

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
	)	

**REPLY BRIEF OF  
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## I. STATEMENT OF FACTS AND CASE

For the purpose of protecting approximately 420,000 residential, commercial and industrial natural gas customers of Duke Energy Ohio, Inc. (“Duke” or “Utility”) from unlawful charges, the Office of the Ohio Consumers’ Counsel (“OCC”), the Kroger Company (“Kroger”) and Ohio Manufacturers’ Association (“OMA”)<sup>1</sup> respectfully request this Court to reverse, vacate or modify the decision of the Public Utilities Commission of Ohio (“PUCO” or “Commission”) in the cases below. Joint Appellants incorporate the facts as stated in their Merit Brief filed on May 27, 2014.

## II. ARGUMENT

**Proposition of Law 1: The PUCO Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants That Were Not Used And Useful, And That Were Not A Cost To The Utility Of Rendering Public Utility Service During The Test Year, In Violation Of Ohio Law, Including, But Not Limited To, R.C. 4909.15.**

**A. The PUCO has incorrectly stated the “used and useful” standard contained in R.C. 4909.15(A)(1).**

The PUCO alleges that the Appellants are confused regarding the significance of the “used and useful” test found in R.C. 4909.15(A)(1). Merit Brief for Appellee at 14 (July 2, 2014). The PUCO bases this argument on the fact that the words “used and useful” do not appear in R.C. 4909.15(A)(4). *Id.* Although the words “used and useful” do not appear in the statute, a “used and useful” analysis is necessary to determine if a particular expenditure can lawfully be collected from customers under R.C. 4909.15(A)(4) – in order to match expenses with a rate base asset. Essentially, if an underlying asset is not used and useful in the provision of utility service, then any expenses related to that asset cannot be charged to customers. The

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<sup>1</sup> Collectively “Joint Appellants.”

PUCO has admitted that the “used and useful” standard determination can be useful in trying to determine if a particular expenditure is can be collected from customers under R.C.

4909.15(A)(1). PUCO Merit Brief at 14 (July 2, 2014). But the PUCO erred in the case below because it failed to properly apply this matching principle. Instead, the PUCO engaged in unlawful regulation in order to explain and justify why this matching was not appropriate in this instance.

The PUCO claims that—for many types of expenditures—the matching relationship does not exist. *Id.* at 15. The PUCO goes on to list some examples -- which were not part of the explanation in the Opinion and Order -- where the relationship allegedly does not exist. Despite the examples, conspicuously the PUCO fails to explain or discuss why the matching relationship does not exist between the MGP-related environmental investigation and remediation expenses and the underlying manufactured gas plant asset. *Id.* In order to authorize collection of the expenses from customers, the PUCO should analyze the relationship between the environmental investigation and remediation expenses to determine whether those expenses can be “matched” with the manufactured gas plant asset. *East Ohio Gas Co. v. Pub. Util. Comm.*, 133 Ohio St. 212, 233 (1938); *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, Pub. Util. Comm. No. 89-1001-EL-AIR, 1990 Ohio PUC LEXIS 912, (Aug. 16, 1990) (“*Ohio Edison I*”); Appx. at 000152 – 000218; *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*, Pub. Util. Comm. Nos. 07-551-EL-AIR, et al., 2009 Ohio PUC LEXIS 58, (Jan. 21, 2009) (“*Ohio Edison II*”); Appx. at 000219 – 000272. The PUCO failed to do that analysis in the cases below.

Instead the PUCO analyzes the MGP-related environmental investigation and remediation expenses in isolation, and that is why the PUCO's Order is unlawful.

The PUCO uses the example of a security guard protecting a rate-based facility as being "quite clearly recoverable, not under R.C. 4909.15(A)(1) but rather under R.C. 4909.15(A)(4)."

The PUCO states:

The guard is not "used and useful" but the facility is. The guard's labor supports this "used and useful" asset and is recoverable, not under R.C. 4909.15(A)(1) but rather under R.C. 4909.15(A)(4)." PUCO Merit Brief at 14-15.

Interestingly, in an actual case before the PUCO, it was determined that because the facility was no longer "used and useful," then such labor costs for security of that facility, under PUCO precedent, could not be collected from customers. *Ohio Edison II* Pub. Util. Comm. Nos. 07-551-EL-AIR, et al., 2009 Ohio PUC LEXIS 58, at 30-31 (Jan. 21, 2009); Appx. at 000219 – 000272.

Similarly, under the same PUCO precedent, if the manufactured gas plant facility is no longer "used and useful," then costs for remediation of those facilities should also not be recoverable. The law requires an analysis be conducted that determines if such a relationship exists before customers pay any associated costs. The PUCO should have determined that because the MGP facilities were not "used and useful," in the provision of utility customers at the date certain (i.e. meaning that there was no such relationship as describe above), the expenses incurred to remediate those facilities could not be charged to customers.

Instead of properly construing the law, the PUCO created an exception to the statute that does not exist (in order to determine 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.

*Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 Ohio PUC LEXIS 259, at 128-29 (Nov. 13, 2013) (emphasis added); Appx. at 000125. The exception that the PUCO relies upon in its Order does not exist in the statute. And as a creature of statute—the PUCO does not have the discretion to ignore the law and create exceptions where none exist. *Canton Storage and Transfer Co., Inc. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 5, 647 N.E.2d 136 (1995).

The PUCO should have attempted to “match” the MGP-related environmental investigation and remediation expenses, with the rate base asset that caused the pollution. The outcome of that analysis would have resulted in a disallowance of the MGP-related remediation expenses because the MGP facilities which caused the pollution were not “used and useful” in over 50 years, let alone as of date certain.

The PUCO argues that although it did not make any “used and useful” finding, the test is not a relevant criterion in this case. Merit Brief for Appellee at 14 (July 2, 2014). Despite claims to the contrary, and although not using the specific words “used and useful” in its Order, it is interesting to note that in regard to another finding included in its Order, the PUCO did make a “used and useful” determination and disallowed certain costs. Specifically, in deciding to disallow \$2,331,580 of costs associated with the purchased parcel located to the west of the East End MGP Site, the PUCO made the following determination:

With regard to the purchased parcel located to the west of the western parcel of the East End site, we find that the record does not support a recovery of the \$2,331,580 Duke is requesting be included in Rider MGP. *Duke failed to prove, on the record, what, if any, of this purchased parcel was, or ever had been, used for the provision of manufactured gas or utility service for the customers of Duke or its predecessors.\* \* \*. Thus, when applying the requirement for recovery set forth in R.C 4909.15(A)(4), we are not willing to entertain Duke’s unsubstantiated request for recovery of costs related to property*

*[that] 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.*

*Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 Ohio PUC LEXIS 259, at 128-29 (Nov. 13, 2013) (emphasis added); Appx. at 000131.

Interestingly, in the quoted language above, the PUCO relied on the fact that the purchased parcel had never been used for the provision of manufactured gas or utility service in deciding to exclude the associated costs. That PUCO analysis is consistent with R.C. 4909.15(A)(1), excepting that the proper focus for the PUCO under that statute should have been a determination as of the date certain and not whether the facilities had been used at any time “past or present.” That relevant statutory authority 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.* (Emphasis added.)

This section of the law requires a two-prong test in order for costs to be included in the rates paid by customers. Customers should pay only those costs associated with “property” that is: 1) “used and useful” as of the date certain, and 2) is used to render the public utility service for which rates are being determined.

It should be noted that the outcome (disallowance of cost collection) is the same. However, the PUCO’s inquiry with regards to the purchased parcel should have been limited to the fact that at date certain the purchased property was not used and useful, and the associated expenses should have been disallowed – as they were.

Furthermore, although unstated, the PUCO's analysis recognizes that the proper linkage (relationship) for matching rate base and expenses under R.C. 4909.15(A)(1) and 4909.15(A)(4) does not exist for costs incurred for remediation of the parcel west of the East End MGP Site. The PUCO 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." This PUCO finding shows that the PUCO properly disallowed costs, in one instance, for collection from customers because the matching did not exist—the purchased parcel did not cause the environmental remediation and thus, the PUCO disallowed the costs from being collected from Duke's customers.

The PUCO should have conducted that same analysis with regards to the remainder of the environmental expenditures at the other two MGP sites. It is undisputed that the MGP facilities were not used and useful on date certain, March 31, 2012 in the cases below. Specifically, Duke's own witness testified that those two sites have not been used and useful in providing utility service to customers in over 50 years. Direct Testimony of Jessica Bednarcik at 5, Supp. at 000052, *Duke Energy Ohio*, Pub. Util. Comm. Nos. 12-1685-GA-AIR, et al.; *see also* Supp. at 000104, Tr. Vol. I at 183 (Bednarcik) (Apr. 29, 2013). It is also undisputed that the former MGP facilities were the cause of the pollution being remediated by Duke. Supp. at 000054-56. Therefore, the MGP-related investigation and remediation expenses could not be linked to distribution facilities "used and useful" in provision of utility service on March 31, 2012 (the date certain). Thus it was unlawful for the PUCO to authorize Duke to collect the associated \$55.5 million MGP-related investigation and remediation expenses from its customers. This Court should reverse, vacate or modify the PUCO's Order authorizing Duke to charge MGP-related investigation and remediation expenses to customers.

**Proposition of Law 2: The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not A Normal Recurring Expense, In Violation Of Ohio Law Including, But Not Limited To, R.C. 4909.15(A)(4).**

**A. The MGP-related environmental investigation and remediation expenses were not costs of providing current utility service under R.C. 4909.15(A)(4).**

The PUCO stated that it determined that these expenditures were recoverable because the remediation expenses were a current, legally imposed obligation that was necessary for the good of the community served and to maintain the properties themselves for other public uses. Merit Brief for Appellee at 9 (July 2, 2014). The PUCO also stated that costs need not be tied to current service to be paid by customers. *Id.* at 11. However, the PUCO's arguments are inconsistent with law and precedent.

4909.15(A)(4) Appx. at 000276, R.C. 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.

The statute assesses costs to the utility for rendering public utility service during the test period.

Furthermore, the test year results must be "reasonably representative of normal operations."

*Franklin County Welfare Rights Organization v. Pub. Util. Comm.*, 55 Ohio St. 2d 1, 6, 377 N.E.2d 990 (1978). The MGP-related investigation and remediation costs in no way can be considered costs of rendering the current public utility service, and are not reasonably representative of normal operations during the test year.

The case that the PUCO relies upon to support its argument is not controlling in regard to this Court's determination. The PUCO argues that costs need not be tied to current service where the obligation to pay is current. However, the case that the PUCO relies upon involves an

electric fuel cost case and the Court specifically states it is not deciding this issue under R.C.

4909.15(A)(4). 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).

*Office of Consumers' Counsel v. Pub. Util. Comm.*, 24 Ohio St.3d 149, 152, 493 N.E.2d 1334 (1986). Additionally, in the 1986 *Consumers' Counsel* case the PUCO relies upon, the PUCO argues that the relevant fact is that the obligation to pay is current that results in the determination that the costs do not need to be tied to providing current service. Merit Brief for Appellee at 11 (July 2, 2014). However, the record demonstrates that Duke has not been the subject of any enforcement action from the U.S. EPA or the Ohio EPA (in regard to the MGP sites). Second Supp. at 000001; Tr. Vol. I at 139 (Margolis) (Apr. 29, 2013). Accordingly, Duke's argument that it has a current obligation from a 1980 law that is being paid is without merit.

The PUCO attempts to analogize the environmental remediation costs to taxes in an effort to justify the collection of these costs from customers. Merit Brief for Appellee at 9 (July 2, 2014). The analogy is misplaced.

The PUCO states that validly imposed taxes may be collected from customers. *Id.* As a general statement of law that is correct. However, the PUCO fails to discuss limitations on collection of validly imposed taxes from customers. It is axiomatic, for example, that property

taxes on property that is not used and useful in providing utility service, while validly imposed on the utility, would not be recoverable from its utility customers.<sup>2</sup>

Furthermore, income taxes owed because of income generated from non-regulated operations, while validly imposed on the utility, would not be collected from its utility customers. Because there are legal limits on the collection of taxes from a utility's customers, the Court in this case should also recognize legal limits on the ability of a Utility to collect from its customers MGP-related investigation and remediation costs under R.C. 4909.15(A)(4).

**B. The PUCO's authorization of the collection of MGP-related investigation and remediation expenses from Duke's customers is unlawful because those expenses are not normal and recurring.**

Joint Appellants argued on brief that in determining whether to include certain costs in customers' rates, the PUCO must decide whether the costs in question are "the cost to the utility of rendering the public utility service for the test period." Merit Brief for Joint Appellants at 17 (May 27, 2014). Duke stated in its brief that "this distinction is another thinly veiled attempt to rewrite the ratemaking formula expressed in R.C. 4909.15(A)(4). Merit Brief for Duke at 14 (July 3, 2014). However, it was the Supreme Court of Ohio holding that "R.C. 4909.15(A)(4) 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" that anchors Joint Appellants' argument. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 164, 423 N.E.2d 820 (1981).

Duke misinterprets the Court's holding in *Consumers' Counsel*. Duke states: "[w]hat matters is not whether the cost is normal, recurring, but whether the costs were incurred in the

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<sup>2</sup> 64 American Jurisprudence 2d, Public Utilities, Section 122, \* \* \* **Taxes on property of a public utility that is not used in the public service may not be charged to operating expenses. (*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)).** \* \* \*. (Emphasis added).

rendering of public utility services during the test year.” Merit Brief for Duke at 14 (July 3, 2014). The Court’s decision in *Consumers’ Counsel* established a test for determining whether a particular cost is a cost of rendering public utility service. The answer being yes—it may be collected from customers—if it is a normal and recurring cost. In this case, the MGP-related investigation and remediation costs were not normal and recurring, and should not be collected from customers. To allow such collection violates R.C. 4909.15(A)(4).

Duke uses some examples to highlight its position that remediation cost collection in this case is lawful. *Id.* at 14-15. But those examples can be distinguished from the costs that Duke seeks to collect from customers now. First, Duke suggests that remediation expenses are no different from repair or maintenance costs. *Id.* at 15. Duke is incorrect. To the extent the repair or maintenance costs are incurred repairing or maintaining facilities that are currently “used and useful” in the provision of distribution utility service, those costs, if prudently incurred during the test year of a rate case could be collected from Duke’s customers. Likewise Duke’s argument that suggests its customers should not pay for repair or maintenance costs from larger, infrequent projects is misplaced. *Id.* Such statements are indicative that Duke does not understand the Court’s holding in *Consumers’ Counsel*. That Court decision stands for the proposition that if it is debatable whether the costs that a utility seeks to collect from its customers can be lawfully collected, then the PUCO should only permit collection of those costs if they are normal and recurring. Conversely, there is nothing debatable about a utility collecting from customers prudently incurred repair or maintenance expenses for facilities that are currently used and useful in the provision of distribution utility service, if incurred during the test year of a rate case.

Another extreme example used by Duke takes Joint Appellants' arguments out of context. That is an argument that "system restoration costs from a 100- year storm would not be recoverable because the magnitude of the natural disaster creating those costs is by definition, abnormal and seldom recurring." *Id.* Again the *Consumers' Counsel* normal and recurring test is applied in circumstances where the costs in question are not clearly costs incurred providing utility service. No one would debate whether prudently incurred costs of restoring utility distribution service or rebuilding utility infrastructure that was used and useful at the time of a major storm, would qualify as costs of providing utility service. *In Re Application of Duke Energy Ohio, Inc., to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, ¶8.

These examples by Duke are inconsistent with the case before this Court. Duke has expended significant dollars to clean up pollution caused by MGP facilities that have not been used and useful for 50 years or longer. Remediation expenses can be distinguished from repair and maintenance of facilities that are currently used and useful. Thus the *Consumers' Counsel* normal and recurring test is determinative of the PUCO's review of the MGP-related remediation costs. Because those costs are not normal and not recurring expenses—they are not costs incurred for the rendering of public utility service during the test year.

Intervening Appellees argue that there is nothing unusual in utility ratemaking in allowing the recovery of environmental remediation expenses. Brief for Intervening Appellees at 9 (July 3, 2014). However, the case that Intervening Appellees rely upon is a 1987 Commission Ordered Investigation Case in which the PUCO's inquiry was limited to the accumulation and treatment of funds for nuclear plant decommissioning. The PUCO stated:

Respondents should note that the scope of this inquiry is limited to the accumulation and treatment of funds for nuclear decommissioning. *The recovery of invested capital, the*

*method of decommissioning, and the appropriate estimates of the cost of decommissioning for various units are outside the scope of this inquiry.*

*In the Matter of the Commission's Investigation into the Funding of the Decommissioning Costs of Nuclear Generating Stations*, Pub. Util. Comm. No. 87-1183-EL-COI, 1987 Ohio PUC LEXIS 239, at 3 (Aug. 18, 1987) (emphasis added). Not only did the cited Order not state the nuclear decommissioning costs were recoverable, but it was clearly stated in the PUCO's Order that the recovery of invested capital in the nuclear decommissioning effort was outside the scope of the PUCO's inquiry.

Therefore, this Court should reverse, vacate or modify the PUCO's Order authorizing Duke to charge MGP-related investigation and remediation expenses to customers.

**Proposition of Law 3: The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not Expenses For Duke's Utility Distribution Service, In Violation Of Ohio Law Including, But Not Limited To, R.C. 4909.15.**

**A. The PUCO fails to put forth any argument that MGP-related investigation and remediation expenses are related to the provision of distribution utility service.**

The PUCO Merit Brief does not address Joint Appellants' arguments (contained in the Proposition of Law 3) that the MGP-related investigation and remediation expenses are costs of providing distribution service. Merit Brief for Joint Appellants at 17 (May 27, 2014). It is interesting to note that two Commissioners dissented in the Opinion and Order on the very same point of law being raised by Joint Appellants. 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.**

*Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 Ohio PUC LEXIS 259, at 128-29 (Nov. 13, 2013) (Commissioners Lesser and Haque, dissenting) (emphasis added); Appx. at 000151. The dissenting opinion is consistent with the Joint Appellants' understanding of Ohio's ratemaking law. The MGP-related investigation and remediation costs were not shown to be related to the provision of distribution utility service. The case below was a distribution rate case, yet the costs in question have no relationship to Duke's provision of distribution utility service to current distribution customers. The costs at issue were not incurred from the provision of regulated distribution service. Regulated distribution utilities like Duke should not be permitted by the PUCO to charge distribution customers for these non-distribution costs.

Duke stated in its Merit Brief that the PUCO had established a sufficient nexus between the remediation expenses and its *current utility service operations*. Merit Brief for Duke at 19 (July 3, 2014) (emphasis added.) However, the quoted language from the PUCO Order and the arguments in Duke's Merit Brief neglect to refute the Joint Appellants' argument (and the point being made by the dissenting Commissioners) that a 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 customers.

**Proposition of Law 4: PUCO Orders May Be Stayed Pending An Appeal To The Supreme Court of Ohio Without The Posting Of A Bond Because The Bond Requirement In R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine.**

The arguments of the Appellees and amici attempt to distract this Court from how the specific bond requirement in R.C. 4903.16 violates the separation of powers doctrine that is the foundation of Ohio government. This distraction takes the form of a series of flawed procedural and substantive arguments that seek to diminish the magnitude of the legislative branch interfering with an important judicial function. In addition, Appellees raise a series of policy

arguments that exaggerate and distort the practical effect of this Court holding the specific bond requirement unconstitutional.

The specific bond requirement of R.C. 4903.16 is not moot as the issues present a live controversy and the parties clearly have a cognizable interest in the outcome. In addition, this issue will reoccur until definitively ruled on by this Court. *Cleveland Branch of the NAACP v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001); *Demis v. Sniezek*, 558 F.3d 508, 512 (6th Cir. 2009). In adopting a similar test, Ohio courts have looked to whether intervening events prevent a court from granting effective relief. *Siemon v. Bailey*, 2nd Dist. Clark No. 2002-CA-10, 2002-Ohio-3488, ¶ 2. “The burden of demonstrating mootness ‘is a heavy one.’” *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979).

In its Brief, the PUCO comes nowhere close to carrying that burden for three salient reasons. First, there is clearly a live and present controversy regarding this issue in this case and many other cases going forward. This is best illustrated in the brief of Intervening Appellee Columbia Gas of Ohio, et al. which goes on at length about the alleged consequences of a finding that the specific bond requirement is unconstitutional. Merit Brief for Columbia et al. at 21-27 (July 3, 2014). While these claims are wildly exaggerated and bear little credence, they do demonstrate a live and present controversy. They also demonstrate a cognizable interest in the outcome.

Another reason that the PUCO has not carried its burden of proving mootness is that this issue is certain to reoccur. It arises in many PUCO cases before this Court. It has a direct effect on the decision of a party to prosecute an appeal of a PUCO order before this Court. Given the Court’s rule that has been prohibiting refunds of even unlawful PUCO orders,<sup>3</sup> the very reason

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<sup>3</sup> *In re Application of Columbus S. Power Co.*, Slip Opinion 2014-Ohio-462, at ¶ 54.

for an appeal may be gone if an order is not stayed. As a practical matter, in many appeals, the strict imposition of the specific bond requirement makes a bond prohibitively expensive, thus eliminating any benefit to Ohio consumers.

On July 29 2014, this Court denied Duke Energy's motion to lift the stay but granted its motion to require a bond. The parties were then ordered to submit briefs on what is the appropriate amount of the bond required by R.C. 4903.16. This Court did not rule on the arguments presented in Appellants' Merit Brief.

Indeed, even this Court's decision demonstrates that these issues are not moot and will present a live controversy. The conflicting decisions also highlight the need for clarification of this issue. Fortunately, a ruling on propositions of law four and five will help provide this much needed clarity.

The next procedural distraction is an argument by Amicus Ohio Edison that due to prior precedent, in order to hold the specific bond requirement in R.C 4903.16 unconstitutional this Court must overrule prior cases. As a result, the test set out in *Westfield v. Galatis* controls. 100 Ohio St.3d 216, 2003-Ohio-5848, 797 N.E.2d 1256, ¶ 48. This argument is fatally flawed for two primary reasons. First, most of the prior cases dealing with the bond requirement did not specifically discuss the separation of powers doctrine as it relates to the specific bond requirement. Also, many of those cases predate the *Norwood* decision, which underscore the importance of applicability of the separation of powers doctrine. More importantly, by its own terms, the *Galatis* test only applies to issues of substantive laws. *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, 906 N.E.2d 427, ¶ 32. The specific bond requirement is procedural, in that it is the means to obtain a stay. Consequently, *Galatis* is not applicable here.

Even within the merits as briefed, there are similar efforts to muddy the waters and obscure the separation of powers problem. Duke Energy claims that since the right to appeal a PUCO order is statutory, the separation of powers doctrine does not apply. This argument has the dual distinction of both ignoring the current posture of the case and the case law in this area. This argument is undermined simply by noting that once the appeal is properly taken, jurisdiction vests in this Court.

Thus, it is the interference with this Court's exercise of its inherent power to issue stays that creates the separation of powers issue. How the matter arrived before this Court is irrelevant. Once the administrative action is over, the legislature under the separation of powers doctrine has no right to control subsequent judicial proceedings before this Court. This precise issue was addressed in *Smother's v. Lewis*, 672 S.W.2d 62, 64 (Ky.1984). The Kentucky Supreme Court in *Smother's* held that a Kentucky statute that prohibited courts from interfering with an order of revocation of an alcoholic beverage license unconstitutionally violated the separation of powers. The court reached this holding despite the fact that the procedure for appeal of such administrative orders in Kentucky was entirely statutory. The *Smother's* case was not just cited in passing as part of *Norwood v. Gamble*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115. Rather it was extensively quoted and heavily relied upon in the opinion. *Norwood* at ¶ 117.

The Intervening Appellees, primarily the other gas utilities make widely exaggerated policy or slippery slope arguments that are simply inaccurate for four key reasons. First, any decision by this Court is likely to be limited to R.C. 4903.16 and its specific bond requirement. No other statutes are at issue. Second, and more importantly, the various bonds cited by Intervening Appellees are different in that the court retains the ability to fashion the appropriate bond or security or in many cases allow a stay with no bond at all. For example, R.C. 2505.09,

the court has discretion as to the amount of the bond or even if a bond is necessary. That statute does not require a bond in a specific amount. In addition, excepting the limited exception in R.C. 2505.12, under R.C. 4903.16, this Court or the legislature could still require a bond to protect all parties. Any statute or decision would simply have to allow this Court to exercise its inherent judicial authority as to the amount of the bond.

Third, the other gas utilities are wrong to rely on Court rules to support its argument that the bond requirement does not violate the separation of powers.<sup>4</sup> Specifically, the other gas utilities rely on Civ.R.62(B) requiring a bond. But that is a Court rule. The Court can do what it wants in regard to the granting of stays. That is the point. With a Court rule (Civ. R. 62(B)), there is only one branch of government involved. That is the way it is meant to be.

Finally, the Intervening Appellees argue that this Court has already upheld the bond requirement and that this Court should not depart from prior precedent. An examination of these cases demonstrates that they did not directly address the separation of powers issue as put before this Court in Proposition of Law No. 4. In *Norwood*, the statute at issue, R.C. 163.19 had been upheld in earlier cases. This Court found those cases distinguishable, since they involved due process challenges as opposed to separation of powers arguments. *Norwood* at ¶ 139.

For example, a primary case relied on by the Intervening Appellees, *In Re Southern Power Company et al.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E. 655 (2011), does indirectly uphold the bond requirement, but it does not address how that bond requirement infringes on judicial authority. Like other cases that cite to or apply the bond requirement, the *Columbus Southern* case is distinguishable since it never addressed the issue now before this

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<sup>4</sup> *Columbia et al.* Merit Brief at 22.

Court. This Court's July 29, 2014 decision to require a bond also does not specifically address the separation of powers issue.

The inescapable issue is that the specific bond requirement in R.C. 4903.16 directly infringes on this Court's inherent judicial power by severely limiting its ability to stay the effect of an unlawful order of the PUCO. When considered in conjunction with the inability to refund even unlawful utility charges under current Court rule, the violation of the separation of powers doctrine is even more egregious. While *Norwood* dealt with a different statute, the *Norwood* principles are directly applicable to this case and compel a finding of unconstitutionality.

**Proposition of Law 5: PUCO Orders May Be Stayed Pending An Appeal By The OCC<sup>5</sup> To The Supreme Court of Ohio Without The Posting Of A Bond Because The Public Office Exemption To The Bond Requirement (R.C. 2505.12) Applies To OCC.**

The Intervening Appellees argument focusing on R.C. 4903.16 ignores that this statute must be read *in pari materia* with R.C. 2505.12. At the outset, Intervening Appellees do not directly dispute two crucial issues. First, they do not dispute that the Office of Consumers' Counsel is a public or state officer pursuant to R.C. 2505.12(A)(3). More importantly, no specific argument or authority is offered that the two statutes do not pertain to the same subject matter, since they both pertain to stays of execution during an appeal. Consequently, the statutes should be read *in pari materia*. *Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 111, 163 N.E. 2d 167 (1959) (Herbert, J., dissenting); *Akron v. Department of Insurance*, 10th Dist. Franklin No. 13-AP-473, 2014-Ohio-96, ¶ 39. Both statutes work to affect a common purpose, which is to set conditions for a stay on appeal. R.C. 2505.12 should also be read in conjunction with Civil Rule 62(C), which follows the statute in requiring no bond when a state officer in his representative capacity is appealing. While not directly applicable, Civil Rule 62(C), which was

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<sup>5</sup> Kroger and OMA are not participating in this proposition of law.

adopted through a process controlled by this Court, is an expression of the general philosophy that the state or government entities should not be subject to bond requirements.

The purpose of R.C. 2505.12 and Civ. Rule 62 is also ignored by Appellees. The whole point of this statute and rule is that the state, which operates on monies paid by taxpayers, fees and other assessments, should not be subject to the same bond requirements as private persons or entities. This statute and rule represent a policy determination by the legislature and this Court that the taxpayers should not be saddled with these expenses (and other potential liability if a bond were forfeited) simply to be allowed to pursue an appeal. Due to taxpayer funding, this statute and rule recognize that governmental entities are different and should be treated differently. To interpret the specific bond R.C. 4903.16 as applying to public entities completely frustrates the policy behind R.C. 2505.12 and Civil Rule 62 and undermines the common purpose that both statutes work to effect.

This interpretation is bolstered by the fact that R.C. 4903.16 is ambiguous as to its application to government entities. It does not specifically reference government entities nor does it define appellant. It also does not explain in any way the procedure for multiple appellants. In his dissent in *Columbus v. Pub. Util. Comm.*, Justice Herbert notes that this statute was intended to apply primarily to public utilities. 170 Ohio St. at 111. This silence creates an ambiguity that is resolved by reading R.C. 4903.16 *in pari materia* with R.C. 2505.12 and Civil Rule 62 to effectuate the common purpose of both statutes, which is to provide for stays on appeal in the appropriate circumstances.

Appellees also argue that R.C. 2503.03(B) precludes the consideration of R.C. 2505.12 in this case. Despite its superficial appeal, this argument is flawed in three key respects. First, it completely fails to address the *in pari materia* rule of construction. Next, the section does not

specifically reference bonds dealing primarily with final appealable orders. Most importantly, once jurisdiction is vested in this Court, it is no longer solely an administrative proceeding and this court's rules and other Ohio statutes should be considered. See, *Smother's v. Lewis*, 672 S.W.2d 62, 64 (Ky.1984). The argument that this is only a statutory proceeding should be rejected in this context as well as on the separation of powers issue.

Finally, this Court should no longer follow *Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 163 N.E.2d 167 (1959). As previously argued, since the specific bond requirement is procedural, *Westfield v. Galatis* is not applicable. In any case, the specific bond requirement is unworkable in its application to government entities. Given the amounts at issue, it precludes governmental entities or officers such as the Office of Consumer's Counsel from obtaining a stay due to the expense of a bond. In an era of ever tightening government budgets and dwindling tax revenues, governmental entities simply cannot afford such an expense or exposure to a liability for a forfeited bond. To apply the specific bond requirement to governmental entities frustrates the purpose of the statute since it prevents such entities from obtaining a stay in most cases.

### **III. CONCLUSION**

For all the reasons argued above, this Court to reverse, vacate or modify the decision of the PUCO in these cases. Duke made a business decision to voluntarily remediate environmental waste related to manufactured gas plants that were operational over 50 years ago by Duke's predecessor and were not used and useful in rendering utility distribution service to Duke's customers during the test year. Additionally, the Court should find that the mandatory bond requirement of R.C. 4903.16 is unconstitutional and inapplicable to OCC--a state agency.

Respectfully submitted,

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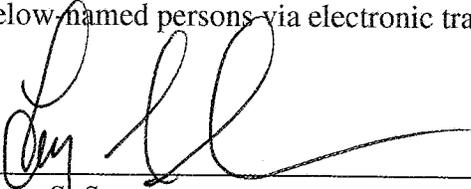
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply Brief of Joint Appellants* has been served upon the below named persons via electronic transmittal this 4th day of August 2014.

  
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