

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION FOR A STAY TO PREVENT DUKE FROM CHARGING
MANUFACTURED GAS CLEAN-UP COSTS TO CUSTOMERS WHILE THE
PROCESS IS PENDING FOR REHEARING AND ANY APPEALS
OR, IN THE ALTERNATIVE,
MOTION TO MAKE DUKE’S IMPENDING RATES FOR CHARGING
MANUFACTURED GAS CLEAN-UP COSTS TO CUSTOMERS SUBJECT TO
REFUND PENDING THE OUTCOME OF REHEARING AND ANY APPEALS
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL,
KROGER COMPANY,
OHIO MANUFACTURERS’ ASSOCIATION and
OHIO PARTNERS FOR AFFORDABLE ENERGY**

For the purpose of protecting Duke’s approximately 420,000 natural gas customers, the Office of the Ohio Consumers’ Counsel (“OCC”), Kroger Company (“Kroger”), Ohio Manufacturers’ Association (“OMA”) and Ohio Partners for Affordable Energy (“OPAE”), and (collectively, “Movants”) respectively move for a Stay of the November 13, 2013 Opinion and Order (“November 13, 2013 Order” or “Order”) of the

Public Utilities Commission of Ohio (“Commission” or “PUCO”). The Stay is requested with regard to the PUCO’s authorization for Duke Energy Ohio, Inc. (“Duke” or “Utility”) to collect more money from its customers for their natural gas service through the manufactured gas plant (“MGP”) Rider. A Stay is necessary in order to prevent irreparable harm to the Utility’s customers during the pendency of the rehearing and/or appeal of the Order. In the alternative, the Movants request that the PUCO order that the rates paid by customers for Duke’s deferred MGP-related investigation and remediation costs are collected subject to refund to customers.

The reasons for granting this Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On November 13, 2013, the PUCO issued its Opinion and Order in the above captioned matter, authorizing Duke to collect from customers nearly \$55.5 million¹ in environmental investigation and remediation costs for two MGP sites. Those two sites have not been used and useful in providing utility service to customers in over 50 years.² In reaching its decision that Duke’s customers should pay for these costs, the PUCO’s ruling derogates Ohio’s ratemaking formula codified in R.C. 4909.15.³

¹ Duke’s Compliance Tariff Filing at Exhibit 1 (November 27, 2013).

² See also, Tr. Vol. I at 183 (Bednarcik) (April 29, 2013) (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).

³ R.C. 4909.15(A); See also R.C. 4909.15(A)(4).

That law provides for the collection of rates related to the provision of current service from facilities which are used and useful in providing that service. In establishing law mandating that rates be set to recover the costs of current service related to the facilities which provide those services, the legislature established a reasonable balance between the interests of the public utility and the interests of customers. This law which has been in place since the creation of public utility regulation in Ohio in 1911,⁴ establishes mandatory requirements on the PUCO and does not contain any exemptions or exceptions from the statute.

The PUCO erred in allowing recovery of costs associated with facilities which have not operated in 50 years, in violation of this law. In addition, the PUCO erred in finding that the environmental remediation expenditures were prudent and reasonable in accordance with R.C. 4909.154.

If rates (not subject to refund) are permitted to go into effect before the lawfulness of the November 13, 2013 Order is considered by the PUCO (on rehearing) and/or the Supreme Court of Ohio, then customers will be irreparably harmed as discussed below. The PUCO should, therefore, issue a stay of its November 13, 2013 Order in regard to the MGP Rider to prevent such harm from occurring.

⁴ 1911 vol. 102 549 1911(House Bill 325: Changing the name of the Railroad Commission of Ohio to that of the Public Service Commission of Ohio, defining the powers and duties of the latter commission with respect to public utilities and to amend sections 501, 502 and 606 of the General Code). General Code Section 606, Section 25 (1911).

II. HISTORY OF THE PROCEEDINGS

On August 10, 2009, Duke filed an Application with the PUCO to defer environmental investigation and remediation costs.⁵ The Commission granted Duke's Application on November 12, 2009.

On June 7, 2012, Duke filed its Prefiling Notice for its request to increase natural gas distribution rates. As part of the Utility's Rate Case Application, subsequently filed on July 9, 2012, Duke sought the authority to collect from its customers investigation, remediation and carrying costs associated with the Utility's environmental concerns at its MGP sites.⁶

On January 4, 2013, the PUCO Staff filed its Staff Report of Investigation ("Staff Report"). On February 4, 2013, OCC, as well as other interested parties, filed Objections to the Staff Report as required by R.C. 4909.19. On February 25, 2013, OCC filed the testimony of its expert witnesses in support of its Objections, including four witnesses relating to Duke's MGP claims. Kroger filed the expert testimony of Neal Townsend.

On April 2, 2013, a Stipulation and Recommendation ("Stipulation") was entered into between Duke, the PUCO Staff, OCC, OPAE and other interested parties for all of the issues except for MGP-related cost recovery. As part of the Stipulation, the Signatory Parties bifurcated the issue of MGP-related cost recovery and collection, and instead agreed to litigate the MGP issues.⁷

⁵ *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 (August 10, 2009). ("Duke Deferral Case").

⁶ Duke Ex. No. 2 (Application, Schedule) at C-3.2 (July 9, 2012).

⁷ Joint Ex. No. 1 (Stipulation and Recommendation) at 8 (April 2, 2013).

The evidentiary hearing was conducted on April 29 through May 2, 2013. And, as discussed above, the November 13, 2013 Order authorizes Duke to collect approximately \$55.5 million of previously deferred MGP-related environmental remediation costs from its customers.

III. STANDARD OF REVIEW

The Commission has noted that there is no controlling precedent in Ohio setting forth the conditions under which the Commission will stay one of its own orders.⁸ The Commission, however, has favored the four-factor test governing a stay that was supported in a dissenting opinion by Justice Douglas,⁹ and which has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review.¹⁰ This test involves examining:

- (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Whether the stay would cause substantial harm to other parties; and
- (d) Where lies the public interest.¹¹

As discussed below, on balance the Movants here meet this test.

⁸ See *In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (February 20, 2003) ("Access Charge Decision") at 5.

⁹ See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604. See also *In the Matter of the Complaint of Northeast Ohio Public Energy Council*, Case No. 09-423-EL-CSS Entry at 2 (July 8, 2009) Motion for Stay Granted.

¹⁰ Access Charge Decision at 5.

¹¹ *Id.*

With regard to the alternative of making the collections subject to refund, the PUCO has, in the past, required refunds to protect customers, as discussed below in Section IV.E. If the Commission does not stay its November 13, 2013 Order as requested herein, then the PUCO should order that the rates paid under the MGP Rider are subject to refund.

IV. THE PUCO SHOULD GRANT A STAY TO PROTECT DUKE'S CUSTOMERS DURING THE PROCESS OF REHEARING AND ANY APPEALS.

A. There Is A Strong Likelihood That Movants Will Prevail On The Merits of Their Positions to Protect Ohio Customers from Paying for Duke's Pollution Clean-Up Costs.

There is a strong likelihood that Movants will prevail on the merits resulting from rehearing and/or appeal in these cases. The Utility has been authorized to collect MGP-related investigation and remediation costs from Duke's customers. But manufactured gas production ceased (at these two sites) more than half a century ago.¹² In fact, the majority of manufactured gas production -- and in turn the pollution from that production -- also occurred prior to PUCO regulation of natural gas utilities.¹³ As indicated above, Ohio ratemaking law -- R.C. 4909.15 -- prohibits recovery of costs that are not related to service or to facilities that are not used and useful in service to current customers. Thus, had the PUCO properly applied Ohio ratemaking law, the Utility's request should have been denied. The proper application of Ohio ratemaking law did not occur in these cases.

¹² Duke's MGP Sites operated during the following periods: for the East End from 1884 to 1963, and for the West End from 1843 to 1928. Duke Ex. No. 20A (Supplemental Testimony of Andrew Middleton) at 2-5 (February 25, 2013); See also, Tr. Vol. I at 183 (Bednarcik) (April 29, 2013) (West End Site stopped manufacturing gas in 1928).

¹³ Tr. Vol. II at 413 (Bednarcik) (April 30, 2013).

The Commission is a creature of statute and lacks authority to deviate from the statutory requirements related to ratemaking.¹⁴ The PUCO's ratemaking formula under the law balances the interests of Ohioans and their public utilities. In these cases, the PUCO failed to correctly apply the ratemaking law; therefore, there is a strong likelihood that Movants will prevail on the merits.

The Movants are also likely to prevail because the PUCO erred when it found that Duke had met its burden of proving that the MGP-related remediation costs were prudently incurred. Duke's overall request in these cases was \$62.8 million. Nearly \$55.5 million of Duke's request involved MGP-related investigation and remediation costs.¹⁵ Because Duke's request was filed as part of a rate case application,¹⁶ the PUCO had a duty to review the prudence of Duke's MGP-related expenditures under Ohio's ratemaking statute, R.C. 4909.154. And, as the Supreme Court of Ohio explained in *Duke Energy*, Duke had to "prove a positive point: that its expenses had been prudently incurred *** [t]he commission did not have to find the negative: that the expenses were imprudent."¹⁷

Instead, what occurred was that the PUCO Staff took no position on the prudence issue in its Staff Report, and the Commission relied entirely on the Utility's expert(s) in imposing \$55.5 million in investigation and remediation costs on customers. The PUCO made this decision despite the fact that the Utility failed to document that it had evaluated

¹⁴ *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1.

¹⁵ The balance of Duke's request included carrying charges (\$5 million) and a request to collect from customers the premium paid for acquisition of an adjacent parcel of land (\$2.3 million) that the PUCO denied Duke from collecting.

¹⁶ Duke's Application was filed under R.C. 4909.18.

¹⁷ *In Re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, at ¶8.

alternative remedial options, and OCC presented an expert environmental engineer -- James Campbell, Ph.D. -- with extensive experience with MGP site investigation and remediation who testified that, using a different approach, the investigation and remediation job could have, and should have been done for only \$8.0 million.¹⁸

In reaching its decision, the PUCO, however, completely disregarded Dr. Campbell's testimony, appearing to ignore his testimony simply because he was not licensed under Ohio EPA's Voluntary Action Program (VAP) and because he had not actually worked -- for the Utility -- on its MGP sites.¹⁹ The PUCO's dismissal of OCC's witness's testimony, without evaluation, and its adoption of the Utility's position in the absence of its assessment of alternative remedial options was error. The evidence of alternative remedial options costing tens of million dollars less is fatal to the PUCO's finding that Duke's MGP-related expenditures were prudently incurred.

Finally, the PUCO's Order was not a unanimous decision. In fact two Commissioners dissented on purely legal grounds. The dissenting opinion stated:

We respectfully dissent from our colleagues in this case. Duke is attempting to obtain relief that we are simply unable to grant as we are limited by the statutory authority given to this Commission under R.C. 4909.15. Specifically, Duke is attempting to recover the expenses for remediation of the subject properties under R.C. 4909.15(A)(4). We decline to extend the statutory language and the established precedent to interpret (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.

¹⁸ OCC Ex. 15A, (Direct Testimony of James R. Campbell, Ph.D.) at 38 (February 25, 2013).

¹⁹ Order at 64.

The dissent does not disagree with the majority because of issues of discretion or weight of the evidence arguments, but rather reflects a fundamental disagreement regarding the law. Importantly, the dissenting opinion is consistent with the Movant's interpretation of Ohio's ratemaking law.

For all these reasons, Movants have demonstrated a strong likelihood that they will prevail on the merits.

B. Duke's Impending Collection Of The Deferred MGP-Related Investigation And Remediation Costs From Customers Is Likely To Cause Irreparable Harm To Customers.

Harm is irreparable "when there could be no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be 'impossible, difficult, or incomplete.'"²⁰ In the context of judicial orders, the Supreme Court of Ohio traditionally looks to whether there is an effective legal remedy if the order takes effect, to determine whether to stay the proceedings.²¹

In *Tilberry v. Body*, the Ohio Supreme Court found that the effect of a court order calling for the dissolution of a business partnership would cause "irreparable harm" to the partners because "a reversal ... on appeal would require the trial court to undo the entire accounting and to return all of the asset distributions" -- a set of circumstances that would be "virtually impossible to accomplish."²² In *Sinnott v. Aqua-Chem, Inc.*, the Ohio Supreme Court found that a lower court's pre-trial findings could be appealed at the point

²⁰ *FOP v. City of Cleveland* (8th Dist. 2001), 141 Ohio App. 3d 63, 81, citing *Cleveland v. Cleveland Elec. Illuminating Co.* (8th Dist. 1996), 115 Ohio App. 3d 1, 12, appeal dismissed, 78 Ohio St. 3d 1419 (1997).

²¹ See, e.g., *Tilberry v. Body* (1986), 24 Ohio St. 3d 117; *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158, 161.

²² *Tilberry*, 24 Ohio St. 3d at 121.

they were issued because the findings allowed the case to proceed to trial.²³ The majority reasoned that “the incurrence of unnecessary trial expenses is an injury that cannot be remedied by an appeal from a final judgment,”²⁴ and so concluded that “[i]n some instances, ‘[t]he proverbial bell cannot be unrung and an appeal after final * * * judgment on the merits will not rectify the damage’ suffered by the appealing party.”²⁵ Here, the bell is ringing loud that Duke’s customers need the PUCO to protect their interest in a refund.

Although, as Justice Rehnquist observed, “the temporary loss of income, **ultimately to be recovered**, does not usually constitute irreparable injury,”²⁶ *Tilberry* and *Sinnott* illustrate that economic harm does become irreparable where the loss cannot be recovered. Here, Duke’s customers affected by the Commission’s order are unlikely to recover their losses in the event the Ohio Supreme Court overturns the PUCO’s decision.

The PUCO should protect the Utility’s customers from this harm. The Commission should stay the collection of the deferred MGP-related investigation and remediation costs until all appeals are exhausted.

C. The Stay That is Needed to Protect Customers During the Process of Rehearing and Appeal Could Be Structured So Not To Cause Substantial Harm To Duke.

Duke will likely assert that there is no mechanism under Ohio law that permits the retroactive refund of over-collections from customers, where such payments are not made

²³ *Sinnott*, 116 Ohio St. 3d at 164.

²⁴ *Id.* at 163.

²⁵ *Id.* at 162 (quoting *Gibson-Myers & Assocs. v. Pearce* (9th Dist.), 1999 Ohio App. LEXIS 5010, *7-*8 (compelled disclosure of a trade secret would “surely cause irreparable harm”).

²⁶ *Sampson v. Murray* (1974), 415 U.S. 61, 90 (emphasis added).

subject to refund.²⁷ But a Stay, while protecting Duke's customers, could be structured so as to not harm the Utility. In the Duke Deferral Case, the Commission issued a Finding and Order that established the constraints under which Duke was authorized to accrue carrying charges on the MGP deferrals. The PUCO stated:

Duke is further authorized to accrue carrying charges on all deferred amounts between the dates the expenditures were made and the date recovery commences.²⁸

However, in the Order in these cases, the Commission further restrained the Utility from the collection of any carrying charges on the remediation costs. The PUCO stated:

In addition, we find the intervenors' argument that the shareholders should bear some of the responsibility for the remediation costs persuasive, in that the carrying costs should not be borne by the ratepayers. * * *, and request for recovery in a timely manner, so as to minimize the ultimate rate burden on customers. Therefore, given the circumstances presented in these cases and the decades-long contamination that necessitated these utility costs, we find it appropriate to deny Duke's request for recovery of the associated carrying charges.²⁹

In order to protect the Utility from harm arising from a Stay -- and the delay in collection of deferred MGP-related investigation and remediation costs from customers, the PUCO could authorize Duke to accrue reasonable carrying charges during the pendency of the Stay. Those carrying charges would then be collected from customers only if the PUCO's Order was upheld.

²⁷ See, e.g., *Lucas County Commissioners v. Pub. Util. Comm.* (1997), 80 Ohio St. 3d 344; *Keco*, 166 Ohio St. 254, ¶ 2 of the syllabus.

²⁸ *Id.*, Finding and Order at 3.

²⁹ Order at 59-60 (emphasis added).

D. A Stay to Prevent Duke from Collecting Increased Rates from Customers (During the Process of Rehearing and Appeal) Would Further The Public Interest.

In the dissent in the Supreme Court case in which Justice Douglas recommended standards for a stay of a PUCO decision, he noted that PUCO Orders “have effect on everyone in this state -- individuals, business and industry.”³⁰ That effect on customers is all the more pronounced in these difficult economic times when customers can ill afford unjustified increases in essential services. It thus was fitting that Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is “above all in these types of cases, where lies the interest of the public” and that “the public interest is the ultimate important consideration for this court in these types of cases.”³¹

As discussed above, the Stay sought by Movants would prevent irreparable harm to Duke’s customers -- in this case, residential, commercial and industrial, with a proposal to assure no substantial harm to the Utility. In addition, the Stay would provide some relief to customers who are already burdened by the fragile state of the economy. The public interest; therefore, would be furthered by a stay of the collection of the Deferred MGP-related investigation and remediation costs.

E. In The Alternative, The PUCO Should Make The MGP Rider Collections Subject To Refund.

An alternative approach to protecting customers is for the PUCO to make Duke’s collection of MGP-related investigation and remediation costs subject to refund. The PUCO has, in the past, ordered that utility rates should be subject to refund. In 1983, the

³⁰ *MCI*, 31 Ohio St.3d at 606.

³¹ *Id.*

Commission determined that, with regard to an AEP Ohio Company, a portion of the allowance related to Columbus & Southern Ohio Electric Company's construction work in progress for the Zimmer plant would be collected subject to refund to customers.³² After the Commission's action was upheld on appeal,³³ the Commission ordered the Company to refund approximately \$4.5 million to its customers.³⁴

In that case, the Commission ordered the refund to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule or reason. In this case, if the Commission does not stay the collection of the MGP Rider rate, then the Commission should follow precedent and make the rates subject to refund to protect Ohio customers.

V. CONCLUSION

A properly structured stay of the collection of the deferred MGP-related investigation and remediation costs would protect Duke's residential customers without harming Duke. In the alternative, the PUCO could protect customers by ruling that the MGP Rider collections are subject to refund. In order to avoid unjust and irreparable harm to Duke's customers, the PUCO should grant the Stay sought in this Motion or in the alternative, rule that the MGP Rider charges are collected subject to refund.

³² *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise Its Depreciation Accrual Rates and Reserves*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

³³ *Columbus & Southern Ohio Electric Co. v. Public Util. Comm.* (1984), 10 Ohio St.3d 12.

³⁴ Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Motion* has been served upon the below-named persons via electronic transmittal this 2nd day of December 2013.

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Summary: Motion Motion for a Stay to Prevent Duke from Charging Manufactured Gas Clean-Up Costs to Customers While the Process is Pending for Rehearing and any Appeals or, in the Alternative, Motion to Make Duke's Impending Rates for Charging Manufactured Gas Clean-Up Costs to Customers Subject to Refund Pending the Outcome of Rehearing and any Appeals by 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.