

**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
)	

**MEMORANDUM CONTRA
DUKE ENERGY OHIO INC.'S
APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
KROGER COMPANY
OHIO MANUFACTURERS' ASSOCIATION, AND
OHIO PARTNERS FOR AFFORDABLE ENERGY**

I. INTRODUCTION

On November 13, 2013, the Public Utilities Commission of Ohio (“Commission” or “PUCO”) issued its Opinion and Order (“Order”) authorizing Duke Energy Ohio, Inc. (“Duke” or “Utility”) to collect \$55.5 million from its customers for environmental investigation and remediation costs for two Manufactured Gas Plants (“MGP”) sites that began service in the 1800’s and that have not been used and useful in providing utility

service in over 50 years.¹ That PUCO Order is unlawful and unreasonable for the reasons discussed in the December 13, 2013 Application for Rehearing filed by the Office of the Ohio Consumers' Counsel ("OCC"), Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA") and Ohio Partners for Affordable Energy ("OPAE") (collectively, "Joint Consumer Advocates").

For the purpose of protecting the 420,000 natural gas customers of Duke from unlawful and unreasonable charges, the PUCO should modify its November 13, 2013 Opinion and Order consistent with the Joint Consumer Advocates' Application for Rehearing. Additionally, the PUCO should deny Duke's request for rehearing for the reasons discussed below.²

II. ARGUMENT

In its Application for Rehearing, the only argument that Duke raises for the PUCO's consideration is that "the timeframe for the recovery of costs incurred for environmental remediation established therein as such timeframe is not supported by the record."³ Duke fails to cite any specific⁴ law to support its allegation. And Duke does

¹ The West End site is located on the west side of downtown Cincinnati and it was constructed by the Cincinnati Gas Light and Coke Company in 1841. Gas for lighting was first produced at the plant in 1843, and the manufacture of gas ceased in 1928. The East End site is located about four miles east of downtown Cincinnati. Construction of the East End site began in 1882 and commercial operations began in 1884, with the manufacture of gas ceasing in 1963. Duke Ex. No. 20(A) (Supplemental Testimony of Andrew Middleton at 25 (February 25, 2013); See also Tr. Vol. I at 183 (April 29, 2013).

² The Office of the Ohio Consumers' Counsel ("OCC"), Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA") and Ohio Partners for Affordable Energy ("OPAE") (collectively, "Joint Consumer Advocates"), in accordance with Ohio Adm. Code 4901-1-35(B), file this Memorandum Contra Duke's Application for Rehearing of the November 13, 2013 Opinion and Order of the Public Utilities Commission of Ohio.

³ Duke's Application for Rehearing at 1 (December 13, 2013).

⁴ R.C. 4903.10 requires that all applications for rehearing present specific grounds for Commission review. Ohio Adm. Code 4901-1-35(A) requires that applications for rehearing present specific grounds for rehearing and that the purpose of the corresponding memorandum is to "set forth an explanation of the basis for each ground for rehearing *identified in the application for rehearing*."

not claim that the PUCO's limitation is unreasonable.⁵ The PUCO should deny Duke's request for rehearing.

While Duke should not be permitted to recover MGP investigation and remediation costs from customers, as the Joint Consumer Advocates have argued in their Application for Rehearing, there is no merit in Duke's position that the PUCO's ten-year limitation on recovery of allowed costs is too short. Notwithstanding its previous arguments, Duke undermines its own position by acknowledging that the ten-year time frame appears reasonable. Specifically, Duke admits that "the Commission established a timeframe that, absent exigent circumstances, appeared reasonable."⁶

Moreover, in light of Duke's drawn-out and plodding record to date with investigation and remediation of these sites, the PUCO should be very circumspect in entertaining any claim of exigency. The record demonstrates that Duke's actions to date have not been prompt in addressing the pollution at the MGP sites.

Duke alleged it has strict liability for the environmental cleanup pursuant to Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"),⁷ a law that was passed in 1980.⁸ Duke's witness also testified that Duke was aware of MGP-related environmental issues for the sites at issue dating back to 1988.⁹ The evidence further shows that Duke put insurance companies on notice of potential environmental claims in 1996,¹⁰ and put shareholders on notice of potential

⁵ Duke's Application for Rehearing at 1 (December 13, 2013).

⁶ Duke's Memorandum in Support of Application for Rehearing, at 6 (December 13, 2013).

⁷ Duke Initial Brief at 5 (June 6, 2013).

⁸ Duke Initial Brief at 29 (June 6, 2013).

⁹ Duke Ex. No. 21A (Supplemental Testimony of Jessica Bednarcik) at 16 (February 25, 2013).

¹⁰ Kroger Ex. No. 2 (OCC INT 17-667).

environmental liability in 1997.¹¹ Yet Duke did not even commence investigation alone, remediation at the East End and West End Sites until 2008 and 2009, respectively.¹²

Duke offered little explanation for these delays – delays of up to 29 years from CERCLA’s enactment – and offered no explanation of how an action up to 29 years later (and even much later than the origins of the pollution) constitutes “prompt” action.

Duke’s customers should not pay for MGP investigation and remediation costs. Nonetheless, the PUCO’s Order (in regard to placing a time limit upon collection of costs from customers) would impose some limit to Duke’s unreasonable delays in its remediation activities and cost claims sought from consumers.

Finally, the PUCO cannot grant Duke its alternative relief of “clarifying that the Opinion and Order allows the Company to seek an extension of the timeframe as circumstances dictate.”¹³ The PUCO has held that motions for clarifications of a PUCO Order are not appropriate and that the proper way to seek further understanding of the intent of an Order is through an application for rehearing. *In the Matter of the Application of Columbia Gas*, Pub. Util. Comm. No. 07-478-GA-UNC, 2007 Ohio PUC LEXIS 633, Entry on Rehearing at ¶13, (September 12, 2007). But in *Columbia*, the Commission held that because the utility had included its Motion for Clarification as a part of its Application for Rehearing, the PUCO would consider the motion as an additional argument for rehearing.¹⁴

¹¹ OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at BMH-3 (February 25, 2013).

¹² Duke Initial Brief at 31 (June 6, 2013).

¹³ Duke’s Memorandum in Support of Application for Rehearing, at 7 (December 13, 2013).

¹⁴ *In the Matter of the Application of Columbia Gas*, Pub. Util. Comm. No. 07-478-GA-UNC, 2007 Ohio PUC LEXIS 633, Entry on Rehearing at ¶13, (September 12, 2007).

But, unlike the movant in *Columbia*, Duke did not include its request for clarification in its Application for Rehearing.¹⁵ Duke included that request in its Memorandum in Support.¹⁶

R.C. 4903.10 does not provide for the filing of a memorandum in support of an application for rehearing.¹⁷ The requirement for filing a memorandum in support is an administrative requirement of the PUCO for the purpose of setting “forth an explanation of the basis for each ground for rehearing *identified in the application for rehearing*.”¹⁸ Duke’s reliance on its Memorandum in Support does not cure the Application’s statutory defect of failing to state, in accordance with R.C. 4903.10, the alleged unreasonableness or unlawfulness of the PUCO’s failure to clarify the “exigent circumstances” language in the PUCO’s Order. Accordingly, the PUCO should deny Duke’s request for rehearing and clarification.

III. CONCLUSION

For all the reasons discussed above, the PUCO should deny Duke’s rehearing request to alter or modify the timeframe under which Duke can collect MGP-related investigation and remediation costs from customers and Duke’s request for clarification. Instead, the PUCO should modify its unlawful and unreasonable November 13, 2013 Opinion and Order consistent with the Joint Consumer Advocates’ Application for Rehearing.

¹⁵ See Duke’s Application for Rehearing (December 13, 2013).

¹⁶ Duke’s Memorandum in Support of Application for Rehearing, at 7 (December 13, 2013).

¹⁷ See R.C. 4903.10.

¹⁸ Ohio Adm. Code 4901-1-35(A) (emphasis added).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Contra was served by electronic service to the following parties of record, this 23rd day of December, 2013.

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Summary: Memorandum Memorandum Contra Duke Energy Ohio Inc.'s Application for Rehearing by the Office of the Ohio Consumers' Counsel, Kroger Company, Ohio Manufacturers' Association and Ohio Partners for Affordable Energy electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.