

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Increase in its) Case No. 12-1685-GA-AIR
Natural Gas Distribution Rates.)

In the Matter of the Application of Duke) Case No. 12-1686-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval of an) Case No. 12-1687-GA-ALT
Alternative Rate Plan for Gas Distribution)
Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval to Change) Case No. 12-1688-GA-AAM
Accounting Methods.)

ENTRY

The Commission finds:

- (1) Duke Energy Ohio, Inc. (Duke or Company), is a natural gas company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission, pursuant to R.C. 4905.04, 4905.05, and 4905.06.
- (2) By Opinion and Order issued November 13, 2013, the Commission approved the Stipulation and Recommendation (Stipulation) signed by Duke, Staff, the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), The Greater Cincinnati Health Council, Cincinnati Bell Telephone Company, LLC, The Kroger Company (Kroger), Direct Energy Business, LLC, and Direct Energy Services, LLC, and People Working Cooperatively, Inc. As part of that Stipulation, the parties agreed to litigate the issues related to Duke's request to recover costs for the investigation and remediation of its manufactured gas plants (MGPs). Upon consideration of the record in these cases, in its Order, the Commission, inter alia, concluded that Duke sustained its burden to prove that it prudently incurred MGP investigation and remediation costs related to the sites, less certain costs and

charges, and said costs should, in accordance with R.C. 4909.15(A)(4), be considered costs incurred by Duke for rendering utility service and be treated as expenses incurred during the test year. Therefore, Duke was authorized to recover \$62.8 million, less \$2.3 million for the purchased parcel on the East End site, the 2008 costs for the West End site, and all carrying charges for both sites, on a per bill basis, over a five-year amortization period. In addition, the Commission, while placing limits on the deferral, authorized Duke to continue to defer such costs beyond December 31, 2012. Finally, the Commission determined that, beginning March 31, 2014, and on or before March 31 in each subsequent year, Duke may update Rider MGP based on the unrecovered balance, minus any carrying charges, as of the prior December 31. Therefore, the Commission authorized Duke to file proposed tariffs reflecting the authorized amount to be included in Rider MGP for review and approval.

- (3) On November 27, 2013, consistent with the November 13, 2013 Order, Duke filed its proposed tariffs for review and approval.
- (4) By Entry on Rehearing issued January 8, 2014, the Commission denied the applications for rehearing filed by various parties, reaffirming its November 13, 2013 Order.
- (5) On December 2, 2013, OCC, Kroger, OP&E, and the Ohio Manufacturers' Association (Movants) filed a motion for stay of the Commission's November 13, 2013 Order in these cases, with regard to its authorization of Duke to collect money from its customers, through Rider MGP, for the MGP-related expenses for investigation and remediation. According to Movants, a stay is necessary in order to prevent irreparable harm to Duke's customers during the pendency of the appeal of the Order. In the alternative, Movants request the Commission order that the rates paid by customers for Duke's deferred MGP-related costs be collected subject to refund to customers. See *In re Columbus & S. Ohio Elec. Co.*, Case No. 81-1058-EL-AIR, Entry (Nov. 17, 1982) and Order on Rehearing (May 1, 1984); *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 460 N.E.2d 1108 (1984).
- (6) While Movants acknowledge there is no controlling precedent setting forth the conditions under which the Commission will

stay an order, they state the Commission has favored the following four-factor test governing a stay that has been used in courts when determining whether to stay an administrative order pending judicial review: whether there has been a strong showing that movant is likely to prevail on the merits; whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay; whether the stay would cause substantial harm to other parties; and the public interest. *See In re Intrastate Access Charges*, Case No. 00-127-TP-COI (*Intrastate Access Charges*), Entry on Rehearing (Feb. 20, 2003); *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 510 N.E.2d 806 (1987); *In re Northeast Ohio Pub. Energy Council*, Case No. 09-423-EL-CSS (*Northeast Ohio Pub. Energy Council*), Entry (July 8, 2009). Movants assert they have met this four-factor test. Had the Commission properly applied Ohio ratemaking laws, Movants contend Duke's request for recovery of the MGP costs should have been denied. In addition, Movants argue the Commission erred by relying on Duke's experts to determine whether Duke met its burden of proof regarding the prudence of the MGP expenses. Movants also note that the November 13, 2013 decision was not a unanimous decision, as two Commissioners dissented on legal grounds. Therefore, Movants opine that there is a strong likelihood that they will prevail on the merits. Movants offer that the Supreme Court traditionally looks to whether there is an effective legal remedy if the order takes effect to determine whether to stay the proceeding; noting that economic harm does become irreparable where the loss cannot be recovered. *See Tilberry v. Body*, 24 Ohio St.3d 117, 493 N.E.2d 954 (1986); *Sinnott v. Aqua-Chem, Inc.* 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217. In the instant cases, Movants believe the customers are unlikely to recover their losses in the event the Supreme Court overturns the Commission's decision. Movants note that Duke is likely to 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 subject to refund. *See Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997); *Keco Industries v. The Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). The Commission, in its Order in these cases, while granting the request for recovery of the deferred MGP costs, denied Duke's request for associated carrying costs. Therefore, in order to

protect Duke from harm arising from a stay and, thus, the delay in collection of the deferred MGP-related costs from customers, Movants suggest the Commission authorize Duke to accrue reasonable carrying charges during the pendency of the stay. Movants assert that, given these difficult economic times, customers cannot afford unjustified increases in essential services. Therefore, the public interest would be furthered by a stay of the collection of the deferred MGP-related investigation and remediation costs.

- (7) On December 13, 2013, Duke filed a memorandum contra Movants' motion to stay, stating that the motion is a veiled effort to reassert arguments already heard and decided by the Commission. Duke submits that the motion is procedurally and legally defective. Pursuant to R.C. 4905.32 and Supreme Court precedent, Duke argues a utility has no choice but to collect the rates set by order of the Commission, citing *Keco*. In addition, Duke notes that, in accordance with R.C. 4903.15, a Commission order is effective immediately upon its journalization, unless a different time is specified by the Commission. Moreover, Duke states the Supreme Court has affirmed that the collection of rates pursuant to a Commission order will not be stayed absent an application to the Court and the posting of a bond. See *Keco* at 258; *Office of Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 575 N.E.2d 157 (1991); *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. However, Movants ignore this established protocol and improperly seek to stay the Commission's Order. In addition, Duke points to Commission precedent wherein the Commission denied a motion to stay, noting that the legality of the decision was a question to be decided by the Supreme Court. *In re Ohio Edison Co.*, Case No. 90-718-EL-ATA, Finding and Order (Aug. 30, 1990). Duke further states that a stay of a proceeding is an action in equity and the Commission does not have any equitable jurisdiction. *State Alarm, Inc. v. Ameritech Ohio, Inc.*, Case No 95-1182-TP-CSS, Opinion and Order (Feb. 21, 1996). Duke submits that the four-factor test referenced by Movants cannot be sustained. According to Duke, the Commission's Order is well-founded and based upon ratemaking authority set forth in R.C. 4909.15, therefore, Movants cannot establish a likelihood of prevailing on the merits. Duke avers that Movants cannot establish and support the existence of irreparable harm to customers or other

parties, stating that the Supreme Court cases cited by Movants, *Tilberry* and *Sinnott*, in support of their claim are either remote from the matters under consideration in these proceedings or unrelated to Movants' present arguments. As to the public interest, Duke states that, for the Commission to stay its own decision would create doubt on those who maintain interest in the financial status of Duke and its regulatory oversight. Such uncertainty would have negative financial consequences on Duke and for its customers. Therefore, a stay is not in the best interest of the public. With regard to Movants' alternative proposal that the Commission should have made the rider subject to refund, Duke argues that any refund order would be contrary to Supreme Court precedent declining to engage in retroactive ratemaking. Duke notes that the Supreme Court has made it clear that the statutes protect against unlawfully high rates by allowing the Court to stay execution of Commission orders, in accordance with R.C. 4903.16. *See Keco; In re Application of Columbus S. Power Co.*

- (8) Movants filed a reply to Duke's memorandum contra on December 20, 2013, reiterating the arguments made in their initial motion and arguing that, contrary to Duke's assertions, the Commission has the authority to grant a stay to protect Duke's customers during the process of rehearing and any appeals. Movants assert that, in accordance with R.C. 4903.10, the Commission may effect a stay of its Order, as long as that action is taken before an appeal occurs and jurisdiction is relinquished to the Supreme Court. Movants note, however, that the Commission, in the past, has granted stays pending the results of an appeal, citing *In re Ameritech Ohio, Inc.*, Case No. 99-938-TP-COI, Entry (June 26, 2002). Movants argue the Commission should take similar action in these cases pending judicial review.
- (9) Upon review of Movants' motion to stay the Commission's November 13, 2013 Order, with regard to its authorization of Duke to collect from its customers the MGP-related expenses for investigation and remediation through Rider MGP, and the responsive pleadings, the Commission finds that the motion should be denied. In our Order and Entry on Rehearing, the Commission thoroughly reviewed and considered all arguments raised by the parties in these cases in rendering our decision on the merits of Duke's request to recover the MGP-

related costs. Our ultimate analysis and application of the statute and precedent was clearly delineated in those documents. Therefore, we believe it would be both antithetical to our decision in these cases and inappropriate for us to entertain Movants' motion to stay at this time. Moreover, when applying the four-factor test advocated by Movants to determine whether a stay should be granted in these proceedings, we conclude that Movants have failed to satisfy the criteria, as they have failed to demonstrate a strong showing that they are likely to prevail on the merits, that they would suffer irreparable harm absent the stay, that the stay would cause substantial harm to other parties, or that the public interest requires the stay. As for Movants' alternative proposal that the Rider MGP would be subject to refund, the Commission, likewise, finds that such a determination would be contrary to our decision in these cases approving Duke's request to recover the MGP-related costs. Accordingly, Movants' motion for stay should be denied.

- (10) With regard to our review of Duke's proposed tariffs reflecting the authorized amount to be included in Rider MGP, which were filed on November 27, 2013, the Commission finds that such tariffs are reasonable and in compliance with our directives set forth in the November 13, 2013 Order; therefore, such tariffs should be approved. The new tariffs will become effective on a date not earlier than the date upon which complete final tariff pages are filed with the Commission.

It is, therefore,

ORDERED, That Movants' motion to stay the November 13, 2013 Order, with regard to its authorization of Duke to collect money through Rider MGP, is denied. It is, further,

ORDERED, That Duke's proposed tariffs, filed on November 27, 2013, reflecting the authorized amount to be included in Rider MGP, are approved. It is, further,

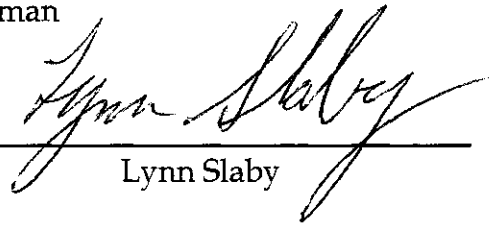
ORDERED, That Duke is authorized to file, in final form, complete copies of its tariffs filed on November 27, 2013, consistent with the provisions of the November 13, 2013 Order. Duke shall file one copy in its TRF docket and one copy in these case dockets. The effective date of the revised tariffs shall be a date not earlier than the date upon which complete, printed copies of the final tariff pages are filed with the Commission. It is, further,

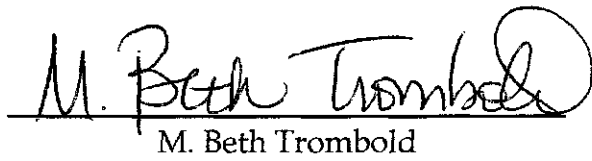
ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman

Steven D. Lesser


Lynn Slaby

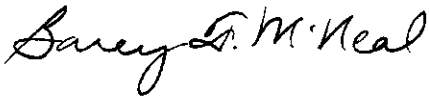

M. Beth Trombold

Asim Z. Haque

CMTP/vrm

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FEB 19 2014



Barcy F. McNeal
Secretary

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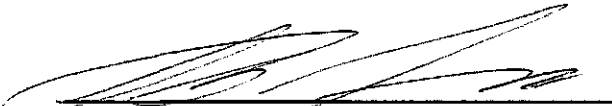
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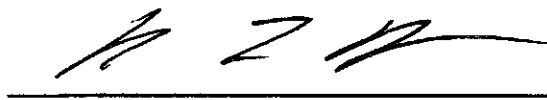
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CONCURRING AND DISSENTING OPINION OF
COMMISSIONERS STEVEN D. LESSER AND ASIM Z. HAQUE

We concur, in part, and dissent, in part. We concur with the rest of our colleagues in their decision to deny Movants' motion to stay. However, we must continue to dissent from the majority on the substantive matter of Duke's recovery of its environmental remediation expenses. There is no basis under Ohio law for granting such recovery and, as such, we do not agree that Duke can include these expenses in its tariffs.



Steven D. Lesser

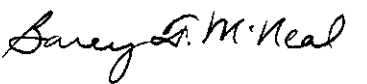


Asim Z. Haque

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Barcy F. McNeal
Secretary