

**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)

**APPLICATION FOR REHEARING BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND THE KROGER COMPANY**

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In its December 21, 2016 Finding and Order,¹ the PUCO continues on its course to facilitate Duke's quest to charge customers millions of dollars for environmental remediation of manufactured gas plant sites -- locations that have not been used and useful for 50 years. Previously, the PUCO ordered Duke to complete remediation of the "East End" MGP site over a ten-year period ending December 31, 2016.² Now, the PUCO is allowing Duke to continue deferring remediation costs (for later collection from customers) for an additional three years.³ In the Order, the PUCO agreed with Duke that "exigent circumstances" occurred that delayed Duke's remediation of the East End site. The evidence, however, does not support this conclusion.

¹ Finding & Order (Dec. 21, 2016) (the "Order").

² *In re Application of Duke Energy Ohio, Inc. for an Increase in its Nat. Gas Distrib. Rates*, Case No. 12-1685-GA-AIR, Opinion & Order at 72 (Nov. 13, 2013).

³ Order ¶ 37.

The Order is unreasonable and unlawful for at least the following reasons:

- Assignment of Error 1: The PUCO unreasonably and unlawfully found that Duke "established that exigent circumstances have occurred, warranting an extension of the Company's deferral authority." The circumstances that arose during remediation do not constitute "exigent circumstances." The PUCO's finding that exigent circumstances existed is manifestly against the weight of the evidence, violating R.C. 4903.09.
- Assignment of Error 2: The PUCO unreasonably and unlawfully found that Duke could extend the deferral period by three years, causing customers to potentially bear more costs. The PUCO failed to provide record support or justification for the three-year extension period. Nor did it properly set forth the reasons prompting this decision as required by R.C. 4903.09.
- Assignment of Error 3: The PUCO unreasonably and unlawfully extended Duke's deferral authority for the costs related to environmental investigation and remediation that cannot be lawfully collected from Ohio customers under R.C. 4909.15. The environmental investigation and remediation costs are costs associated with MGP sites that were never "used and useful" in providing public utility service to Duke's Ohio customers.

The Office of the Ohio Consumers' Counsel ("OCC") and the Kroger Co. respectfully request that the PUCO grant rehearing and abrogate or modify the Order for the reasons in the attached memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In November 2013, the PUCO determined that it was appropriate for Duke Energy Ohio to begin charging customers nearly \$55.5 million for environmental investigation and remediation costs for the cleanup of coal tar residues from two manufactured gas plants through Rider MGP.⁴ These plants have not produced gas in more than 50 years and were not used or useful in providing utility service to customers.⁵ The PUCO has now unlawfully and unreasonably approved Duke's application to continue deferring costs at its East End Site for another three years.⁶ For customers this means the potential for added costs associated with collecting from customers Duke's deferred remediation costs for another three years. OCC, on behalf of Duke's 420,000 residential customers, and Kroger, now request

⁴ *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).

⁵ *See In The Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, Direct Testimony of Jessica Bednarcik at 5 (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.")

⁶ Order ¶ 43.

that the PUCO grant rehearing to prevent Duke from deferring these costs- costs it will seek to collect from customers in the future.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute permits "any party who has entered an appearance in person or by counsel in the proceeding" to apply for rehearing in respect to "any matters determined in the proceeding." Applications for rehearing must be filed within thirty days of the PUCO's order.

OCC and Kroger filed motions to intervene in this proceeding. The PUCO granted both.⁷

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is "sufficient" reason to do so. After such rehearing, the PUCO may "abrogate or modify" the order in question if "the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."⁸

For the reasons describe below, the Order is unreasonable, unlawful, unjust, and unwarranted under R.C. 4903.10. The PUCO should grant OCC's and Kroger's application for rehearing. It should abrogate or modify the Order, consistent with OCC's and Kroger's recommendations in this application for rehearing.

⁷ *Id.* ¶ 14.

⁸ R.C. 4903.10(B).

III. BACKGROUND

Nearly 40 years ago, the Supreme Court of 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.”⁹ This longstanding principle is codified in Ohio law under R.C. 4909.15.¹⁰

Despite the law, in its last rate case, Duke sought to charge customers for environmental investigation and remediation for two former manufactured gas plants.¹¹ Duke was first granted authority to defer environmental investigation and remediation costs related to these plants in 2009.¹² In 2012, Duke sought to recover the costs they had begun deferring in 2009. OCC, Kroger, and other parties opposed this customer charge because these plants have not been used and useful for over 50 years. Production of manufactured gas at these plants ended in the 1960s.¹³

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

⁹ *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St. 2d 449, 453 (1979) (denying the utility's request to include a nuclear power plant in its rate base because it was not used and useful) (emphasis added).

¹⁰ R.C. 4909.15(A)(1).

¹¹ *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).

¹² *In re Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM, Finding and Order at 4 (Nov. 12, 2009).

¹³ See *In The Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, Direct Testimony of Jessica Bednarcik at 5 (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.”)

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.¹⁴

But the other Commissioners found otherwise. Duke was authorized to charge customers nearly \$55.5 million in remediation costs for its manufactured gas plants.¹⁵

OCC, Kroger, and other parties appealed the PUCO's ruling to the Supreme Court.¹⁶ The Supreme Court will soon decide whether the PUCO illegally allowed Duke to charge customers for these manufactured gas plants.¹⁷ On May 16, 2016, Duke filed an application to seek to continue deferring costs at the East End site for an additional five years.¹⁸ OCC, Kroger, OP&E, and PUCO Staff individually filed comments opposing this deferral.¹⁹ On December 21, 2016, the PUCO issued a Finding and Order granting Duke's request to continue deferring costs, but modified the period of the deferral to three years from five years.²⁰

¹⁴ *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).

¹⁵ *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).

¹⁶ Case No. 2014-0328.

¹⁷ Oral argument before the Supreme Court is scheduled for February 28, 2017.

¹⁸ Order ¶6.

¹⁹ *Id.*

²⁰ *Id.* at ¶37.

IV. ERRORS

- A. **The PUCO unreasonably and unlawfully found that Duke "established that exigent circumstances have occurred, warranting an extension of the Company's deferral authority." The circumstances that arose during remediation do not constitute "exigent circumstances." The PUCO's finding that exigent circumstances existed is manifestly against the weight of the evidence, violating R.C. 4903.09.**

In the Order allowing Duke to defer MGP costs at the East End site for another three years, the PUCO found that Duke had established that "exigent circumstances" occurred to allow it to extend the deferral period.²¹ This finding was unreasonable and unlawful because it was manifestly against the weight of evidence violating R.C. 4903.09.

Under Ohio law, all decisions must be supported by findings of fact that "set forth the reasons prompting the decisions arrived at, based upon said findings of fact."²² So the PUCO must set forth the grounds for their decision. The Supreme Court has determined that the record must contain sufficient probative evidence "to show that the PUCO's determination is not manifestly against the weight of evidence."²³ When the PUCO determined that Duke met the standard for "exigent circumstances," this finding was manifestly against the weight of the evidence as presented by the PUCO Staff, OPAE, OCC, and Kroger.

²¹ *Id.* at ¶36.

²² R.C. 4903.09.

²³ *MCI Telecomm. Corp. v Pub. Util. Comm'n*, 38 Ohio St.3d 266, 268 (1988) (R.C. 4903.13 sets the standard for overturning PUCO decisions as "unreasonable or unlawful", and the Supreme Court has determined that in order to overturn a PUCO finding of fact, it must be "manifestly against the weight of evidence.").

The PUCO accepted Duke's arguments that complications that resulted from the sensitive underground infrastructure that existed under the middle parcel of the MGP sites resulted in delays and were "exigent circumstances."²⁴ An "exigent circumstance" is characterized in the PUCO's earlier order as "an event beyond the control of the Company."²⁵ But not all events beyond human control cause delay in completing a project on a pre-specified schedule. If an event is foreseeable, and its probable occurrence is taken into account in planning, scheduling, and managing a project, there is no reason for the event to cause delays. Therefore, the mere occurrence of an adverse event is insufficient to create an exigent circumstance.

Duke did know, or should have known, about the complex nature of the sensitive underground infrastructure that lies below the middle parcel. Therefore, the presence of such infrastructure does not constitute an "exigent circumstance" causing Duke's delay.

Duke had been investigating and remediating costs since at least 2008, five years before the recovery of the costs was approved. It should not come as a surprise to Duke that there was complex geology or subsurface gas pipes.²⁶ The company had control over planning, scheduling and managing its work such that the event would not cause any inordinate delays in completing the remediation project. In fact, Duke's claims that the remediation of the middle parcel could not have been "fully realized until after the site assessments were complete"²⁷ suggest a fundamental lack of planning and proper project

²⁴ Order ¶ 36.

²⁵ *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).

²⁶ In fact the existence of these pipes was referenced by Duke witnesses in 2013. *See In the matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, Supplemental Direct Testimony of Jessica L. Bednarcik at 15 (Feb. 25, 2013).

²⁷ Reply Comments of Duke Energy at 9 (Dec. 2, 2016).

management, which was not an event beyond Duke's control. As the PUCO Staff comments pointed out: "Staff has shown that Duke has maintained exclusive control over the location, amount, schedule, and pace of the remediation work at the East End site and that the Company's Application does not point to any new or even unusual conditions that could have reasonably caused delays in completing the remediation."²⁸ There is no evidence that any of the events or facts that Duke relies on were truly out of Duke's control or that these events did, or should have, resulted in any delay in remediation.

Therefore, the PUCO's conclusion that Duke can continue to defer remediation costs for three more years based on a finding of exigent circumstances is manifestly against the weight of evidence in this case. As a result, rehearing should be granted to thoroughly investigate the nature of Duke's cost and time overruns.

B. The PUCO unreasonably and unlawfully found that Duke could extend the deferral period by three years, causing customers to potentially bear more costs. The PUCO failed to provide record support or justification for the three-year extension period. Nor did it properly set forth the reasons prompting this decision as required by R.C. 4903.09.

In its Finding and Order, the PUCO determined that the five-year deferral extension suggested in Duke's application was "excessive and contradictory to the Commission's reasoning for the initial ten-year time frame."²⁹ As a result, the PUCO modified Duke's proposed deferral period to three years. While OCC and Kroger agree with the PUCO that a five-year time period is excessive, there is no record support for a three-year deferral period. As stated above, Ohio law requires PUCO to base its decisions

²⁸ PUCO Staff Comments at 12 (Nov. 23, 2016).

²⁹ Order ¶ 37.

on findings of fact and record evidence.³⁰ There is no record support for a three-year deferral period.

OPAE, OCC, Kroger, and the PUCO Staff all advocated for no extension of the deferral period. Since the PUCO determined that Duke's proposed five-year period is excessive and contradictory to the PUCO's past reasoning,³¹ there is no other evidence to support any deferral period in this case. The PUCO cannot justify a three-year deferral period without citing any evidence in the record supporting that period. This is both unreasonable and contrary to R.C. 4903.09 (requiring the PUCO to base its decisions on facts in the record.)³²

The PUCO found that Duke failed to meet its burden of proof³³ for a five-year extension. Similarly, there is no evidence to support a three-year deferral period. So the proper result is to deny Duke's application in its entirety—not to grant the application for a shorter period of time that lacks record support.

³⁰ R.C. 4903.09.

³¹ Order ¶37.

³² See, e.g., *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306.

³³ *In re Application of the Ottoville Mut. Tel. Co.*, Case No. 73-356-Y, 1973 Ohio PUC LEXIS, at *4 ("the applicant must shoulder the burden of proof in every application proceeding before the Commission").

C. The PUCO unreasonably and unlawfully extended Duke's deferral authority for the costs related to environmental investigation and remediation that cannot be lawfully collected from Ohio customers under R.C. 4909.15. The environmental investigation and remediation costs are costs associated with MGP sites that were never "used and useful" in providing public utility service to Duke's Ohio customers.

Under Ohio law, only costs from utility plant that are "used and useful" in rendering utility service may be collected from customers.³⁴ The environmental clean-up costs that the PUCO approved are related to utility plant (in this case the manufactured gas plant) that has not been used and useful for many years. The PUCO was wrong. The Supreme Court will soon be hearing this case; it is currently scheduled for oral argument on February 28, 2017. But in the meantime it is inappropriate for the PUCO to allow Duke to defer (for future collection from customers) more of these illegal and unreasonable charges.

The Supreme Court has interpreted R.C. 4909.15 to mean that only the facilities that are "actually used and useful" may be included in rates for recovery from customers.³⁵ Previously, the Supreme Court reviewed whether a utility's nuclear power plant that had not yet become operational should have been included in the utility's rate base.³⁶ The Supreme Court held that the nuclear power plant was not includable in base rates because the requirements of R.C. 4909.15 had not been met.³⁷ The Supreme Court stated that the statutory language incorporated the generally accepted principle, given by the United States Supreme Court, "that a utility is not entitled to include in the valuation

³⁴ R.C. 4909.15(A)(1)

³⁵ *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 58 Ohio St.2d 449, 453, 391 N.E.2d 311 (1979).

³⁶ *Id.* at 452.

³⁷ *Id.* at 457.

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."³⁸

The Supreme Court further stated that it would be inequitable to prematurely shift the risk of the failure of an asset not yet proven from the shareholders to the customer.³⁹ The Supreme Court reasoned that the shareholders stand to gain from the success of the plant, so it is appropriate for them to bear the risk of its failure as opposed to the customers, who gain nothing if the plant succeeds and therefore should not also be expected to bear the risk of its failure.⁴⁰

The East End site that Duke is requesting to continue to defer remediation charges on has not been used and useful in providing utility service to customers in over 50 years.⁴¹ It is OCC's and Kroger's position that it was unlawful for the PUCO to approve any cost recovery for environmental remediation of the East End site in Duke's rate case. Therefore, it follows that it should be deemed unlawful for the PUCO to approve any deferral of unlawful costs, including the further deferral of East End remediation costs in this case.

V. CONCLUSION

In its Order, the PUCO has again allowed Duke to defer gas plant remediation costs for plants that are not used and useful in providing service to its 420,000 residential

³⁸ *Id.* (citing to *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938)) (emphasis added).

³⁹ *Id.* at 456.

⁴⁰ *Id.*

⁴¹ See *In The Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, Direct Testimony of Jessica Bednarcik at 5 (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.")

customers and Kroger. The PUCO unlawfully found exigent circumstances to allow Duke to extend the deferral of the costs beyond what was previously allowed. The PUCO's decision that exigent circumstances exist to allow the extended deferral period was erroneous. The PUCO should grant rehearing, abrogate the Order, and deny Duke's application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel and Kroger Co. was served via electronic transmission to the persons listed below, on this 20th day of January, 2017.

/s/ Christopher Healey
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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/20/2017 4:56:45 PM

in

Case No(s). 16-1106-GA-AAM, 16-1107-GA-UNC

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