

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Duke Energy Ohio, Inc., for Authority) Case No. 16-1106-GA-AAM
to Defer Environmental Investigation)
and Remediation Costs.)

In the Matter of the Application of) Case No. 16-1107-GA-UNC
Duke Energy Ohio, Inc., for Tariff)
Approval.)

**COMMENTS
OF
OHIO PARTNERS FOR AFFORDABLE ENERGY**

Ohio Partners for Affordable Energy ("OPAE") herein comments on these applications in which Duke Energy Ohio, Inc. ("Duke") seeks to extend beyond December 31, 2016 its current accounting authority to defer expenses that Duke incurs to cleanup manufactured gas plant ("MGP") sites, which are not used and useful for public utility service. The deferral of these costs means that Duke intends to collect them eventually from its natural gas distribution ratepayers. However, because these costs are not associated with utility plants in service or with natural gas distribution service, they may not be collected from ratepayers. In the event that accounting authority for deferral of these costs is authorized, the Commission must make clear that such authority does not constitute ratemaking and approval of Duke's applications is not a determination of what, if any, of these costs may be appropriate for recovery in Duke's distribution rates. Such an order comports with Commission precedent. *Duke Energy Ohio*, Case No. 09-712-GA-AAM, Entry on Rehearing (January 7, 2010) at 9.

MGP costs are not incurred for Duke's public utility service; therefore, OPAE and others have appealed to the Supreme Court of Ohio the Commission's order under which Duke may collect from natural gas distribution ratepayers the costs associated with the cleanup of these MGP sites. Ohio Supreme Court Case No. 2014-328. In OPAE's appeal, OPAE alleges that the Commission erred in authorizing Duke to charge distribution ratepayers for MGP investigation and remediation expenses that were not a cost to Duke of rendering public utility service. OPAE Notice of Appeal to the Supreme Court of Ohio, Case No. 2014-328, March 5, 2014; Commission Case Nos. 12-1685-GA-AIR, et al. The Court has now set the oral argument in this case for February 28, 2017.

OPAE and others also moved for a stay of the Commission's orders on MGP collections at both the Commission and the Ohio Supreme Court. In the Motion for a Stay filed at the Commission, OPAE and others argued that there was a strong likelihood that they would prevail on the merits of their position because the MGP costs are not costs to render public utility service. A stay was needed to prevent Duke from collecting these unlawful charges from ratepayers pending the appeal. In the alternative, the Commission should have made MGP cost collections through the MGP Rider subject to refund. Motion for Stay, Case Nos. 12-1685-GA-AIR, et al., December 2, 2013. The Commission did not grant the stay so that Duke was able to collect these unlawful charges from ratepayers.

A motion for stay was also filed at the Supreme Court of Ohio. The Court initially granted the stay on May 14, 2014. However, when the Court required a bond, the Appellants could not pay the bond so that the stay was lifted on November 5, 2014. In

the pleadings before the Court, there was discussion of the issue of refunds in the event of a successful appeal. The Commission argued:

It is possible that the Commission could order a rate increase which is imposed and collected for a period of time but the Commission order is later reversed by this Court. This leaves ratepayers in the position of having paid, quite legally, charges that are later determined to be improper going forward. Ratepayers are then unable to be repaid for these amounts already collected. The Court recognized this effect in its *Keco Industries, Inc. v. Cincinnati and Suburban Co.*, 166 Ohio St. 254 (1957) decision.

The *Keco* decision has no application in this case. *Keco* dealt with a traditional ratemaking in which the Commission fully reviewed evidence of costs prior to the rate taking effect and set a uniform rate to be charged to customers until a new rate case is decided. There is no mechanism in a traditional ratemaking to review or adjust the rate between rate cases.

In more recent decades the Commission has increasingly used adjustable rate mechanism, or riders. In rider proceedings, the Commission establishes a rate based on initial estimates, and this rider is then collected from customers. But in contrast to traditional ratemaking, there is also a rider reconciliation process, colloquially called a “true up”, in which the Commission reviews the rate, normally annually, to match costs actually experienced. This adjustment will then either result in a marginal reduction or increase in future rider rates charges to customers.

The Commission concluded: “In sum, no stay is needed in this case as *Keco* does not apply and ratepayers could receive a refund if the order is reversed.” Brief Regarding Bond Requirements Submitted on Behalf of Appellee, the Public Utilities Commission of Ohio, Ohio Supreme Court Case No. 2104-328 (August 12, 2014) at 2-3, 8.

If the Commission grants these applications to allow Duke to continue deferring MGP costs beyond December 31, 2016, the Commission should recognize in its any order allowing for deferrals that the deferrals are not a guarantee of future recovery from ratepayers. The Commission has traditionally found that granting accounting authority for deferrals is not a guarantee of future cost recovery. Duke first asked for

authorization to defer costs for MGP environmental investigation and remediation in Case No. 09-712-GA-AAM (August 10, 2009). In its order granting the deferrals, the Commission included the language included in all deferral orders in which the Commission specifically reserves the right to rule on the appropriateness of any rate recovery in a future base rate case. Case No. 09-712-GA-AAM, Finding and Order (November 12, 2009) at 3-4. Deferral accounting authority is separate from rate review. The Commission's grant of deferral authority for Duke's investigation and remediation costs is not a ratemaking order and does not ensure or guarantee Duke will be authorized subsequently to collect such deferred costs from its ratepayers. Case No. 09-712-GA-AAM, Entry on Rehearing (January 7, 2010) at 7.

Moreover, in the case of MGP expenses, the collection of which is on appeal to the Supreme Court, the costs cannot be recovered from ratepayers in the event of a successful appeal. Even amounts already collected from ratepayers through the MGP Rider must be refunded through the MGP Rider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of these Comments will be served by the Commission's Docketing Division *via* electronic transmission on the electronically-subscribed persons listed below this 23rd day of November 2016.

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Summary: Comments electronically filed by Colleen L Mooney on behalf of Ohio Partners for Affordable Energy