BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 14-375-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval	))	Case No. 14-376-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 15-452-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval	))	Case No. 15-453-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 16-542-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval	))	Case No. 16-543-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 17-596-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval	))	Case No. 17-597-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 18-283-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval	))	Case No. 18-284-GA-ATA

REPLY COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Respectfully submitted,

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Duke is asking the PUCO for permission to charge Cincinnati-area customers $26 million more for its costs to clean up defunct manufactured gas plant ("MGP") sites that were polluted beginning in the 1800s. The PUCO previously made customers pay $55 million for the cleanup, even though its Staff recommended limiting Duke to charging just $6.4 million to customers.

The PUCO Staff now recommends to the PUCO that it should deny permission for Duke to charge customers $11.9 million of the new $26 million.[1] The Office of the Ohio Consumers' Counsel ("OCC") agrees, in part, with the PUCO Staff's position. But the PUCO should deny Duke's charges in their entirety because (i) the MGP sites are not used to provide natural gas distribution service to customers, (ii) there is no statutory authority allowing Duke to charge customers for these expenses, (iii) Duke failed to prove that its expenditures were prudent, and (iv) Duke could have saved customers nearly $19 million by using less costly, but adequate cleanup methods. Duke's applications should be denied.

I. RECOMMENDATIONS

A. The MGP sites are not used to provide natural gas distribution service to customers, and thus, customers cannot lawfully be charged to remediate those sites.

The Staff Report should have evaluated whether the MGP sites are used to provide natural gas distribution service to customers. And had it done so, it should have concluded that there is no lawful nexus between the remediation costs and the public utility service of distributing natural gas to customers by a natural gas distribution

[1] *See* A Report by the Staff of the Public Utilities Commission of Ohio at 7 (Sept. 28, 2018) (the "Staff Report") (recommending that Duke be permitted to charge customers $14,174,112).

company, as required by R.C. 4909.15(A)(4) and potentially other statutes.[2] This is the same conclusion that now-Chairman Haque and former Commissioner Lesser came to in their dissenting opinion when Duke first sought to charge customers for these cleanup costs:

> We decline to extend the statutory language and the established precedent to interpret [R.C. 4909.15](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."[3]

The manufactured gas plants, as their name suggests, were used to *manufacture* natural gas. This is a generation function, not a distribution function. But Duke is now a distribution-only utility because natural gas supply is a competitive service. Duke's cleanup of the MGP sites has no impact on Duke's distribution of natural gas to its current distribution customers.

The PUCO should follow the same reasoning now. Duke should not be allowed to charge its distribution customers for cleanup costs associated with MGP sites that are unrelated to the provision of natural gas distribution service.

B. Duke's proposed charges to consumers for MGP cleanup constitute unlawful single-issue ratemaking.

The PUCO Staff recommended an $11.9 million disallowance in its report.[4] The PUCO should disallow not only the $11.9 million, but the entire $26 million that Duke

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[2] R.C. 4909.15(A)(4) (utility may only charge customers for the "cost to the utility of rendering the public utility service").

[3] *In re Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, Opinion & Order (Nov. 13, 2013) at 80 (the "Rate Case Order").

[4] Staff Report at 7.

requests. The PUCO lacks jurisdiction to approve Duke's request for single-issue ratemaking.

For the PUCO to approve Duke's proposed charges to customers for cleanup of its defunct MGP sites, there must be a statute authorizing these charges.[5] But there is none, so the charges are unlawful.

The Supreme Court of Ohio, in *Pike Natural Gas Co. v. PUCO*, found that the PUCO can approve a single-issue adjustment clause when authorized by statute.[6] The Court found that an excise tax adjustment clause—the same as a "rider" using today's terminology—was unlawful because there was no statute specifically authorizing it.[7]

There is no statute authorizing Duke to charge customers for environmental cleanup costs through a single-issue charge (Rider MGP). R.C. 4929.11(A) allows for an "automatic adjustment mechanism . . . that allows a natural gas company's rates or charges for a regulated service or goods to fluctuate automatically in accordance with changes in a specific cost or costs." But any such rider must be approved following an application by the utility filed under R.C. 4929.11, R.C. 4909.18, or R.C. 4929.05.[8] Duke's applications in these cases were not filed under any of these statutes.[9]

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[5] *See, e.g.*, *Ohio Bell Tel. Co. v. PUCO*, 17 Ohio St. 2d 45, 47 (1969) ("The commission is a creature of statute and has only those powers given to it by statute."); *In re Ohio Power Co.*, 144 Ohio St. 3d 1, 9 (2015).

[6] 68 Ohio St. 2d 181, 183 (1981).

[7] *Id.* at 183-87.

[8] R.C. 4929.11(A)-(B).

[9] *See* Case No. 14-375-GA-RDR, Application (Mar. 31, 2014) (not citing R.C. 4929.05 or R.C. 4929.11 and explicitly stating that Duke was *not* seeking approval under R.C. 4909.18); Case No. 15-452-GA-RDR, Application (Mar. 31, 2015) (not citing R.C. 4929.05 or R.C. 4929.11 and explicitly stating that Duke was *not* seeking approval under R.C. 4909.18); Case No. 16-542-GA-RDR, Application (Mar. 31, 2016) (not citing R.C. 4929.05, R.C. 4929.11, or R.C. 4909.18); Case No. 17-596-GA-RDR, Application (Mar. 31, 2017) (not citing R.C. 4929.05, R.C. 4929.11, or R.C. 4909.18); Case No. 18-283-GA-RDR (Mar. 28, 2018) (not citing R.C. 4929.05, R.C. 4929.11, or R.C. 4909.18).

Further, Rider MGP is not an "automatic adjustment mechanism." The rider does not get updated automatically based on changes in costs, but instead is the subject of a new application each year and a PUCO prudence review.[10] There is nothing "automatic" about the annual changes in rates under Rider MGP. Nor does Duke (or the PUCO Staff) cite any other authority for Duke's proposed charges in any of its applications in these cases, tacitly admitting that there is none.[11]

Further, there is an important distinction between these cases and the PUCO's approval of charges to customers for MGP cleanup costs in Duke's most recent natural gas rate case. In that case (No. 12-1685-GA-AIR), the PUCO authorized Duke to charge customers for MGP cleanup costs under R.C. 4909.15(A)(4).[12] R.C. 4909.15(A)(4) allows a utility to charge customers for "[t]he cost to the utility of rendering the public utility service for the test period." Thus, the PUCO allowed Duke to charge customers for MGP cleanup costs that it incurred through December 31, 2012, which was the end of the test period in that rate case.[13] But in the current cases, Duke seeks to charge customers for MGP cleanup costs for 2013 through 2017. These costs fall outside the test period from Duke's last base rate case, and Duke does not have a pending natural gas base rate case.

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[10] Rate Case Order at 71-72.

[11] *See* Case No. 14-375-GA-RDR, Application (Mar. 31, 2014); Case No. 15-452-GA-RDR, Application (Mar. 31, 2015); Case No. 16-542-GA-RDR, Application (Mar. 31, 2016); Case No. 17-596-GA-RDR, Application (Mar. 31, 2017); Case No. 18-283-GA-RDR (Mar. 28, 2018).

[12] *In re Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, Opinion & Order (Nov. 13, 2013) (the "Rate Case Order").

[13] Rate Case Order at 3 (identifying test period as ending December 31, 2012), 64 (allowing Duke to charge customers for MGP cleanup costs through December 31, 2012). Similarly, the Ohio Supreme Court's decision in *In re Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437 (June 29, 2017) has no bearing on the current cases. In that case, the Court addressed only those MGP cleanup costs from 2008 to 2012, and the current cases relate to MGP cleanup costs from 2013 to 2017. The Supreme Court did not make any findings or rulings regarding Duke's ability to charge customers for MGP cleanup costs outside the context of a pending base distribution rate case.

Thus, Duke cannot rely on R.C. 4909.15 to charge customers for 2013 through 2017 MGP cleanup costs in these rider cases as opposed to a base rate case.

The PUCO lacks statutory authority to approve single-issue charges to customers for Duke's cleanup of its defunct MGP sites. It should not only adopt the PUCO Staff's recommended disallowance of $11.9 million but should deny Duke's applications in their entirety.

C. The PUCO should find that Duke failed to meet its burden of proof that its manufactured gas plant cleanup costs were prudently incurred for charging to customers.

The Staff Report did not address whether the MGP-related remediation costs were prudently incurred. Staff in its report should have concluded that Duke's MGP remediation costs were imprudent. But if the PUCO accepts OCC's argument above (which it should), then there is no need for the PUCO to consider the prudence of Duke's MGP spending because the PUCO lacks statutory authority to approve any charges to customers in these cases.

Nevertheless, the PUCO should find that Duke has not met its burden of proving that the charges to consumers are prudent for the following reasons.

i. Duke has not proven that its remediation took place within the geographic boundaries of the East End and West End sites to which the PUCO limited any charges to customers.

Duke bears the burden of proving that its proposed charges to consumers for MGP cleanup costs are prudent.[14] But as the Staff Report demonstrates, Duke's

[14] Rate Case Order at 72 ("Duke shall bear the burden of proof to show that the costs incurred for the previous year were prudent."); *In re Application of the Ottoville Mutual Telephone Company for Authority to Increase its Rates and Charges*, 1973 Ohio PUC Lexis 3, 4 (PUCO Case No. 73-356-Y) ("the applicant must shoulder the burden of proof in every application proceeding before the Commission").

inadequate record-keeping makes it impossible to determine whether the MGP cleanup costs in question relate to the East End and West End sites (which the PUCO allowed for charges to customers) or to property outside the geographic boundaries of those sites (which the PUCO has denied for charges to customers).[15]

For example, there is a parcel of land adjacent to the East End site, which the PUCO Staff refers to as the "Purchased Parcel," "Area West of the West Parcel"[16] or "WOW."[17] In the Rate Case Order, the PUCO ruled that Duke could not charge customers for remediation of the Purchased Parcel.[18] But in the current cases, Duke was unable to distinguish between cleanup costs on the Purchased Parcel and cleanup costs on the other three parcels at the East End. As the PUCO Staff explained, Duke "did not record costs by parcel."[19] Likewise, costs Duke incurred for "air monitoring, ground water well installations and testing, laboratory fees, permitting fees, soils disposal costs," and other costs "cannot be assigned to any particular parcel."[20]

Based on Duke's failure to segregate costs associated with the Purchased Parcel from costs associated with the other three East End parcels, the PUCO Staff recommended a 50% disallowance for 2013 to 2016 and a 70% disallowance for 2017.[21] But this recommendation is inconsistent with the applicable burdens of proof in this case. As discussed, Duke bears the burden of proving that its costs were prudently incurred. To

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[15] Staff Report at 3-4.

[16] The East End site is divided into three parcels, which are generally referred to as the western or west parcel, central parcel, and eastern or east parcel. *See* Rate Case Order at 36.

[17] Staff Report at 3.

[18] Rate Case Order at 60.

[19] Staff Report at 4.

[20] *Id.*

[21] *Id.*

do so, therefore, Duke must prove that its MGP cleanup costs pertain to the western, central, or eastern parcels of the East End, and *not* the Purchased Parcel. If Duke failed to keep adequate records separating those costs (or otherwise could not separate costs by parcel), then it has not met its burden of proof.

The PUCO Staff's recommended disallowance should be increased to a 100% disallowance.

ii. Duke should have utilized less expensive remediation techniques that could reduce the cost that customers pay to clean up the MGP sites.

The Staff Report should also have protected consumers by recommending disallowances based on Duke's failure to adopt less costly remediation alternatives.

a. The PUCO should find that Duke did not prudently incur its MGP-related remediation expenses because Duke did not identify any alternatives that it considered.

For the PUCO to properly evaluate whether Duke's remediation efforts (and the costs of those efforts) were prudent, it would need to know what alternatives were available. But Duke did not identify *any* potential alternatives to its chosen (and expensive) remediation options.

In an attempt to get around this omission, Duke witness Bachand testified that Duke employees "work closely with Ohio EPA VAP CPs and experienced environmental consultants to evaluate different options based on various criteria, including compliance with environmental regulations, protection of human health and the environment, best practices, feasibility, constructability, safety, prior experience, and cost."[22] But Mr.

[22] *See, e.g.*, Case No. 18-283-GA-RDR, Direct Testimony of Todd L. Bachand on Behalf of Duke Energy Ohio, Inc. at 12-13 (Mar. 28, 2018).

Bachand did not identify any of these alternatives, did not explain how Duke evaluates them, and did not identify specific efforts Duke made to choose effective options at the least cost to consumers. In its report, the PUCO Staff should have concluded that Duke failed to meet its burden of proving prudence based on its failure to demonstrate efforts to consider more cost-effective alternatives that would limit charges to customers.

b. Duke continued its practice of cleaning up the MGP sites at greatly higher cost than necessary, to the detriment of consumers who pay Duke's charges.

From 2008 to 2012, Duke spent significantly more than it should have to safely clean up the MGP sites. For example, as OCC explained in Duke's rate case, Duke (i) excavated at 20 to 40 feet below ground surface when excavating 2 feet would have generally sufficed, (ii) engaged in unnecessary groundwater remediation beyond institutional and engineering controls, (iii) failed to properly apply the two-foot below ground surface application excavation standard for non-residential remediation, (iv) could have used institutional controls such as use restrictions to save money on remediation, (v) could have reduced cost by using soil covers or asphalt paving in most locations, (vi) failed to request variances before performing remediation, and (vii) performed unnecessary security, air, and vibration monitoring, among other things.[23] Thus, Duke spent an estimated $65 million on remediation when it could have performed equally effective remediation for a fraction of that cost, around $8 million.[24]

[23] *See generally* Case No. 12-1685-GA-AIR, Post-Hearing Brief by the Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy at 50-89 (June 6, 2013).

[24] *Id.* at 88.

And according to Duke witnesses Bachand and Bednarcik, Duke's cleanup of the MGP sites has continued in the same manner as it did from 2008 through 2012.[25] The majority of the costs being claimed by Duke are associated with investigation, design and remediation of the Middle and Purchased Parcels at the East End MGP Site and Phase 2A, Phase 3 and Tower Areas of the West End MGP Site. Duke conducted remedial alterative evaluations for Middle and WOW Parcels as well as Phase 3 and Tower areas, after being heavily criticized by OCC and the PUCO Staff for not doing so during previous efforts from 2008 to 2012.

But conducting the alternatives evaluations did not change Duke's pre-conceived notions about the type of remedial options it preferred. Duke has again chosen to excavate soil to depths of up to 20 feet below ground surface as well as solidify deeper soil (by mixing the soil with reagents like portland cement), even in areas where tar was not indicated by its investigations. In doing so, Duke continued to employ remedial approaches that far exceed more cost-effective and reasonable remedial options provided for in Ohio EPA's VAP Rules—options that could have significantly reduced the possible charges to customers. As a result, Duke spent significantly more money than was necessary.

For example, by applying institutional controls and adopting commonly used risk mitigation measures, soil remediation could have been accomplished much more cost-

[25] *See, e.g.*, Case No. 14-375-GA-RDR, Direct Testimony of Jessica L. Bednarcik on Behalf of Duke Energy Ohio, Inc. at 12 (Mar. 31, 2014) ("The activities that occurred at the East End and West End properties related to the remediation of MGP impacts were conducted following the procedures described in my 2012 written testimony and 2013 oral testimony in the Natural Gas Rate Case . . ."); Case No. 18-283-GA-RDR, Direct Testimony of Todd L. Bachand on Behalf of Duke Energy Ohio, Inc. at 13 (Mar. 28, 2018) ("The activities that occurred at the East End and West End MGP properties related to the remediation of MGP impacts were conducted following the procedures described in 2012 written testimony and 2013 oral testimony in the Duke Energy Ohio Natural Gas Distribution Rate Case by Duke Energy Ohio witness Jessica Bednarcik . . .").

effectively (*i.e.*, without significant excavation) by construction of engineering controls, such as soil or asphalt covers. Had Duke employed appropriate remediation techniques, it potentially could have cleaned up the MGP sites for *less than $1 million*, rather than the $20 million that it actually spent.

The utility's management decision to exceed reasonable, cost-effective, and protective VAP requirements, and to spend excessively to conduct remediation that was not necessary under Ohio EPA's VAP Rules, was imprudent. Had Duke more reasonably interpreted and applied the VAP Rules, more cost-effective and protective MGP site remedies could have, and should have, been implemented that potentially would have protected consumers from being over-charged for the remediation efforts.

The PUCO Staff Report should have recommended significant further disallowances based on Duke's decision to continue using unnecessarily costly remediation techniques.

D. The PUCO should schedule an evidentiary hearing to hear evidence on Duke's proposal to charge Cincinnati-area customers $26 million, on the imperative that Duke should promptly credit consumers with the $50 million in insurance proceeds that it has received to date, and on other matters.

The parties should have an opportunity to present evidence at a hearing before the PUCO decides whether to permit Duke's proposed charges to consumers for manufactured gas plant cleanup.

E. Customers should be credited (paid) the insurance proceeds now that Duke has received for MGP cleanup (rather than waiting for Duke to continue litigating additional insurance claims).

Under the Rate Case Order, Duke is required to pursue insurance recovery to reduce the amount that customers pay to remediate the MGP sites:

> The Commission agrees that Duke should continue to use every effort to collect all remediation costs available under its insurance policies, and Duke should continue to pursue recovery from any third parties who may also be statutorily responsible for the remediation of the MGP sites. We find that any proceeds paid by insurers or third parties for MGP investigation and remediation should be used to reimburse the ratepayers.[26]

In its Staff Report, the PUCO Staff recommended that Duke "notify the Commission of the status of the recovery of funds" and that Duke make "annual filings on the docket affirming that funds either have or have not been obtained for as long as the Company is pursuing mediation, settlement, and/or litigation efforts."[27]

OCC agrees with the PUCO Staff that Duke should continue to remain accountable to the PUCO regarding its efforts to secure insurance funds for the benefit of customers. But as OCC explained in its initial comments, Duke has already received insurance funds that should be given to consumers. Duke is holding those funds while it continues to pursue insurance claims.[28] In fact, Duke has already received over *$50 million* in insurance proceeds.[29] Not one dime of that amount has been given to customers. The PUCO should order Duke to return all insurance proceeds to customers now rather than waiting (possibly years) until all insurance litigation is complete.

II. CONCLUSION

The PUCO should not make customers pay over $26 million to Duke (in addition to the $55 million they've already paid) for cleanup of its defunct MGP sites dating back

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[26] Rate Case Order at 67.

[27] Staff Report at 6.

[28] Comments by the Office of the Ohio Consumers' Counsel (Sept. 28, 2018).

[29] OCC received this information from Duke through a discovery response that was marked confidential, so OCC has not attached it. Duke has agreed that the $50 million number could be publicly disclosed. OCC reserves all rights regarding Duke's claims of confidentiality regarding insurance settlements.

to the 1800s. The PUCO Staff's recommendation to disallow $11,867,900 in charges to consumers is a good start in protecting consumers from unjust and unreasonable charges. But the PUCO should disallow any additional charges to consumers, based on law and reason. And the PUCO should afford parties an opportunity to present evidence and appear at a hearing regarding these consumer issues.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Reply Comments was served on the persons stated below via electric transmission this 30th day of October 2018.

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Summary: Comments Reply Comments by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Healey, Christopher Mr.