

**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

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**INITIAL BRIEF OF THE GREATER CINCINNATI HEALTH COUNCIL AND  
CINCINNATI BELL TELEPHONE COMPANY**

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**I. History of the Proceedings.**

In Case No. 09-712-GA-AAM, Duke Energy Ohio (“Duke”) sought and received permission by the Commission to defer environmental investigation and remediation costs associated with manufactured gas plant (“MGP”) sites for potential recovery in a future rate case. In approving the request, the Commission expressly stated that it was “not determining what, *if any*, of these costs may be appropriate for recovery in Duke’s distribution rates.”<sup>1</sup> Because the deferral order did not result in any increase in rates or charges, the Commission found that it could approve the application without a hearing.<sup>2</sup> The Commission expressly stated that nothing in the deferral order would be binding upon it in any subsequent investigation or proceeding

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<sup>1</sup> Nov. 12, 2009 Finding and Order, Case No. 09-712-GA-AAM, ¶ 7 (Kroger Exh. 3) (emphasis added).

<sup>2</sup> *Id.*, ¶ 9.

involving the justness or reasonableness of any rate, charge, rule or regulation.<sup>3</sup> In response to requests for rehearing, the Commission confirmed that it had decided nothing with respect to the recoverability of any deferred MGP expenses.<sup>4</sup>

In its Application in this case, Duke sought authority to recover approximately \$65.3 million<sup>5</sup> that it had spent or expected to spend by year end 2012, together with carrying costs, investigating and remediating two MGP sites in Cincinnati, one known as the West End facility and the other known as the East End facility. Duke's expenditures at these sites were made because, under federal and state environmental laws, as the current owner and the successor in interest to the former owner and operator of the sites it is responsible for the environmental cleanup.

The Staff Report recommended that Duke's request not be approved. The Staff Report rejected all costs associated with remediation of the West End site and most costs associated with the East End site.<sup>6</sup> The Staff calculated the amount of MGP remediation costs associated with the property that it deemed used and useful for current gas distribution service. It recommended that Duke be allowed to recover approximately \$6.3 million as costs of providing current gas utility service.<sup>7</sup> Duke objected to the Staff recommendations with respect to recovery of MGP investigation and remediation expenses and seeks recovery of all of its MGP costs.<sup>8</sup>

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<sup>3</sup> *Id.*, p. 4.

<sup>4</sup> Jan. 7, 2010 Entry on Rehearing, ¶¶ 3, 4, 7, 9, 10, 11 (Kroger Exh. 4).

<sup>5</sup> The actual amount spent through year end 2012 was approximately \$62.8 million. Tr. 746.

<sup>6</sup> Tr. 883.

<sup>7</sup> Staff Report, pp. 45-46.

<sup>8</sup> Duke Energy Ohio's Objections to Staff Report of Investigation and Summary of Major Issues, filed Feb. 4, 2013, Objections 6(a)-(i) (Duke Exh. 30).

## **II. Facts.**

According to Duke's own historical account of these two sites, the West End site began operation in the 1840s and continued to operate in various forms until 1909 when natural gas began to arrive in the Cincinnati area via pipeline from West Virginia.<sup>9</sup> The East End site began production in 1884 and also ceased operation in 1909.<sup>10</sup> Production resumed temporarily at both sites in 1918 in order to meet peak winter demands.<sup>11</sup> Production ceased permanently at the West End site in 1928<sup>12</sup> and at the East End site in 1963.<sup>13</sup> Duke acknowledges that both sites likely were contaminated by the time their primary production period ceased in 1909.<sup>14</sup> Duke has offered no evidence distinguishing the costs it spent to remediate contamination caused at the West End site between the 1840s and 1909 from that which occurred between 1918 and 1928, or distinguishing the contamination occurring at the East End site between 1884 and 1909 from that occurring between 1918 and 1963. From the record, the Commission can only conclude that the same investigation and remediation activities would still have been necessary had the MGP sites permanently ceased operation in 1909, as both sites were already contaminated by that time.

Operations at these two MGP sites ceased decades ago, but Duke has only recently incurred environmental remediation costs to remove contamination caused by the past operation of the MGP sites. There were no current gas distribution facilities in the areas of the West End site that have been remediated.<sup>15</sup> The West End site has various components of electrical

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<sup>9</sup> Bednarcik Direct Testimony, Attachment JLB-1 (Duke Exh. 21); Tr. 407.

<sup>10</sup> Tr. 439.

<sup>11</sup> Tr. 413, 440.

<sup>12</sup> Tr. 183.

<sup>13</sup> Tr. 321-22.

<sup>14</sup> Tr. 408, 439.

<sup>15</sup> Tr. 448-49, 453-54, 458.

equipment on it, including transmission towers and substations.<sup>16</sup> There were no gas distribution facilities on the portion of the West End site north of Mehring Way. While gas pipelines and related facilities were present near the eastern edge of the part of the West End site south of Mehring Way, none of the MGP remedial work was done in that area.<sup>17</sup>

Duke identified three discrete areas at the East End site. “Identified Area A” to the west and “Identified Area B” to the east are largely vacant land.<sup>18</sup> The middle portion, also referred to as “Identified Area C” has a building and gas operations on it.<sup>19</sup> The Staff Report reviewed the status of each of the three Identified Areas. Because the Eastern Parcel (Identified Area B) was largely a vacant field, except for some underground pipelines, the Staff recommended that Duke only be permitted to recover MGP remediation expenses for land twenty-five feet on either side of the existing pipelines.<sup>20</sup> The Staff Report found that the Western Parcel (Identified Area A) was also essentially a vacant field, although Duke had recently installed vaporizers for its propane mixing facility which were not in operation as of the date certain in this case.<sup>21</sup> The Staff concluded that none of the remediation expense associated with the Western Parcel were incurred with respect to natural gas distribution plant in service, with the exception of a small area around the existing vaporizer building, and recommended against recovery of costs except with respect to that small area. The Staff recommended allowance of all MGP expenses attributable to the Central Parcel (Identified Area C), although no direct remediation work has occurred in that area to date.<sup>22</sup>

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<sup>16</sup> Tr. 419-27.

<sup>17</sup> Staff Report, pp. 44-45; Tr. 459-60.

<sup>18</sup> Tr. 429, 892.

<sup>19</sup> Tr. 429, 508, 906.

<sup>20</sup> Staff Report, p. 41.

<sup>21</sup> Staff Report, p. 41.

<sup>22</sup> Staff Report, p. 42; Tr. 896-97.

The Staff Report rejected expenses incurred by Duke to acquire property from a developer adjacent to the Western Parcel as that property was never used for gas service.<sup>23</sup> In total, the Staff Report allowed approximately \$6.3 million in remediation costs to address specific portions of the East End site that are currently being used for gas distribution operations.

### **III. Legal Argument.**

Duke contends that the \$62.8 million it spent through the end of 2012 for MGP investigation, remediation and carrying costs should be recoverable from captive gas distribution customers as expenses. However, Duke has not proven that the costs it seeks to recover were expenses of providing utility service. Therefore, the Commission should not permit recovery of these costs.

The Commission's ratemaking formula is codified in Ohio Revised Code § 4909.15. In general, rates are designed to recover a reasonable rate of return on the rate base, plus operating expenses. Duke contends that its MGP expenditures are recoverable as operating expenses. However, the recoverability of operating expenses is grounded in the language of the R.C. § 4909.15(A)(4):

(A) The public utilities commission, when fixing and determining just and reasonable rate, fares, tolls, rentals, and charges, shall determine:

\* \* \*

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section . . .<sup>24</sup>

The problem with Duke's theory of recovery is that the MGP expenses it incurred were not attributable to "public utility service rendered for the test period." Those expenses were incurred

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<sup>23</sup> Staff Report, p. 43.

<sup>24</sup> The test period in this case was calendar year 2012. *See* July 2, 2012 Entry. While not all of Duke's claimed MGP expenses were incurred during the test period, by virtue of the deferral order in Case No. 09-712-GA-AAM, previously incurred but deferred expenses are treated as having occurred during the test year for ratemaking purposes.

on account of events that had occurred decades earlier and are not recoverable under the ratemaking formula.

The expenses are attributable to owning and operating the MGP sites prior to 1963 and were not caused by Duke's provision of gas utility service during the test period. Duke apparently views its environmental remediation expenses as just a "cost of doing business"<sup>25</sup> and seems to take for granted that they should be recoverable, but not all "costs of doing business" are associated with providing current utility service.

The MGP costs were not a cost of conducting current utility business -- they were the cost of having conducted an MGP business fifty to one hundred seventy years ago. Duke would still be liable for the MGP environmental remediation costs even if it had exited the gas utility business altogether in 1968 when it last operated the East End site (or even 1928 or 1909 for that matter), because of its history of ownership and operation of the sites. Thus, Duke's expenditures would have been required irrespective of its current lines of business and are a shareholder, not ratepayer, responsibility.

In fact, Duke has not even demonstrated that the MGP costs it expended were the result of providing *past utility* service. In 1909, Duke's predecessor in interest that owned and operated the MGP facilities<sup>26</sup> was not a regulated public utility, as there was no such thing in Ohio at the time. In 1909, the Commission was known as the Ohio Railroad Commission and had no jurisdiction over gas companies. That changed in 1911 with the passage of H.B. 325. That legislation changed the name of the Commission from the Railroad Commission to the

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<sup>25</sup> Tr. 710, 840.

<sup>26</sup> According to Duke Exh. 30, Attachment JLB-1, the MGP plants were originally constructed by the Cincinnati Gas Light and Coke Company, a predecessor to Duke. Presumably, ownership of the MGP sites passed to the Cincinnati Gas and Electric Company at some point after it was formed in 1901, then to Duke Energy Ohio, Inc. with the Duke/Cinergy merger in 2006.

Public Service Commission of Ohio. It also gave the Commission jurisdiction over gas companies, natural gas companies, telephone companies and other public utilities other than railroads for the first time.<sup>27</sup> H.B. 325 enacted General Code § 614-2, which first defined a “gas company” to be a public utility. Duke’s predecessor was not regulated as a public utility until at least 1911 and these sites had already been contaminated by it through many years of operation before it was a public utility.

The Staff Report generously allowed approximately \$6.3 million in expenses associated with cleaning up specific areas that are currently in use for gas distribution service. One could theorize that *those* costs were associated with the provision of gas distribution service during the test period because they were associated with cleaning up property that is currently used and useful. But that is only a matter of happenstance as Duke would have had to incur those cleanup costs whether or not it was in the gas utility business, whether or not it still owned the MGP sites and whether or not there was gas distribution plant in use on the MGP sites. The Commission could rightfully reject all MGP remediation costs as being caused by historical activities, not current service.

Even Duke acknowledges that its liability for cleanup costs of the MGP sites is not because it is currently a public utility, but rather because its predecessor was the owner and operator of the property when the contamination occurred.<sup>28</sup> That liability has existed for decades and is not a result of any current operations.<sup>29</sup> Current utility customers do not benefit from the past operation of the MGP sites, the customers who received manufactured gas at the

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<sup>27</sup> See also <http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/puco-history/>

<sup>28</sup> Tr. 93-94, 122-23, 271.

<sup>29</sup> Tr. 145-46.

time the MGP plants operated did,<sup>30</sup> and that ended decades ago. Current ratepayers are not insurers of Duke's legacy environmental responsibilities and should not have to pay for past environmental problems when they did not cause them or benefit from the service provided.

#### **IV. Conclusion**

Environmental remediation costs are only be recoverable to the extent that they are necessary expenses to Duke's current gas distribution service. Costs Duke would have had to incur even if it was not in the gas utility business are not recoverable from ratepayers. Duke's MGP cleanup activities do not relate to the provision of current service, so the liability for these costs should not be assigned to current ratepayers.

Respectfully submitted,

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<sup>30</sup> Tr. 272-73.



## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the parties of record listed below this 6th day of June, 2013 by electronic mail service.

/s/ Douglas E. Hart

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Summary: Brief electronically filed by Mr. Douglas E. Hart on behalf of Greater Cincinnati Health Council and Cincinnati Bell Telephone Company LLC