

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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**COMMENTS BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND THE KROGER CO.**

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**I. INTRODUCTION**

This case is the latest in Duke's quest to charge customers lots of money for environmental remediation of manufactured gas plant sites that have not been used and useful for 50 years. Previously, the PUCO required Duke to complete remediation of the "East End" MGP site by December 31, 2016.<sup>1</sup> The PUCO found that Duke and its shareholders must be accountable and thus, customers should not pay for remediation costs after that date.<sup>2</sup> Yet in its application, Duke asks the PUCO for permission to charge customers for remediation of the East End site for an indefinite period of time beyond December 31, 2016.

To obtain an extension, the PUCO has ruled that Duke must show that "exigent circumstances" exist. The PUCO has defined exigent circumstances as events "beyond

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<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685, Opinion and Order at 72 (Nov. 13, 2013) (the "2013 MGP Order").

<sup>2</sup> *Id.* That PUCO decision has been appealed to the Ohio Supreme Court and oral argument has been set. See Notice of Oral Argument (Nov. 2, 2016), Ohio Supreme Court Case No. 2014-0328.

the control" of Duke.<sup>3</sup> Duke claims that the remediation has been "arduous" and it has had to contend with winter weather conditions, complexity in the site area, and has had to conduct more intense investigations with respect to the remediation. Duke claims that these factors have led to its delay in remediating the East End MGP site and so it needs an indefinite extension. The PUCO should find that the difficulties Duke experienced do not amount to exigent circumstances. Customers should not be forced to pay for remediation activities after December 31, 2016. Duke's application for an indefinite extension should be denied.

## **II. BACKGROUND**

Nearly 40 years ago, the Ohio Supreme Court acknowledged the "generally accepted principle that a utility is not entitled to include in the valuation of its rate base property not actually used or useful in providing public service, no matter how useful the property may have been in the past or may yet be in the future."<sup>4</sup> This longstanding principle is codified in Ohio law under Revised Code section 4909.15.<sup>5</sup>

Despite the law and the Ohio Supreme Court precedent, in its last rate case, Duke sought to charge customers for environmental investigation and remediation for two former manufactured gas plants.<sup>6</sup> OCC, Kroger, and other parties opposed this customer charge because these plants have not been used and useful for 50 years. Production of

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<sup>3</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685, Entry on Rehearing at 4 (Jan. 8, 2014) (the "2014 MGP Entry").

<sup>4</sup> *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St. 2d 449, 453 (1979) ("*OCC v. PUCO*") (emphasis added). (denying the utility's request to include a nuclear power plant in its rate base because it was not used and useful).

<sup>5</sup> R.C. 4909.15(A)(1).

<sup>6</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685, Opinion and Order at 72 (Nov. 13, 2013).

manufactured gas at these plants ended in the 1960s.<sup>7</sup> PUCO Commissioners Lesser and Haque agreed with the intervening parties:

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.<sup>8</sup>

But a majority of the Commissioners found otherwise. Duke was authorized to charge customers nearly \$55.5 million in remediation costs for its manufactured gas plants.<sup>9</sup>

OCC, Kroger, and other parties appealed the PUCO's ruling to the Ohio Supreme Court.<sup>10</sup> The Supreme Court will soon decide whether the PUCO illegally carved out an exception for Duke to charge customers for these manufactured gas plants.<sup>11</sup>

Regardless of the ultimate resolution of these issues, the PUCO can act now to protect customers in the current case. It can do so by enforcing its prior Order, which limited the remediation costs that customers must pay. The prior Order found that customers should not pay for remediation costs at the East End site after December 31,

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<sup>7</sup> See Direct Testimony of Jessica Bednarcik at 5, *In The Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR (July 20, 2012) ("According to the Company's annual reports, manufactured gas operations ended at East End in 1963 and at West End in 1967.")

<sup>8</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685, Dissenting Opinion of Commissioners Steven D. Lesser and Asim Z. Haque (Nov. 13, 2013).

<sup>9</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685, Opinion and Order at 72 (Nov. 13, 2013).

<sup>10</sup> Case No. 2014-0328.

<sup>11</sup> Oral argument before the Supreme Court is scheduled for February 28, 2017.

2016, absent "exigent circumstances." Duke has failed to show that exigent circumstances exist. The PUCO should deny Duke's application.

### III. COMMENTS

**"Exigent circumstances" must exist for the PUCO to grant Duke's requested extension. No such circumstances exist here.**

In its order requiring customers to pay remediation costs at the MGP sites, the PUCO placed limits on the remediation activities. The PUCO found that the remediation should take place over a limited period of time. The PUCO ruled that it was "reasonable and in the public interest" for collection from customers be "finite."<sup>12</sup> So the PUCO found that Duke should collect remediation costs from customers for a maximum of "10 years from the date of the commencement of the remediation mandate under CERCLA."<sup>13</sup> On rehearing, the PUCO confirmed that Duke was required to complete remediation within the established ten-year period. "[T]he Commission reiterates its determination that it is essential that recovery from customers of the costs incurred to remediate the MGP sites be limited to a reasonable timeframe of 10 years."<sup>14</sup> For the East End site, this ten-year period expires on December 31, 2016.<sup>15</sup>

In the current case, Duke seeks permission to collect costs from customers for remediating the East End site beyond December 31, 2016, citing alleged "exigent

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<sup>12</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685, Opinion and Order at 72 (Nov. 13, 2013) (the "November 13 MGP Order").

<sup>13</sup> *Id.*

<sup>14</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685, Entry on Rehearing at 4 (Jan. 8, 2014).

<sup>15</sup> *Id.*

circumstances."<sup>16</sup> In support of its position, Duke argues that the approved recovery period "is not absolute" and that "arduous conditions could render such ten-year period unreasonable."<sup>17</sup> This mischaracterizes the November 13 MGP Order. This order permits an extension beyond ten years only under "exigent circumstances."<sup>18</sup> An "exigent circumstance" is "an event beyond the control of the Company."<sup>19</sup> Consistent with the PUCO's directive that it is "essential" for all remediation to take place within ten years, Duke must reach a very high bar to prove that exigent circumstances exist.

The circumstances described in Duke's application do not rise to the level of exigent circumstances. They do not warrant an extension in the face of the PUCO's firm ruling that remediation of the East End site should conclude by December 31, 2016.

Duke claims that the following events warrant an extension beyond December 31, 2016:

- Regulations that prevented Duke from investigating or remediating during Winter heating months when it is necessary to provide propane to supplement natural gas service.<sup>20</sup>
- The subsurface conditions of a portion of the site including the complex geology and location of gas lines required greater investigation.<sup>21</sup>
- Vibration sensitive utility infrastructure has to be protected from the vibrations from the remediation work.<sup>22</sup>

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<sup>16</sup> See Application at 3-12.

<sup>17</sup> See Application ¶ 5.

<sup>18</sup> See November 13, 2013 MGP Order at 72.

<sup>19</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685, Entry on Rehearing at 4 (Jan. 8, 2014).

<sup>20</sup> Application at 6.

<sup>21</sup> *Id.* at 7-8.

<sup>22</sup> *Id.*

- Extreme weather during the 2013 and 2014 winter seasons, caused an increased need for propane, which prevented further remediation work from going forward.<sup>23</sup>
- Complexities in geology resulted in more negotiations between Duke and its consultant.<sup>24</sup>

OCC and Kroger agree that Duke should pace its investigation and remediation work appropriately to ensure the health and safety of its employees and ensure a reliable natural gas distribution system. But the events that Duke describes above are not exigent circumstances. These events were foreseeable. Duke should have known that it could not conduct remediation activities in the winter because of its winter propane injection activities. In fact, Duke had been investigating and remediating costs since at least 2008,<sup>25</sup> five years before the recovery of the costs was approved. It should not come as a surprise to Duke that it needed to inject propane in the winter, or that there was complex geology or subsurface gas pipes.

Duke failed to complete remediation of the East End in a timely fashion. The reasons for its failure do not constitute "exigent circumstances." Simply because the remediation was "arduous" does not allow Duke to meet the standard. The PUCO should reaffirm its ruling that Duke and its shareholders should be held accountable and that customers should be protected from continuing to pay for remediation beyond the reasonable ten-year period.<sup>26</sup>

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<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> See *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685, Opinion and Order at 72 (Nov. 13, 2013) (stating that Duke could recover remediation costs that began in 2008).

<sup>26</sup> *Id.* ("We believe that, absent exigent circumstances, this 10-year timeframe from the inception of the federal mandate to the closure of cost recovery is reasonable and necessary in order to protect the public interest and ensure the Company and its shareholders are held accountable.").

Exigent circumstances do not exist in this case. Duke should not be permitted to continue to charge customers for remediation costs at the East End site after December 31, 2016. To find otherwise would render meaningless the PUCO's prior ruling that protected customers from paying remediation costs beyond the ten-year period.

#### **IV. CONCLUSION**

The PUCO required Duke to complete remediation efforts in ten years. Duke failed to do so. To protect the public interest and hold Duke and its shareholders accountable, the PUCO should preclude any further collection of remediation costs from customers. Duke's request to charge customers in perpetuity should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of these Comments was served on the persons stated below via electronic transmission, this 23rd day of November 2016.

*/s/ Christopher Healey* \_\_\_\_\_

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Summary: Comments Comments by The Office of the Ohio Consumers' Counsel and The Kroger Co. electronically filed by Ms. Jamie Williams on behalf of Healey, Christopher Mr.