’s incurrence of the approximately \$55.4 million in MGP remediation costs was discretionary.

Appellees attempt to distance the “used and useful” standard from the requirements of §4909.15(A)(4).²⁰ Yet the *Ohio Edison* cases demonstrate that the Commission has intimately connected these standards by requiring the utility to demonstrate that an operating expense associated with utility-owned property was “matched” with property that was “used and useful” at the date certain in the provision of utility service in order to be recoverable under R.C. §4909.15(A)(4).²¹ Further, reading the “used and useful” standard set forth in R.C. §4909.15(A)(1) in concert with the requirements of R.C. 4909.15(A)(4) is consistent with principles of statutory interpretation. As this Court has held, “[s]tatutes which relate to the same

¹⁹ Duke Brief at 17 (referring to Opinion & Order, Case No. 89-1001-EL-AIR (August 16, 1990) and Opinion & Order, Case No. 07-551-EL-AIR (January 21, 2009) (“*Ohio Edison* cases”).

²⁰ Duke Brief at 6-12; PUCO Brief at 14-15.

²¹ See *Ohio Edison* cases.

subject are *in pari material*. Although enacted at different times and making no reference to each other, they should be read together to ascertain and effectuate the legislative intent.”²²

CONCLUSION

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

Respectfully submitted,



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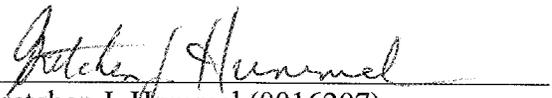
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²² *Ohio v. Moaning*, 76 Ohio St. 3d 126, 666 N.E.2d 1115 (1996).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by overnight mail this 4th day of August, 2014 to the parties listed below.



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