BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates	)	Case No. 12-1685-GA-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval	)	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service	)	Case No. 12-1687-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods	)	Case No. 12-1688-GA-AAM

MOTION OF COLUMBIA GAS OF OHIO, INC.
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Ohio Adm. Code 4901-1-12, Columbia Gas of Ohio, Inc. ("Columbia") moves for leave to submit an *amicus curiae* brief in support of Duke Energy Ohio's application to recover its deferred environmental investigation and remediation costs in this proceeding and a reply brief in response to the parties' initial post-hearing briefs. A Memorandum in Support of this Motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Columbia Gas of Ohio, Inc. ("Columbia") seeks leave to file an *amicus curiae* brief in this proceeding in order to support Duke Energy Ohio's application to recover deferred environmental investigation and remediation expenses.

In its application in this proceeding, Duke Energy Ohio explained that it proposed to "recover [approximately $60 million in] deferred costs associated with the remediation of former manufactured gas plant (MGP) sites" as authorized in a prior case. Duke proposed to amortize those costs in base rates, with deferrals and carrying charges, over a three-year period, and then continue deferring any additional costs incurred after the test year.[1] Commission Staff, however, has opined that many of the costs Duke Energy Ohio seeks to recover are "not recoverable in natural gas rates" because those costs "were incurred in areas of the former MGP sites that are not currently used and useful for natural gas distribution service[.]"[2]

In 2008, this Commission approved an application by Columbia to defer its environmental investigation and remediation costs incurred after January 1, 2008, with carrying charges on the deferred balance. The Commission held in that proceeding that Columbia's recovery of the deferred amounts would be addressed in Columbia's next base rate case.[3] Columbia's future ability to recover those deferred environmental investigation and remediation costs is now threatened by the extraordinary and erroneous legal positions that the Commission's Staff has taken in this proceeding.

The Commission has granted interested parties leave to file briefs as *amici curiae* in several cases where full intervention is not necessary or warranted.[4]

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[1] Application of Duke Energy Ohio, Inc. at pp. 5-6, 8 (July 9, 2012).

[2] A report by the Staff of the Public Utilities Commission of Ohio, at p. 45 (Jan. 4, 2013).

[3] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 08-606-GA-AAM, Entry (Sept. 24, 2008).

[4] *See In re Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 94-987-GA-AIR, 1994 Ohio PUC LEXIS 684, *8 (Aug. 4, 1994); *In re Application of FirstEnergy Corp. on Behalf of Ohio Edison Co. et al. for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case Nos. 99-1212-EL-ETP *et al.*, Entry, ¶5 (Mar. 23, 2000); *In re Complaint of WorldCom, Inc. at al. v. City of Toledo*, Case No. 02-3207-AU-PWC, Entry, ¶¶7, 11 (Mar. 4, 2003); *In re Complaint of XO Ohio v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry, ¶30 (May 14, 2003). *See also ICG Telecom Group, Inc. v. Ameritech*

Here, Staff has acknowledged that whether Duke can recover the costs it incurred to investigate and remediate its former MGP sites from gas customers through base rates, even if the MGPs were not used and useful in rendering natural gas distribution service at the date certain, is "essentially a legal issue."[5] Consequently, Columbia's submission of an *amicus curiae* brief on this limited legal issue, at the post-hearing stage of this proceeding, will not prejudice any party. Instead, it will simply contribute to the full development and equitable resolution of one of the important legal issues remaining in this proceeding.

Accordingly, given Columbia's strong interest in the Commission's determination of the recoverability of deferred environmental remediation expenses, and consistent with Commission precedent, Columbia seeks leave of this Commission to file the attached *amicus curiae* brief, which discusses the precedent from this Commission and other states' public utilities commissions that supports the recoverability of MGP site remediation expenses. Columbia also requests leave to file a reply brief, so that it may address the legal arguments on this issue that are raised in the parties' initial post-hearing briefs.

Ohio, Case No. 97-1557-TP-CSS, Entry, ¶9 (Feb. 3, 1998) (explaining the effect of a prior order that denied intervention but granted the company *amicus curiae* status); *Time Warner Telecom of Ohio, L.P. v. Ameritech Ohio*, Case No. 98-1438-TP-CSS, Entry, ¶7 (Nov. 10, 1998); *In re Application of Dayton Power & Light Co. for a Waiver*, Case No. 05-1171-EL-UNC, Entry, ¶¶8-9, 13 (Jan. 4, 2006) (denying OCC's motion to intervene as "not necessary" and, instead, considering an *amicus curiae* brief submitted by the OCC and other organizations); *In re Time Warner Telecom of Ohio, L.P. v. Cincinnati Bell Telephone Co.*, Case No. 99-322-TP-CSS, Entry, ¶6 (July 16, 1999).

[5] Prepared Direct Testimony of Kerry J. Adkins, at p. 4 (Apr. 22, 2013).

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I hereby certify that a true and accurate copy of the foregoing Motion for Leave to File *Amicus Curiae* Brief was served by electronic mail upon the following parties this 6th day of June, 2013:

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POST-HEARING BRIEF OF *AMICUS CURIAE* COLUMBIA GAS OF OHIO, INC.

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June 6, 2013

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INTRODUCTION

In May of 2008, Columbia Gas of Ohio ("Columbia") filed an application with the Public Utilities Commission of Ohio ("Commission") for authority to modify its accounting procedures to permit Columbia to defer its environmental remediation costs incurred after January 1, 2008.[6] Columbia explained that it had identified 24 former Manufactured Gas Plant ("MGP") sites in Ohio with ties to Columbia or its corporate predecessors. Of those 24 sites, Columbia had no ownership interest in 20 of the sites. Nonetheless, Columbia explained that it could be liable for some of the environmental remediation costs associated with those former MGP sites, pursuant to Ohio Admin. Code Chapter 3745-300 and the federal Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq. Because the environmental investigation and remediation costs associated with those sites are prudent and necessary business costs, the incurrence of which may result in a significant and unavoidable negative impact on Columbia's earnings, Columbia asked for authority to defer those remediation costs incurred after January 1, 2008, with carrying charges on the deferred balance.

The Commission reviewed Columbia's application, agreed that Columbia's "environmental investigation and remediation costs are necessary business costs incurred *** in compliance with Ohio regulations and federal statutes," and concluded that Columbia's application was "reasonable and should be approved." The Commission limited Columbia's deferral authority to "only those costs in excess of $25,000 per site." The Commission also held that the recovery of the amounts that Columbia deferred pursuant to that authority would be addressed in Columbia's next base rate case.[7] Columbia's future ability to recover those deferred environmental investigation and remediation costs is now threatened by the extraordinary and erroneous legal positions that the Commission's Staff has taken in this proceeding.

As part of Duke Energy Ohio's pre-filing notice in this proceeding, Duke filed notice of its intent to file an application for an alternative rate plan. In that

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[6] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 08-606-GA-AAM, Application of Columbia Gas of Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs (May 19, 2008).

[7] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 08-606-GA-AAM, Entry, ¶¶ 9-10 (Sept. 24, 2008).

alternative rate plan, Duke Energy Ohio sought to recover "deferred costs associated with remediation of manufactured gas plant (MGP) sites * * *."[8] In its subsequent application, Duke explained that it proposed to "recover [approximately $60 million in] deferred costs associated with the remediation of former manufactured gas plant (MGP) sites" as authorized in a prior case. Duke proposed to amortize those costs in base rates, with deferrals and carrying charges, over a three-year period, and then continue deferring any additional costs incurred after the test year.[9]

On January 4, 2013, Commission Staff filed a report of its investigation of Duke Energy Ohio's gas rate case application. In that report, Staff opined that "much of the MGP investigation and remediation costs were incurred in areas of the former MGP sites that are not currently used and useful for natural gas distribution service and are thus not recoverable in natural gas rates[.]"[10] Staff also recommended that Duke "file a rider application in the docket for recovery of the authorized MGP expenses," rather than seeking to recover those expenses through base rates.[11]

Duke raised several objections to Staff's conclusions. Duke objected that its two former MGP sites "have been utilized continuously by the Company for the provision of natural gas distribution service and were therefore used and useful during the time period of the MGP former operations, as well as today." Duke further objected that "the cost of delivering utility service reasonably encompasses the current costs of doing business, including the necessary and prudently incurred costs of complying with environmental standards at utility owned sites."[12]

On April 2, 2013, Duke Energy Ohio filed a stipulation signed by Commission Staff, the OCC, OPAE, Kroger, the OEG, Direct Energy, People Working Cooperatively, and other parties, and supported by the City of Cincinnati. Among other points, the parties agreed that Duke Energy Ohio's revenue recovery for gas base distribution rates would be $241,326,770, an

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[8] Pre-Filing Notice of Duke Energy Ohio, Inc., at PFN Exhibit 5 (June 7, 2012).

[9] Application of Duke Energy Ohio, Inc. at pp. 5-6, 8 (July 9, 2012).

[10] A report by the Staff of the Public Utilities Commission of Ohio, at p. 45 (Jan. 4, 2013).

[11] *Id.* at p. 47.

[12] Duke Energy Ohio, Inc.'s Objections to Staff Report of Investigation and Summary of Major Issues, at p. 6 (Feb. 4, 2013).

amount representing no increase in annualized revenues. The parties agreed that Duke Energy Ohio's return on equity would be 9.84%, and its "cost of debt *** for determining carrying charges for future gas deferral requests" would be 5.32%. The parties were unable to reach agreement on Duke Energy Ohio's recovery of costs related to Duke's environmental remediation of MGP sites, however, and agreed to litigate their positions on that topic at hearing.[13]

In its pre-filed testimony, Staff reiterated its position that Duke Energy Ohio "should only be allowed to recover remediation and investigation costs of the MGP plants related to the portions of the property that were determined to be used and useful [in rendering gas distribution service] at the date certain[,]" which is March 31, 2012, for this proceeding.[14]

Staff's position fundamentally misconstrues the law and precedent of this Commission with regard to the recovery of deferred expenses that were necessarily and prudently incurred. Staff's position is also inconsistent with the conclusions of several other state public utilities commissions that have examined circumstances like those presented here. For these reasons, as further explained below, Columbia encourages the Commission to reject Staff's position and hold that Duke Energy Ohio may recover its necessarily and prudently incurred environmental investigation and remediation costs, regardless of whether the remediated sites were used and useful in rendering gas distribution service as of the date certain in this proceeding.

ARGUMENT

1. Staff's Position Is Inconsistent With Commission Precedent

In order to fix and determine "just and reasonable rates, fares, tolls, rentals, and charges," Ohio's ratemaking statutes require the Commission to consider several factors. In 1999, the Supreme Court of Ohio summarized the ratemaking process as requiring seven steps:

> R.C. 4909.15(A) requires the commission to determine the following: the valuation of the utility's property in service as of a date certain, i.e. its rate base; a fair and reasonable return on that investment; and the expenses incurred in providing service during the test year. Once these determinations are made, the commis-

[13] Stipulation and Recommendation (Apr. 2, 2013).

[14] Prepared Direct Testimony of Kerry J. Adkins at p. 4 (Apr. 22, 2013).

sion, pursuant to R.C. 4909.15(B), computes the gross annual revenues to which the utility is entitled by adding the dollar return on the utility's investment to the utility's test-year expenses. Pursuant to R.C. 4909.15(C), the commission then determines the utility's revenues during the test period. If the revenues received by the utility during the test year are less than the gross annual revenues to which the utility is entitled, the commission must set new rates that will raise the necessary revenue. R.C. 4909.15(D)[15]; *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 537-538, 620 N.E.2d 835, 838-839. To simplify: The value of used and useful property (rate base) (1) is multiplied by rate of return (2), yielding the dollar annual return to which the utility is entitled (3). That amount (3) is added to test-period expenses (4), yielding gross annual revenues to which utility is entitled (5). Subtracted from amount (5) is test period revenues (6), yielding the rate increase (7).[16]

Although the General Assembly has since modified Revised Code Section 4909.15, the general ratemaking process still proceeds as outlined above, with some modifications.

In this case, Staff has improperly applied the "used and useful" requirement from step (1) of the ratemaking process to the determination of test-period expenses, which is step (4) of the process. Staff has also imposed a requirement on the determination of test-period expenses that would effectively render meaningless the longstanding Commission practice of authorizing public utilities to defer expenses for later collection.

In Step (1), again, Section 4909.15(A)(1) of the Revised Code directs the Commission to determine "[t]he valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas *** 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."[17] The Supreme Court of Ohio has explained that, "Incorporated in this statutory language is the generally accepted principle that a utility is not entitled to include in the valuation of its rate base property not actually used or useful in providing its public service, no matter how useful the property may have been in the past or may yet be in

[15] Section 4909.15, Ohio Rev. Code, has been revised since this opinion was issued. The statutory provision that requires consideration of whether the amount charged will "yield reasonable compensation for the service rendered" is now found in subparagraph (E).

[16] *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 54 (1999).

[17] Section 4909.15(A)(1), Ohio Rev. Code.

the future."[18] If a utility company's expenses are "capitalized and treated as property in [the company's] rate base," then they are subject to a prudency review (under Revised Code Section 4909.154) and must meet the "used and useful" requirement of Revised Code Section 4909.15(A)(1).[19] But, Duke Energy Ohio's environmental investigation and remediation expenses were not capitalized and incorporated into rate base. Accordingly, neither Revised Code Section 4905.15(A)(1) nor its "used and useful" standard apply to Duke's recovery of those expenses.

Instead, the applicable statutory provision is Revised Code Section 4909.15(A)(4), which determines "[t]he cost to the utility of rendering the public utility service for the test period ***, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period."[20] This provision "is designed to take into account the normal, recurring expenses incurred by utilities in the course of rendering service to the public for the test period," such as "reasonable expenditures for repairs, maintenance, personnel-related costs, administrative expenses, and taxes."[21] Unlike Section 4909.15(A)(1) of the Revised Code, Section 4909.15(A)(4) does not require that the property that is the basis for the expense be "used and useful *** in rendering the public utility service for which rates are to be fixed and determined."[22] Instead, costs recovered under Revised Code Section 4909.15(A)(4) must simply be prudent and necessary.

The Commission can, and repeatedly has, treated the amortization of previously deferred expenses as test year expenses under section 4909.15(A)(4). An early example can be found in a 1979 opinion from the Supreme Court of Ohio, in which the Court affirmed the Commission's decision to

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[18] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 449, 453 (1979), *citing Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938).

[19] *Cincinnati Gas & Elec. Co.* at 58.

[20] Section 4909.15(A)(4), Ohio Rev. Code.

[21] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 164 (1981); *see Office of Consumers' Counsel v. Pub. Util. Comm.*, 6 Ohio St.3d 405, 408 (1983) (explaining that the 1981 opinion "reversed the commission for its transformation without statutory authorization of a 'major capital investment,' which had never provided any service to the utility's customers, into an item of expense.").

[22] Section 4909.15(A)(1), Ohio Rev. Code.

"permit[ ] the amortization of deferred scrubber costs as test year expenses under R.C. 4909.15(A)(4) and (C)."[23] The Court explained:

> The record indicates that this is a proper accounting procedure. Although these costs were paid prior to the test year, under principles of accrual accounting, they were deferred until the scrubber actually went into operation. The yearly amortized portion of these expenses was reflected on the company's books in the test year, and thus constituted a test year expense within the meaning of R. C. 4909.15(A)(4) and (C).[24]

A more recent example that illustrates the Commission's long-standing practice of including the amortization of deferred expenses in allowable test year expenses arises in the recent AEP Ohio distribution rate proceeding, decided in December 2011. In that proceeding, the Commission adopted a stipulation and recommendation of the parties that, *inter alia*, implemented a new rider to collect certain deferred regulatory assets.[25] That Deferred Asset Recovery Rider ("DARR") authorized recovery for six different pools of regulatory assets that were established years, and in some cases, many years, before the 2011 rate cases, specifically:

- Consumer education, customer choice implementation, and transition plan filing costs plus carrying charges (Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP);

- Rate Stabilization Plan rate case expenses plus carrying charges (Case No. 04-169-EL-UNC);

- Carrying charges on distribution line extension charges (Case No. 01-2708-EL-COI);

- Mono[n]gahela Power Company (Mon Power) transfer integration costs plus carrying charges and acquired net regulatory assets (Case No. 05-765-EL-UNC);

- AEP Ohio's voluntary Ohio Green Power Pricing Program costs plus carrying charges (Case No. 06-1153-EL-UNC); and

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[23] *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 116 (1979).

[24] *Id.*

[25] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR and 11-352-EL-AIR, Opinion and Order, at pp. 7, 10 (Dec. 14, 2011).

- Storm costs related to the Hurricane Ike windstorm experienced in September 2008 plus debt carrying costs (Case No. 08-1301-EL-AAM).[26]

With regard to the first pool of assets, the parties entered into a Stipulation and Recommendation in Case Nos. 99-1729 and -1730-EL-ETP that, among other things, provided that Columbus Southern Power and Ohio Power each would:

> absorb the first $20 million of actual Consumer Education, Customer Choice Implementation and Transition Plan filing Costs, and will be permitted to defer the remainder of its actual costs for such activities . . . plus a carrying charge, as regulatory assets for recovery *as a cost of service*, by a rider, in future distribution rates.[27]

It was estimated that the total of these deferrals for the two companies would be $86.1 million.[28] In the Opinion and Order in the 1999 ETP cases, the Commission found that "the requested accounting authority is reasonable, and shall be granted."[29]

This is particularly relevant because the Stipulation specifically explained that the deferrals would become *a cost of service* that would underlie the future distribution rates. In other words, the parties intended that the deferrals would become a part of test-year expense, under Revised Code Section 4909.15(A)(4), in the future distribution rate cases that would provide for their recovery. The stipulating parties also agreed that the deferrals would be recovered through a rider, not the base distribution rate. Regardless of the mechanism for recovering those costs, however, the basis for establishing the rate was going to be a rate case conducted in accordance with the standards of Chapter 4909 and, specifically, the

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[26] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR and 11-352-EL-AIR, Prefiled Direct Testimony of Selwyn J. Dias on Behalf of Columbus Southern Power Company and Ohio Power Company, at pp. 8-9 (Mar. 14, 2011).

[27] *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Stipulation and Recommendation, at p. 4 (May 8, 2000) (emphasis added).

[28] *Id.*

[29] *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Opinion and Order, at p. 37 (Sept. 28, 2000)

test year cost-of-service requirement of Section 4909.15(A)(4). The Commission accepted the parties' Stipulation on these points. The only reasonable interpretation of the Commission's acceptance of the Stipulation is that the Commission agreed that the deferrals created as a result of the accounting authority it granted in Case Nos. 99-1729 and -1730-EL-ETP would be amortized and recovered through distribution rates over some period of time determined to be appropriate in the future rate case, and that the amortization allowance determined in that case would be a test year expense under section 4909.15(A)(4). Then, in AEP Ohio's 2011 distribution rate cases, the parties (including Staff) stipulated that those regulatory assets would be recovered through distribution rates. Implicit in that stipulation by the Staff was that the annual amortization of the deferrals would be a cost of service for the test year, under Section 4909.15(A)(4). Clearly, the statutory standard of Section 4909.15(A)(4) was met, because the Commission's Opinion and Order accepted the Stipulation. And, each of the other five types of regulatory assets addressed and recovered in AEP Ohio's 2011 distribution rate proceeding also was able to be recovered through distribution rates because the amortization expense allowance associated with each of them was a cost of service, included within test year expense under Section 4909.15(A)(4) for the test year of the rate cases.

The Commission's decision in the AEP Ohio distribution rate cases is dispositive of the issue, whether allowing rate recovery of past deferrals through rates set in a current rate case meets the requirements of Revised Code Section 4909.15(A)(4). Moreover, the decision in that case is far from an outlier.

In Ohio Power's 1994 rate case, the Commission authorized Ohio Power to amortize and recover expenses for an emissions control research project (the "TIDD Pressurized Fluidized Bed Combustion" project) that it had incurred between January 1, 1982, and November 30, 1986. The Staff Report explained that Ohio Power had "adjusted test year expenses to include an amortization [of] its pre-December 1, 1986, balance associated with" the project.[30] Staff agreed with the amortization,[31] and the Commission approved it as well. OCC then filed an application for rehearing, asserting as error that the expenses for this project "were not incurred in the test year in these proceedings and that the company made no application to defer these expenses." The Commission rejected this

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[30] *In the Matter of the Application of Ohio Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service and Related Matters*, Case No. 94-996-EL-AIR, Staff Report at pp. 21-22 (Dec. 9, 1994).

[31] *Id.*

objection, finding that the deferral had been approved in a prior case (Case No. 87-2189-EL-UNC).[32] So, in this proceeding as well, AEP Ohio's past deferred expenses were able to be recovered through rates because the amortization expense allowance associated with them was included as a cost of service, within test year expense under Section 4909.15(A)(4), for the test year of the rate case.

The next year, in Toledo Edison's 1995 rate case, the Commission authorized Toledo Edison to amortize and recover deferred "program costs, shared savings, and lost revenues" related to the company's Demand-Side Management ("DSM") programs. The test year for that rate case was 1995,[33] and the deferred expenses were incurred between 1993 and 1995. Yet, Commission Staff concluded that Toledo Edison was warranted in "adjust[ing] test year expenses to include *** an amortization of actual deferred demand side management expenses through June 30, 1995, for Commission approved DSM periods."[34] Staff found that the deferral was authorized by the Commission's opinion and order in a prior case, Case No. 92-708-EL-FOR, although it adjusted the requested amount of the deferral to reflect a cap on recovery in a different case and to correct a calculation error.[35] The Commission approved "[S]taff's recommendation concerning DSM cost recovery" and held that the deferred DSM expenses would be amortized over three years.[36] Thus, yet again, the Commission allowed a regulated utility to recover deferred expenses from before the test year by including them in test year expenses, with Staff's recommendation and approval. And at no point in the Staff Report or the Commission's deliberations did Staff or the Commission consider whether DSM program costs, shared savings, and lost revenues were related to property that was used and useful in rendering electric distribution service.

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[32] *In the Matter of the Application of Ohio Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service and Related Matters*, Case No. 94-996-EL-AIR, Entry on Rehearing, at p. 11 (May 18, 1995).

[33] *In the Matter of the Application of The Toledo Company for Authority to Amend and Increase Certain of Its Rates and Charges for Electric Service*, Case No. 95-299-EL-AIR, Staff Report, at p. 1 (Nov. 3, 1995).

[34] *See id.* at pp. 19, 194.

[35] *Id.* at p. 197.

[36] *In the Matter of the Application of The Toledo Company for Authority to Amend and Increase Certain of Its Rates and Charges for Electric Service*, Case No. 95-299-EL-AIR, Opinion and Order at pp. 18-19 (Apr. 11, 1996).

The FirstEnergy ("FE") utilities' 2009 distribution rate case order[37] might be considered by some as a possible obstacle to recovery of deferred MGP remediation costs. That order appears to address whether expenses incurred during the test year are recoverable as test year expenses under section 4909.15(A)(4) if they "do not reflect costs to the utility of rendering public utility service for the test period *** ." The order in the FE utilities rate case should not be interpreted or applied in a manner that contradicts the conclusion that expenses deferred in prior periods, when amortized to expense during a test year pursuant to a Commission order, may be treated as expenses incurred during the test year.

The circumstances that led the Staff, and then the Commission, to conclude that the generating plant security and maintenance expenses at issue in that case should not be regarded as related to current expenses of those utilities are not readily discerned from that FirstEnergy order. However, the Commission's decision can be interpreted as being based on a conclusion that the costs were more appropriately the responsibility of the unregulated generation affiliate, FirstEnergy Solutions, than the regulated distribution companies. In other words, the FirstEnergy utilities decision is based on a completely different set of circumstances from those present in this proceeding. Indeed, the circumstances are different in several respects from those that apply to any case where the utility has already applied for and received authority for deferral of specific expenses. First, prudently incurred MGP remediation costs are a necessary and reasonable cost of doing business as a natural gas local distribution company. They cannot be considered as appropriately the responsibility of any other entity, such as an unregulated affiliate. Indeed, unlike the security and maintenance expenses at issue in the FE utilities' rate case, responsibility for which the FE utilities apparently voluntarily chose to take on, federal law specifically imposes liability on Duke Energy Ohio (and Columbia) for the remediation of the MGP sites. Arguably then, unlike the case of Duke's MGP remediation expenses, the Commission may have concluded that the costs incurred at the FE Utilities' plants were not necessary to the operations of those utilities' distribution businesses. If so, arguably, the FE utilities' generation plant security and maintenance expenses did not meet the necessary, prudent and reasonable standard that is implicit in Revised Code Section 4909.15(A)(4).

[37] *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*, Case Nos. 07-551-EL-AIR et al., Opinion and Order, at p. 14 (Jan. 21, 2009).

Second, the Commission has already authorized the Duke Energy Ohio deferrals. Notably, there was no such prior review of the FirstEnergy security and maintenance expenses by the Commission before the FE utilities proposed to include them in test year expense.

Ultimately, if the standard for inclusion in test year expense is that the expenditure must be directly related to services rendered during the test year, it is difficult to imagine a circumstance when a regulatory asset composed of deferred expenses would ever be includable in test year expense. Such a standard would eviscerate the Commission's ability to authorize expense deferrals, because they would never be recoverable through future rates under Revised Code Section 4909.15(A)(4). The Commission's deferral orders would be nullities when they were issued. That would be an absurd result. It would also be completely at odds with all of the Commission's orders over the years (including the orders in AEP Ohio's distribution rate proceedings, discussed above) that have provided rate recovery for deferred expenses, all of which by definition involve cash expenditures made in periods prior to the test year of the rate proceeding that provides for rate recovery. Indeed, in its Entry on Rehearing in Ohio Power's 1994 rate case, the Commission rejected an argument by OCC that Ohio Power could not recover expenses from 1982 to 1986 because they "were not incurred in the test year in these proceedings ***."[38] The Commission held that it had previously given Ohio Power authority to defer those expenses and, accordingly, approved Ohio Power's adjustment of test year expenses to include an amortization allowance that would, over the amortization period, allow for recovery of the deferred expenses.

Thus, if the Commission's many deferral orders over the years are to be meaningful, the standard for inclusion in test year expense has not been, and cannot be, that the expenditure must be directly related to services rendered during the test year. Instead, the standard for inclusion of an amortization expense allowance for deferrals in test year and recovery through rates should be, were the expenditures necessary, prudent, and reasonable?

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[38] *In the Matter of the Application of Ohio Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service and Related Matters*, Case No. 94-996-EL-AIR,Entry on Rehearing, at p. 11 (May 18, 1995).

2. Staff's Position Is Inconsistent With Other States' Precedent

If the Commission were to conclude that deferred expenses could be recovered through rates so long as those expenses were prudent and necessary, the Commission would find itself in good company. A number of state public utilities commissions have granted cost recovery for deferred environmental remediation expenses through rates, without the need to first determine whether the properties were "used and useful" in rendering utility service, or whether the costs were incurred in the relevant test year.

Many states permit the recovery of deferred remediation expenses, so long as those expenses are prudently and necessarily incurred. The Michigan Public Service Commission, for example, has said it typically permits "gas utilities facing cleanup costs for environmental contamination *** to defer them until the Commission has reviewed those costs and found them to be reasonable and prudent. Thereafter, the annual amortization amounts may be included in determining the utility's rates."[39] A recent report by the New York Public Service Commission ("N.Y. PSC") noted that the N.Y. PSC has usually allowed utilities full recovery of prudently incurred MGP remediation costs.[40] The Oregon Public Utility Commission issued an opinion late last year in which it authorized Northwest Natural Gas Company to amortize expenses from remediating old MGP sites that it had deferred since 2003, after those expenses were reviewed to "ensure that they were prudently incurred."[41] And, the Washington Utilities and Transportation Commission has held that environmental cleanup costs undertaken to comply with federal and state regulations are legitimate business expenses and recoverable in rates, unless such costs were shown to be imprudent in a subsequent rate proceeding.[42] These opinions are all consistent with the posi-

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[39] *In re Application of Peninsular Gas Company for Cost Recovery of Environmental Assessment and Remediation Costs and for Authority to Increase its Rate for the Sale of Natural Gas*, Case No. U-11127, 1997 Mich. PSC LEXIS 221 (July 31, 1997), *aff'd*, Docket No. 205884 (Mich. App. June 18, 1999), *leave to appeal denied*, 463 Mich. 912 (2000).

[40] *Proceeding on Motion of the Commission to Commence a Review and Evaluation of the Treatment of the State's Regulated Utilities' Site Investigation and Remediation (SIR) Costs*, Case No. 11-M-0034, 2012 N.Y. PUC LEXIS 442 (November 28, 2012), *citing, e.g., New York State Electric and Gas Corp.*, Case Nos. 29541 *et al.*, Opinion No. 88-2, 90 PUR4th 322, 1988 N.Y. PUC LEXIS 8 (Jan. 20, 1988).

[41] *In re Northwest Natural Gas Co., dba NW Natural, Request for a General Rate Revision*, Order No. 12 437, Docket No. UG 221, 2012 Ore. PUC LEXIS 429 (Nov. 16, 2012).

[42] *In re Pacificorp Petition for an Accounting Order Regarding Treatment of Environmental Remediation Costs*, Docket No. UE-031658, Order Approving Petition (Apr. 27, 2005) , *citing, e.g., Puget Sound Power & Light Co.*, Docket No. UE-911476 (April 1, 1992).

tion that this Commission took in the AEP Ohio and Toledo Edison rate cases discussed above.

A 1996 case out of the Minnesota Public Utilities Commission ("Minnesota PUC"), moreover, provides an alternative justification for cost recovery that might serve as a philosophical bridge between the Staff's position (that deferred environmental remediation costs may be recovered in rates only if the remediated sites are "used and useful" in providing public utility service) and the position of Duke Energy Ohio. In *In re Request of Interstate Power Company for Authority to Change Its Rates for Gas Service in Minnesota*,[43] Interstate Power Company filed a general rate case under which it "proposed full rate recovery of its deferred investigation and cleanup costs for [two] MGP sites." The Minnesota PUC had previously authorized Interstate to defer its costs for investigating and cleaning up the two sites "from July 11, 1994, the date the Company first asked for deferral authority, for consideration in the Company's next rate case." Upon review of the company's application, the PUC found that granting full rate recovery was consistent with its precedent and authorized Interstate to amortize its costs over ten years, based on a conclusion that the property at issue *had*, at one time, been "used and useful." The Minnesota PUC held:

> The standard for used and useful analysis has consistently been that the property must be used and useful in the provision of utility service. In a case by case analysis, the Commission has found the standard met when the property was owned and used by the utility at the time of pollution *** and when the property was owned and used by the utility at the time of rate recovery *** .
>
> In these cases (and in each of the other cases in which utilities have sought and received MGP cost recovery), the property was used and useful in the provision of utility service. The Commission has therefore determined that a sufficient nexus existed between the circumstances creating the liability and the ratepayers responsible for paying the costs of the liability. Under normal ratemaking policy, a utility is entitled to recovery of prudent and reasonable expenses incurred in the business of providing utility service.[44]

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[43] *In re Request of Interstate Power Company for Authority to Change Its Rates for Gas Service in Minnesota*, Docket No. G-001/GR-95-406, 1996 Minn. PUC LEXIS 27, 167 P.U.R.4th 409 (Feb. 29, 1996), *aff'd*, 559 N.W.2d 130 (Minn. App. 1997), *aff'd*, 574 N.W.2d 408 (Minn. 1998).

[44] *Id.* at *49-50.

In other words, the PUC held, "the correct used and useful analysis allows recoverability if property was used and useful for the provision of utility service at the time of pollution (or for current ratepayers)."[45] The PUC rejected arguments that current customers should not be required to pay for remediation because they received no benefit from MGP production, explaining: "[M]anufactured gas and natural gas are simply two products provided by a gas utility. As technology changed, gas utilities such as Interstate phased out one product (manufactured gas) and substituted another (natural gas). There is simply no basis for cutting off recovery because of a circumstance of technology."[46] Additionally, the PUC held that disallowing cost recovery would be "poor public policy," as it would "discourage environmental cleanup" and "could improperly risk the financial integrity of the utility."[47]

Each of these reasons for allowing deferred cost recovery applies with equal strength in this proceeding. There is no doubt that the MGP sites at issue in this proceeding were once used to provide a public utility service. Accordingly, the deferred costs incurred in remediating those sites were expenses incurred in the business of providing utility service. To the extent the Commission concludes those expenses were prudent and reasonable, there is no public policy justification for denying cost recovery to Duke Energy Ohio for those deferred expenses.

CONCLUSION

Environmental investigation and remediation costs, like the expenses Duke Energy Ohio seeks to recover in this proceeding, are not subject to the "used and useful" requirement of Revised Code Section 4909.15(A)(1). Instead, public utilities commissions across the country – including this Commission – have permitted public utilities to recover deferred environmental remediation expenses, so long as the utilities demonstrated that those expenses were prudently incurred. But even if the Commission were to ignore that precedent, and conclude that any cost recovery for deferred remediation expenses must pass the "used and useful" test in Section 4909.15(A)(1), Ohio Rev. Code, Duke Energy Ohio could recover its deferred environmental remediation costs if it demonstrated that the MGP sites were either currently "used and useful" or were "used and useful" at the time that the MGP sites were polluted. Following Staff's posi-

[45] *Id.* at *53.

[46] *Id.* at *57.

[47] *Id.* at *59, 60.

tion, which would prohibit the recovery of any deferred expenses not incurred in the test year for a given rate case application, would effectively nullify the Commission's deferral authorizations retroactively. The Ohio General Assembly cannot have intended that absurd result.

For all of the reasons expressed above, Columbia Gas of Ohio, Inc. respectfully requests that the Commission hold that expenses incurred to investigate and remediate MGP sites and deferred pursuant to Commission authorization may later be recovered, either through base rates or through a rider, if they are determined to have been prudent and necessary.

Respectfully submitted,

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