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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs.	))))	Case No. 09-712-GA-AAM

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. PROCEDURAL HISTORY 3

III. STANDARD OF REVIEW 4

IV. ARGUMENT 5

A. The Commission's Approval Of Duke's Request For Accounting Authorization To Defer Environmental Investigation And Remediation Costs Was Unlawful, Unreasonable And Not In The Public Interest. 5

B. The PUCO Erred By Stating That Subsequent Recovery Of The Deferred Costs, If Appropriate, Would Be Determined Through A Distribution Rate Case, Not Through A Gas Cost Recovery ("GCR") Proceeding. 10

C. The PUCO Erred By Making A Decision That Relies On Information Not A Part Of The Record. 13

D. The PUCO Erred By Permitting A Letter From Duke's Counsel To Stand As A Supplement To The August 10 Application. 15

E. The Commission Erred By Authorizing The Deferral Of Environmental Investigation And Remediation Costs In A Manner That Unreasonably Violates Prior Commission Precedent And Policy. 18

V. CONCLUSION 23

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APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the November 12, 2009 Finding and Order ("F&O") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, OCC seeks to protect approximately 380,000 residential utility customers of Duke Energy Ohio, Inc. ("Duke" or "the Company") from the unlawful financial consequences of the accounting authority ordered by the Commission.

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the F&O was unjust, unreasonable and unlawful and the Commission abused its discretion because:

A. The Commission Erred By Approving Duke's Request For Accounting Authorization To Defer Environmental Investigation And Remediation Costs, That Was Unlawful, Unreasonable And Not In The Public Interest.

B. The PUCO Erred By Stating That Subsequent Recovery Of The Deferred Costs, If Appropriate, Would Be Determined Through A Distribution Rate Case And Not Through A Gas Cost Recovery ("GCR") Proceeding.

C. The PUCO Erred By Making A Decision That Relied On Information Not A Part Of The Record.

D. The PUCO Erred By Permitting A Letter From Duke's Counsel To Stand As A Supplement To The August 10 Application.

E. The Commission Erred By Authorizing The Deferral Of Environmental Investigation And Remediation Costs In A Manner That Unreasonably Violates Prior Commission Precedent And Policy.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of error, the PUCO should reverse its F&O.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In this proceeding, Duke sought authority to defer certain environmental investigation and remediation costs associated with two manufactured gas plant ("MGP") sites in Ohio.[1] The Commission unlawfully and unreasonably authorized the deferral of costs associated with production facilities that would potentially be collected from customers through future natural gas distribution rates, creating a subsidy in violation of R.C. 4929.02(A)(8). In addition, while the Commission unreasonably considers this to be an accounting order and not ratemaking, the Commission states that subsequent recovery from customers, if appropriate, would be through Duke's distribution rates. The costs that Duke proposes deferring are production–related costs, and as such should have been addressed as part of a GCR proceeding, and not in any future distribution rate case.

Furthermore, the Commission has approved the accounting authority that Duke requested without developing an appropriate or sufficient record. The Commission Staff informally requested Duke to provide confirmation that the properties in question were

[1] Application at 2. ("Although no longer existent, MGP sites were prevalent in Ohio from approximately 1850 to 1950. MGP sites allowed for the production of commercial grade gas from the combustion of coal, oil, and other fossil fuels. The remnants of these former MGP sites may include subsurface structures and associated residuals, such as coal tar, scrubber waste, chemicals, and tanks.").

used and useful. The Company submitted a letter signed by its attorney, and the Commission accepted the letter as a supplement to the Company's application. Such informal procedural short-cuts fail to create a "complete record" as required by Ohio law.[2] The facilities that are on the MGP sites today and their alleged function are not the facilities that caused the Company to undertake the environmental investigation and remediation. Therefore, because the manufactured gas plant facilities are clearly not used and useful, the Commission should not grant the Company the necessary accounting authority to defer the environmental costs.

However, in the event the Commission upholds its decision to grant Duke deferral authority in this case, then the PUCO should follow the precedent it established in other similar proceedings, including a recent Columbia Gas of Ohio, Inc. MGP Case ("Columbia MGP Case"), where the Commission imposed certain requirements on utility companies when approving deferral authority. In the F&O approving Duke's Application, the PUCO imposed some but not all of the requirements previously established in the recent Columbia Gas of Ohio, Inc. MGP Case.[3] The PUCO failed to provide any explanation for this haphazard application of its own recent prior precedent. On rehearing, if deferral authority is allowed to stand, OCC requests that the Commission impose all such requirements that are consistent with Commission precedent.

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[2] R.C. 4903.09, See also *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87.

[3] *Columbia Gas of Ohio, Inc. Request for Authority to Defer Environmental Costs Regarding MGP Sites ("Columbia MGP Case"),* Case No. 08-606-GA-AAM, Entry at 2-3 (September 24, 2008).

II. PROCEDURAL HISTORY

On August 10, 2009, Pursuant to R.C. 4905.13, Duke filed an application ("Application") with the Commission for authority to modify its accounting procedures.[4] Specifically, Duke sought authority to defer certain environmental costs on its books pertaining to environmental investigation and remediation activities associated with two MGP sites.[5]

On September 9, 2009, Ohio Partners for Affordable Energy ("OPAE") filed a Motion to Intervene and a Motion to Dismiss, primarily arguing the MGP sites were not used and useful.

Duke did not file a memorandum contra to OPAE's Motion to Dismiss; however, on October 29, 2009, Duke filed a letter ("Letter") in the Commission's docket in this case alleging that the MGP sites are used and useful. The Letter claimed:

> The properties that are the subject of Duke Energy Ohio's deferral request are used and useful in Duke Energy Ohio's business. More specifically located on these properties are the following: propane cavern, vaporization plant, gas operations district office, substation, parking lot, and an office building with conference facilities. At one time, the manufactured gas plants were used in the production of natural gas to gas utility customers of Duke Energy Ohio. Thus, these plant locations are used in connection with the business operations of Duke Energy Ohio.

On November 10, 2009, OCC filed a Motion to Intervene.

On November 12, 2009, the Commission issued a Finding and Order that authorized Duke to defer the requested environmental investigation and remediation costs.

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[4] Application at 1.

[5] Application at 1.

III. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[6]

In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[7] Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same * * *."[8]

OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission grant rehearing on the matters specified below.

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[6] R.C. 4903.10.

[7] Id.

[8] Id.

IV. ARGUMENT

The Commission's F&O was unjust, unreasonable and unlawful in the following particulars:

A. The Commission's Approval Of Duke's Request For Accounting Authorization To Defer Environmental Investigation And Remediation Costs Was Unlawful, Unreasonable And Not In The Public Interest.

The Commission in its F&O authorized the deferral of environmental investigation and remediation costs associated with two MGP plants in Duke's service territory.[9] It is not clear from Duke's Application that the Company has liability or responsibility for these costs. Duke in its Application stated:

> The existence of MGP subsurface structures and associated residuals may result in a danger to the environment, public health and safety. Pursuant to O.A.C. §§ 3745-300-1 through 3745-300-14 and the Federal comprehensive Environmental Response Compensation and Liability Act (CERCLA), these environmental hazards should be removed in accordance with the applicable state and federal standards or guidelines. Pursuant to CERCLA and/or state rules, a party having the status as the generator of the waste or the property owner at the time of disposal of such waste is identified as a party responsible for removing the environmental and/or public health hazard. Generally speaking, the generator of the waste is typically held more responsible for responding to the hazard than are parties responsible simply by reason of owning the property.

[9] F&O at 3.

> Duke Energy Ohio has identified two former MGP sites in Ohio that it currently owns. As such, Duke has or may incur environmental investigation and remediation costs for one or both of these sites. Site investigation and remediation typically take years to complete and can cost tens of millions of dollars.[10]

Duke could later use the decision as a basis for claiming that customers should pay "tens of millions of dollars" for these old sites.[11] As explained in Duke's Application, the MGP sites were allegedly used "for the production of commercial grade gas from the combustion of coal, oil, and other fossil fuels."[12] These sites were exclusively used in the production of the natural gas commodity over 50 years ago and there is no claim or explanation as to how they were used in the present day provision of natural gas distribution service to Duke's current customers.[13] Nonetheless, Duke noted that should

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[10] Application at 2-3. Inasmuch as Duke alleges currently owning the two MGP sites (but not at the time the plants were manufacturing gas), it is incumbent on Duke to use due diligence in establishing responsibility for the environmental investigation or remediation costs from any and all potentially liable persons, or those affiliated with any other person that is potentially liable, in accordance with relevant Federal and State environmental laws to assure appropriate cost sharing and recovery parameters are adhered to.

[11] Application at 3.

[12] Application at 2.

[13] Using Duke's logic, in this case, FirstEnergy could put a parking lot at the site of its failed nuclear plant, Perry 2, and claim that because the parking lot is allegedly used and useful, then FirstEnergy could get deferred accounting authority for costs related to the Perry 2 plant -- plant that the Company abandoned and the Commission previously disallowed, *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; In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service; In the Matter of the Complaint of Benedictine High School et al., Complainants, v. The Cleveland Electric Illuminating Company, Respondent; In the Matter of the Commission's Investigation into the Financial Condition, Rates, and Practices of The Cleveland Electric Illuminating Company; In the Matter of the Commission's Investigation into the Financial Condition, Rates, and Practices of The Toledo Edison Company*, Case No. 95-299-EL-AIR, et al. Opinion and Order at 89 (April 11, 1996).

it seek collection of the deferred costs, it would do so through rates developed through a natural gas distribution rate case for natural gas distribution service.[14]

In the F&O, the Commission through an accounting authorization will potentially allow Duke the opportunity to recover production costs through distribution rates. Such action would violate R.C. 4929.02(A)(8) and create an unlawful subsidy. R.C. 4929.02(A)(8) states:

> (A) It is the policy of this state to, throughout this state:
>
> * * *
>
> (8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods;

In this case, the provision of the natural gas commodity is a competitive retail natural gas service under R.C. 4929.04, and distribution service is a noncompetitive service under R.C. 4929.03. The law specifically precludes allowing Duke to recover production-related costs through distribution rates. In this case, Duke would be recovering costs associated with the production of gas, an unregulated natural gas service, and proposes to recover these costs through distribution rates, a regulated natural gas service, which is precisely what the law prohibits. Therefore, the Commission should grant rehearing in this case.

[14] Application at 5 (Moreover, to the extent that Duke is authorized any future cost recovery, then that recovery should reflect the Company's customer base at that time. For example, if the activity that caused the cost occurred prior to the establishment of Duke's transportation service, then all customers -- residential, commercial and industrial -- should pay proportionate shares of the cost.).

In an analogous case, the Ohio Supreme Court reversed and remanded a Commission decision granting FirstEnergy[15] accounting authority to defer fuel-related expenses that would have been potentially recovered through future FirstEnergy distribution rates.[16] In *Elyria,* FirstEnergy requested approval of its rate-certainty plan. The rate-certainty plan created a mechanism that would have allowed FirstEnergy to partially recover its fuel-cost increases. Under the plan, if actual increased fuel costs were more than those amounts recovered through the fuel-recovery mechanism, the difference was to be deferred and recovered in future distribution rate cases of FirstEnergy companies for rates commencing in 2009. Fuel deferrals were to be recovered over a 25-year period as regulatory assets in the rate base as part of future distribution rate cases of the FirstEnergy companies after the rate-certainty plan ended.[17]

In its Opinion, the Court noted that generation service is a competitive retail electric service under R.C. 4928.03 and 4928.14(A).[18] The Court added that distribution service is a noncompetitive service under R.C. 4928.15(A).[19] R.C. 4928.02(G) prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice versa.[20] Thus the Court concluded that the PUCO violated R.C. 4928.02(G) when it allowed FirstEnergy to collect deferred increased fuel costs through future distribution rate cases,

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[15] FirstEnergy refers to The Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.

[16] *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305.

[17] Id. at ¶44 and 45.

[18] Id. at ¶50.

[19] Id.

[20] Id. at ¶50.

and reversed the Commission's Order on this issue.[21] In this case, Duke's GCR or commodity service is analogous to FirstEnergy's generation service, and the distribution costs (that would be recovered in a future rate case) are the same as FirstEnergy's distribution costs. Inasmuch as FirstEnergy was prohibited from collecting deferred fuel costs in a distribution rate case, then Duke should be similarly precluded here. Following this precedent, the Commission should grant rehearing and deny Duke's accounting authorization request to defer environmental investigation and remediation costs associated with MGP sites in Ohio for potential subsequent collection through natural gas distribution rates that customers pay.

The Commission's plan to delay a decision on this issue until the Company's next distribution rate case is also in error. The Commission stated:

> Upon consideration of OPAE's motion to dismiss, the Commission points out that deferrals do not constitute ratemaking. See, e.g., *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305 (2007). Through this application, Duke is only requesting the authority to modify its accounting procedures to reflect the deferral of the costs related to the environmental investigation and remediation, as well as the associated carrying charges.[22]

This decision is in error because it contradicts the Ohio Supreme Court holding in *Elyria* where the Court ruled that the Commission's accounting order *authorizing the increased fuel-cost deferrals was conclusive for ratemaking purposes and ripe for consideration.*[23] Despite the Commission's claim that deferrals do not constitute rate making, the Ohio Supreme Court's decision negates that claim "[24] Therefore, the Commission cannot

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[21] Id at ¶79.

[22] F&O at 3.

[23] *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305, ¶57 (emphasis added).

[24] Id.

disregard OCC's arguments on rehearing and put off the issue until a later date in a Duke distribution rate case.

The Commission should address the issue of the accounting authority it unlawfully and unreasonably granted Duke in this case, and on rehearing, determine that the F&O violated R.C. 4929.02(A)(8) by deferring natural gas production-related costs to be later collected through the regulated natural gas distribution service rates that customers pay.

B. The PUCO Erred By Stating That Subsequent Recovery Of The Deferred Costs, If Appropriate, Would Be Determined Through A Distribution Rate Case, Not Through A Gas Cost Recovery ("GCR") Proceeding.

Duke's own Application describes the manufactured gas plant facilities in question as sites "for the production of commercial grade gas from the combustion of coal, oil, and other fossil fuels."[25] As such, the sites had nothing to do with the distribution of natural gas but were allegedly involved in the manufacturing of the natural gas as a commodity. The PUCO claimed in its F&O that it "is not determining what, if any of these costs may be appropriate for recovery in Duke's distribution rates."[26] However, by permitting the accounting change and stating that the cost recovery, if appropriate, would be in a future distribution rate case, the PUCO erred.

Specifically, the Commission erred because the costs for which Duke would potentially be seeking recovery (e.g. environmental investigation and remediation) are directly associated with MGP sites that were allegedly previously used in the production of the commodity of natural gas. Recovery of natural gas commodity costs are more

[25] Application at 2.

[26] F&O at 3.

appropriately addressed in GCR proceedings as set forth in R.C. 4905.302 (Purchased Gas Adjustment Rule) and Ohio Adm. Code 4901:1-14 (Uniform Purchased Gas Adjustment). By definition, R.C. Chapter 4909, governs the fixation of reasonable rates -- base rates or distribution rates -- and not the commodity of natural gas.

On the other hand, R.C.4905.302 specifically addresses the pricing of the commodity of natural gas as noted in R.C. 4905.302 (A)(1). R.C. 4905.302 (C)(1) requires the PUCO to promulgate a purchased gas adjustment rule to govern the investigation into and the establishment of the cost of the natural gas commodity itself. Ohio Adm. Code 4901:1-14 contains those rules. More specifically, Rule 4901:1-14(H) defines gas as "any vaporized fuel transported or supplied to consumers by a gas or natural gas company including, but not limited to natural gas, synthetic gas, liquefied gas, and propane." Rule 4901:1-14-01 (AA) defines Synthetic gas as "gas formed from feedstocks other than natural gas, including but not limited to coal, oil, or naptha." Thus, the MGP facilities that produced gas from coal, oil and other fossil fuels, produced synthetic gas and the Commission's authority to make a determination regarding the recovery of such costs must fall under a GCR proceeding.

However, to the extent that Duke might attempt to obtain approval for its customers to pay any costs associated with the manufactured gas plant facilities, then Rule 4901:1-14-05 would preclude the recovery of any of these costs because as noted in the Application, the MGP sites no longer exist and were prevalent from 1850 to 1950. Ohio Adm. Code 4901:1-14-05 states:

> (A) The gas cost recovery rate equals:
>
> (1) The gas or natural gas company's expected gas cost for the upcoming quarter, or other period as approved by the commission, pursuant to paragraph (K) of rule 4901:1-14-01 of the Administrative Code, plus or minus;
>
> (2) The supplier refund and reconciliation adjustment, which reflects:
>
> (a) Refunds received from the gas or natural gas company's interstate pipeline suppliers or other suppliers or service providers plus ten per cent annual interest; and
>
> (b) Adjustments ordered by the commission following hearings held pursuant to rule 4901:1-14-08 of the Administrative Code, plus ten per cent annual interest, plus or minus;
>
> (3) The actual adjustment, which compensates for differences between the previous quarter's, or other commission-approved period's, expected gas cost and the actual cost of gas during that period, plus or minus; and
>
> (4) The balance adjustment, which compensates for any under- or over collections which have occurred as a result of prior adjustments, plus or minus.

Ohio Adm. Code 4901:1-14-05 contemplates recovery of natural gas commodity costs. Because these sites are not now presently producing any natural gas for Duke's current customers, the Commission could not authorize the recovery of the environmental investigation and remediation costs through the GCR rate.

The Commission erred by stating that collection from customers, if appropriate, would be through a distribution rate case rather than a GCR proceeding. Therefore, the Commission should grant rehearing.

C. The PUCO Erred By Making A Decision That Relies On Information Not A Part Of The Record.

Duke filed a Letter in the Commission's docket referencing a Staff informal inquiry seeking confirmation that the properties in question were *presently* used and useful in service to customers.[27] By Duke's own admission in the Application, the sites no longer exist and were most recently used for the purpose of the production of natural gas over a half century ago.[28] Thus, they cannot be *presently* used and useful for the purpose of the production of natural gas to current customers.

Moreover, neither the Application, nor the Duke Letter claim that the used and useful nature of the facilities in question (e.g. propane cavern, vaporization plant, gas operation district office, substation, parking lot, office building with conference facilities) relate to the primary function of the MGP facilities which allegedly was the manufacture of natural gas for service to customers. Rather, the used and useful claim seemingly relates to activities such as offices, parking lot and conference facility that have nothing whatsoever to do with the manufacture of natural gas. Thus, although the facilities may arguably be used and useful as buildings, parking lots or conference facilities,[29] they are not presently used and useful for the production of natural gas for Duke's service to customers.

The F&O specifically mentioned the Duke Letter as a supplement to the Company's Application. However the Duke Letter mentions an informal inquiry from

[27] Duke Letter (October 29, 2009) (emphasis added).

[28] Application at 2.

[29] Duke alleges that the existing facilities (e.g. parking lot, office building, etc.) are used and useful (not for the manufacture of gas); however, the environmental investigation and remediation costs are to be incurred as a result of the manufacture of gas, not as a result of Duke's use of the property for alternative purposes. Nevertheless, such a determination has not been made in an evidentiary setting and thus, any claim that they are used and useful for any matter is nothing more than an unsubstantiated Company claim, and no different than other claim made by utilities in pleadings.

Staff to the Company.[30] The Staff's informal inquiry mentioned in the Duke Letter does not appear in the record and thus violates the standard established in *Tongren v. Pub. Util. Comm.* (1999),[31] that specifically requires that all information relied on by the PUCO to be part of the record. The PUCO made the Duke Letter a supplement to the Application, and then in turn noted that it had reviewed the Application in making its decision.[32] However, the record does not contain the actual documents referenced in the Duke Letter -- the informal inquiry of the Staff, that the PUCO considered. Thus under the *Tongren* standard the PUCO erred because the record is devoid of documents or information that were included in the decision-making process.

As noted by the Court in *Tongren*, where the PUCO fails to provide a record, the complaining party is effectively foreclosed from demonstrating the prejudicial effect of the order.[33] Since the Staff's informal inquiry mentioned in the Letter/Application is not a part of the record, it is unclear if the Duke Letter accurately portrayed the request. Without the complete informal inquiry of the Staff as part of the record, OCC was denied the opportunity to address such matters as the context in which the request was made and other matters. Moreover, since the inquiry is part of the Letter, but not a part of the record, OCC was precluded from presenting any comments or arguments related to the underlying inquiry.

The Court also noted:

> The sole method of review is by petition in error to the Ohio Supreme Court, which considers both the law and the facts.

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[30] Duke Letter (October 29, 2009).

[31] *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87, 706 N.E.2d 1255.

[32] F&O at 3.

[33] *Tongren* at 92.

> *Dayton P. & L. Co. v. [Public Utilities] Commission of Ohio*, 292 U.S. 290, 302; *Hocking Valley RY. Co. v. Public Utilities Commission* [1919], 100 Ohio St. 321, 326, 327, 126 N.E. 397 [399]. To make such review adequate the record must exhibit in some way facts relied upon by the court to repeal unimpeached evidence submitted for the company.[34]

The absence of the Staff's informal inquiry creates a void of some of the facts relied upon by the PUCO in making its decision. Thus, under the *Tongren* standard, the PUCO erred because it relied on information not a part of the record.

D. The PUCO Erred By Permitting A Letter From Duke's Counsel To Stand As A Supplement To The August 10 Application.

The F&O stated that Duke's Letter supplemented the August 10 Application.[35] In making this determination, the PUCO accepted a Letter that the Company stated was only "correspondence" and transformed it into a Supplement to the Application without the benefit of any public review or procedural due process. Despite such procedural short-cutting, the Commission transformed that "correspondence" into a supplement to Duke's Application. Moreover, the "correspondence" was only intended to be a "response to an informal inquiry from Staff of the Public Utilities Commission of Ohio."[36] Nonetheless, the PUCO not only accepted the "correspondence without any supporting data, but the PUCO also seemingly accepted it for the purpose of establishing that the properties in question were used and useful for utility purposes -- despite a claim in the F&O, that such a determination was not made.[37] The PUCO's claim and the result of its decision are not consistent.

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[34] *Tongren* at 92.

[35] F&O at 1.

[36] See Duke Letter (October 29, 2009).

[37] F&O at 3.

Although the F&O claims that the PUCO's decision is only for a change to accounting procedures and does not reflect any increase in rates,[38] the fact remains that the PUCO Staff requested "confirmation that the properties in question were presently used and useful as set forth in R.C. 4909.15," which is titled "Fixation of reasonable rates."[39] Accordingly, R.C. 4909.15 requires that the PUCO may make a determination of whether property is used and useful for customers, after a hearing. To date there has been no procedural due process. There has been no evidentiary hearing in this case. Nevertheless, the Staff and the Commission have accepted "correspondence" from Duke as proof that the facilities in question are presently used and useful.

If in fact the PUCO were making no ratemaking determination in this case, then there should be no reason to address the issue of the used and useful nature of the properties in question. Why did the PUCO Staff make the inquiry to the Company? And more importantly, why did the PUCO, on its own, transform the Duke "correspondence" into a supplement of the Application and include the Letter as part of the record in this case to establish facilities to be used and useful? The Commission's statement does not comport with its intended consequences and its actions.

OPAE filed a motion to dismiss ("Motion to Dismiss) alleging, *inter alia*, that the facilities were not used and useful.[40] Duke opted not to file a Memorandum Contra to OPAE's Motion, but nonetheless the Commission's F&O denied OPAE's Motion. In making this decision, the Commission's discussion of the issue is limited to "[u]pon

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[38] F&O at 3.

[39] Duke Letter (October 29, 2009).

[40] OPAE Motion to Dismiss. (September 9, 2009) at 4. (In addition to the used and useful argument, OPAE also argued that Duke has not claimed that the MGP sites were ever included in Duke's Ohio jurisdictional natural gas distribution rate base.").

consideration of OPAE's motion to dismiss, the Commission points out that deferrals do not constitute ratemaking."[41] Despite this claim, the Commission in its F&O treats the issue as if it involves ratemaking by accepting the Letter filed by the Company at the informal request of Staff to supplement the Application in attempt to address the issue of the alleged used and useful nature of the facilities in question.

In addition to the procedurally unlawful manner in which the correspondence miraculously became a supplement to the Duke Application, the fact remains that the Duke Letter contained no documentation to confirm that the properties in question were used and useful for service to Ohio customers, or ever included in Duke's Ohio jurisdictional rate base. Rather than provide any type of documentation, the letter is nothing more than a claim by Duke's counsel. Accepting an unsupported claim by counsel as being sufficient to establish that property was used and useful contradicts years of PUCO and Ohio Supreme Court ratemaking precedent.[42]

A final error with the PUCO's handling of the Duke Letter is that the Commission arbitrarily accepted the word of Duke's counsel that the facilities in question are used and useful, over that of counsel for OPAE who claimed that the facilities were not used and

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[41] F&O at 3.

[42] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates* ("Duke Rate Case"), Case No. 07-589-GA-AIR, et al., Pre-Filing Notice (June 18, 2007); *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service* ("DEO Rate Case"), Case No. 07-829-GA-AIR, et al., Pre-Filing Notice (July 20, 2007); *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service* ("VEDO Rate Case"), Case No. 07-1080-GA-AIR, et al., Pre-Filing Notice (September 28, 2007); and *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service* ("COH Rate Case"), Case No. 08-72-GA-AIR, et al., Pre-Filing Notice (February 1, 2008). (In these and other PUCO cases, such claims do not become credible evidence until they undergo the evidentiary process of discovery and hearing.).

useful for customers.[43] Both statements were part of pleadings to the PUCO. Neither document -- the Duke Letter, nor the OPAE Motion -- were made by actual subject matter experts. Rather they are simply claims made by counsel. Moreover, neither document was sworn to or verified as is the case with actual pre-filed testimony submitted by utilities and other participants who take the witness stand before the PUCO at an evidentiary hearing.[44] Thus, with no explanation, the PUCO accepted the Letter of one attorney as a fact, over that of other attorneys. The PUCO's actions constitute an abuse of discretion, in that the basis for its decision is without any explanation or justification whatsoever.[45]

E. The Commission Erred By Authorizing The Deferral Of Environmental Investigation And Remediation Costs In A Manner That Unreasonably Violates Prior Commission Precedent And Policy.

In this case, Duke sought authority to defer the following environmental and remediation costs that it might incur relative to two former MGP sites:

1. A search of historical records to confirm whether Duke or one of its corporate predecessors has or had any corporate connection to the site. The search may include a title investigation to identify prior and current owners and users of the property;

2. A review of the environmental history of the property to ascertain whether any activities may have occurred on the property that led to the release of hazardous substances;

3. An evaluation of all known or suspected releases of hazardous substances;

4. Site investigation costs to determine if there are impacts due to the former MGP;

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[43] OPAE Motion to Dismiss (September 9, 2009) at 4.

[44] Ohio Adm. Code 4901-1-04.

[45] R.C. 4909.11 and R.C. 4909.12.

5. Risk assessment costs to identify any unacceptable present or future risks;

6. Feasibility study costs to review all data collected and evaluate remedies;

7. Remedial work plan costs for a development of a plan that describes the remedy in detail;

8. Design and bid specification costs to develop design for the chosen remedy;

9. Remedial costs associated with the implementation of the chosen remedy;

10. Other costs.[46]

Duke has identified two former MGP sites in Ohio that it currently owns.[47] As such, Duke states it has or may incur environmental investigation and remediation costs for one or both of these sites.[48] Duke stated, "site investigation and remediation typically take years to complete and *can cost tens of millions of dollars*".[49] These are costs that Duke may ultimately seek to collect from its customers.

In its Application, Duke argued that it sought authority to change accounting procedure "consistent with authority granted by this Commission to Columbia in its MGP Case.[50] However, in the Columbia MGP Case, the PUCO established the following requirements that COH must adhere to in order for the PUCO to evaluate requests to

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[46] Application at 4.

[47] Duke filed a letter with the Commission claiming "The properties that are the subject of Duke Energy Ohio's deferral request are used and useful in Duke Energy Ohio's business. More specifically, located on these properties are the following: propane cavern, vaporization plant, gas operations district office, substation, parking lot, and an office building with conference facilities. At one time, the manufactured gas plants were used in the production of natural gas to gas utility customers of Duke Energy Ohio. Thus, these plant locations are used in connection with the business operations of Duke Energy Ohio." (October 29, 2009).

[48] Application at 3.

[49] Application at 3 (emphasis added).

[50] Application at 5.

modify accounting procedures and to defer related costs for environmental investigation and remediation:

1. Only expenses incurred after January 1, 2008, are reasonable;[51]

2. The deferral authority is limited to only those costs in excess of $25,000 per site;

3. The Company should separately identify all costs to be deferred in a sub-account of Account 182, Other Regulatory Assets;

4. Accrual of carrying charges on all deferred amounts is limited to the dates the expenditure was made and the date recovery commences;

5. The carrying charge rate shall be determined annually based on the Company's embedded debt-only interest rate exclusive of the equity component;

6. There will be no compounding; and[52]

7. Prior to their deferral on its books, [the Commission] require[s] Columbia to make an annual filing in this docket detailing the costs incurred in the prior 12-month period covered by the deferrals and the total amount deferred to date. Unless the Staff files an objection to any of the requested deferrals within 30 days of the filing, deferral authority shall be considered granted.[53]

In the F&O, the Commission imposed some of the same requirements on Duke, but not all of them. In the F&O, the Commission stated:

> The Commission has reviewed the application, as well as the applicable federal and state rules and statutes, and finds that these environmental investigation and remediation costs are business costs incurred by Duke in compliance with Ohio regulations and federal statutes. Duke's request to modify its accounting procedures and to defer costs related to the environmental investigation and remediation costs described above is reasonable and should be approved. *Duke should separately identify all costs*

[51] COH filed its Application on May 19, 2008, and the PUCO limited the deferral to expenses incurred to the calendar year of the application. By analogy, the PUCO should limit Duke's deferrals to expenses incurred after January 1, 2009, and then only if any deferrals are allowed.

[52] *In re Columbia MGP Case,* Case No. 08-606-GA-AAM, Entry (September 24, 2008) at ¶3.

[53] *In re Columbia MGP Case,* Case No. 08-606-GA-AAM, Entry (September 24, 2008) at ¶11.

> *to be deferred in a sub-account of Account 182, Other Regulatory Assets [Number 3 above]. Duke is further authorized to accrue carrying charges on all deferred amounts between the dates the expenditures were made and the date recovery commences [Number 4 above]. The carrying charge rate shall be determined annually based on Duke's embedded debt-only interest rate [Number 5 above]. The rate shall be exclusive of the equity component [Number 5 above] and there will be no compounding [Number 6 above].*[54]

In its F&O, the Commission offered no explanation as to why Duke would be treated differently than Columbia in virtually identical proceedings.

The Commission in its F&O failed to impose the following limitations, as were imposed in the COH MGP Case to protect customers:

1. Limit Duke's deferrals to costs that were incurred after a date certain (e.g. January 1, 2009);

2. The deferral authority is limited to only those costs in excess of $25,000 per site; and

3. The annual filing requirement whereby Duke shall detail the costs incurred in the prior 12-month period covered by the deferrals and the total amount deferred to date. In addition, unless the Staff, or other interested Party, files an objection to any of the requested deferrals within 30 days of the filing, deferral authority shall be considered granted.

The above requirements were deemed important to the Commission in the Columbia MGP Case, and should have also been deemed important in this case.

There are additional precedents that support OCC's arguments for imposition of the additional deferral requirements for Duke, in this case. In the Commission's F&O it cited *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305 for the proposition that deferrals do not constitute ratemaking. It is interesting to note that in the

[54] F&O at 3.

underlying Commission order, that was the subject of the *Elyria* appeal, the Commission imposed the following limitations on its approval of deferrals:

> [t]o accomplish the oversight requirements outlined above, the Companies shall be required to establish separate accounts for each of their projects which they propose to include in the annual deferrals * * *. Those accounts and supporting work papers demonstrating that the costs to be deferred are reasonable, appropriately incurred, clearly and directly related to specifically necessary infrastructure improvements and reliability needs of the companies, and in excess of the expense amounts already included in the rate structures of each of the Companies, *shall be provided to the Staff annually and prior to booking the deferral, for review.*[55]

Not unlike the case above, the Commission has historically imposed an annual reporting requirement.[56] The annual reporting requirement is an important element to the systematic review of the cost activity at the time the utility proposes booking the deferral; therefore, the Commission should require it in this case.

Establishing an effective date from which costs that a utility has incurred would be eligible for the authorized accounting treatment is also a common practice by the Commission. The Commission explicitly established such a requirement in the COH MGP Case. In addition, in the Columbia PIR Case, the Commission stated: "the accounting treatment shall be effective January 1, 2009."[57] The Commission should establish a date by which costs expended by the utility shall be eligible for the requested

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[55] *In the Matter of the Joint Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Generation Charge Adjustment Rider,* Case No. 05-704-EL-ATA, et al. Opinion and Order (January 4, 2006) at 9. (Emphasis added).

[56] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Change Accounting Methods,* Case No. 09-371-GA-AAM ("Columbia PIR Case"), Entry at 3 (July 8, 2009) ("Columbia shall file, under this case docket, annual updates on the status of the deferred balances."); See also *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment,* Case No. 07-478-GA-UNC, et al., Entry (April 9, 2008) at 11 ("Annual filings will provide detailed explanations of expenses.").

[57] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Change Accounting Methods,* Case No. 09-371-GA-AAM, Entry (July 8, 2009) at 3.

accounting treatment. There should be no question surrounding the applicable date. In this case, the Commission has not established such a requirement.

The case law, in Ohio, recognizes the PUCO's authority to change its position; however, it cannot be done without appropriate considerations. In *Office of Consumers' Counsel v. Public Utilities Commission,* the Court stated:

> * * Although the Commission should be willing to change its position when the need therefore is clear *and* it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure predictability which is essential in all areas of the law, including administrative law. (Emphasis added.)[58]

In this case the Commission neither demonstrated clear need to change its position in its F&O or that its prior decisions were in error. Therefore, the Commission should grant rehearing, and to protect customers should impose the additional requirements on Duke's deferral authority consistent with the requirements imposed by this Commission in the COH MGP Case.

V. CONCLUSION

The Commission views this case as an accounting procedure matter, but the Company has not met its burden of proof to establish the threshold question as to whether Duke's consumers should be responsible for the collection of such costs. The threshold

[58] *Office of Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49, 50, 461 N.E.2d 303, quoting *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d. 431, 330 N.E.2d 1. See also *State, ex rel. Auto Machine Co. v. Brown* (1929), 121 Ohio St. 73, 166 N.E. 903. See also *Atchison v. Witchita Bd. of Trade*, 412 US 800, 806, 93 S.Ct. 2367 (In 1973 the U.S. Supreme Court set a limit on the power of federal agencies to change prior established policies stating that, while an agency may flatly repudiate its norms, "whatever the ground for the departure [whether it is completely disregarding a policy or simply narrowing its applicability] * * * it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."); *Williams Gas Processing v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (The Court further added that, although not bound by precedent, a demonstration of "reasoned decision-making necessarily requires consideration of relevant precedent.").

issue should be resolved before the Company defers tens of millions of dollars, and subsequently seeks recovery from its residential consumers. For all the reasons stated above, the Commission's Finding and Order unlawfully and unreasonably granted Duke accounting authority to defer production-related costs for potential recovery through natural gas distribution rates. The costs Duke proposes to defer are production-related costs that will be incurred on facilities that are no longer used and useful. Therefore these costs should not be authorized for deferral, and if deferred, should not be recovered through distribution rates, but rather should be addressed through a GCR proceeding. Therefore, the Commission should grant rehearing in this case.

In the alternative, if the Commission should uphold its Finding and Order in which it granted Duke the requested accounting authority, then the Commission should impose requirements on Duke's deferral authority consistent with Commission precedent

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel* has been served upon the below-named counsel via First Class mail, postage prepaid, this 11th day of December 2009.

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