

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE APPLICATION
OF DUKE ENERGY OHIO, INC. FOR
AUTHORITY TO DEFER ENVIRONMENTAL
INVESTIGATION AND REMEDIATION
COSTS.**

CASE NO. 16-1106-GA-AAM

**IN THE MATTER OF THE APPLICATION OF
DUKE ENERGY OHIO, INC. FOR TARIFF
APPROVAL.**

CASE NO. 16-1107-GA-UNC

ENTRY ON REHEARING

Entered in the Journal on February 8, 2017

I. SUMMARY

{¶ 1} The Commission finds that the Ohio Consumers' Counsel and Kroger's joint application for rehearing should be denied.

II. DISCUSSION

{¶ 2} Duke Energy Ohio, Inc. (Duke or the 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.

{¶ 3} R.C. 4905.13 authorizes the Commission to establish systems of accounts to be kept by public utilities and to prescribe the manner in which these accounts will be kept. Pursuant to Ohio Adm.Code 4901:1-13-13, the Commission adopted the Uniform System of Accounts (USOA), which was established by the Federal Energy Regulatory Commission, for gas and natural gas companies in Ohio, except to the extent that the provisions of the USOA are inconsistent with any outstanding orders of the Commission. Additionally, the Commission may require the creation and maintenance of such

additional accounts as may be prescribed to cover the accounting procedures of gas or natural gas companies operating within the state.

{¶ 4} On November 12, 2009, the Commission authorized Duke to defer environmental investigation and remediation costs related to two former manufactured gas plant (MGP) sites in Ohio for potential recovery of reasonable and prudent costs in a future base rate proceeding. *In re Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM (2009 *Deferral Authority Case*), Finding and Order (Nov. 12, 2009) at 4.

{¶ 5} On November 13, 2013, the Commission authorized the recovery of such environmental investigation and remediation costs as had been incurred by the Company between 2008 and 2012. The Commission authorized Duke to recover and continue deferring environmental investigation and remediation costs. The Commission also established dates by which the deferral authority would end, absent the existence of exigent circumstances. Particularly, in respect to the costs applicable to the property designated as the East End site, the Commission determined that the Company could continue to defer and recover such reasonable and prudent costs through December 31, 2016. *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al. (*Duke Rate Case*), Opinion and Order (Nov. 13, 2013) at 70-74. On rehearing, the Commission stated that Duke would be permitted to file an application for an extension of its deferral and related recovery authority in the event of exigent circumstances. *Duke Rate Case*, Entry on Rehearing (Jan. 8, 2014) at 4.

{¶ 6} On May 16, 2016, Duke filed an application in the above-captioned proceedings, requesting Commission authorization to continue to defer environmental investigation and remediation costs subsequent to December 31, 2016, and seek recovery of those costs utilizing the same mechanism and process as provided in the *Duke Rate Case*. Duke states in its application that its request is limited to an extension of the Rider

MGP recovery mechanism for costs incurred in respect to the East End site. Duke also requests that the Commission authorize it to extend its current accounting procedures and permit Duke to defer income statement recognition of environmental investigation and remediation costs for the East End site beyond December 31, 2016.

{¶ 7} On October 27, 2016, the attorney examiner issued an Entry setting forth a procedural schedule for these proceedings and soliciting comments from interested parties.

{¶ 8} On November 23, 2016, comments were filed by Staff, Ohio Partners for Affordable Energy (OPAE), and jointly by Ohio Consumers' Counsel (OCC) and The Kroger Co. (Kroger) (collectively, OCC/Kroger). Duke filed reply comments on December 2, 2016.

{¶ 9} By Finding and Order issued December 21, 2016, the Commission granted Duke's application for an extension of its authority to defer environmental investigation and remediation costs incurred in regard to the East End site for an additional period of three years (Finding and Order).

{¶ 10} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 11} On January 20, 2017, OCC/Kroger filed an application for rehearing of the Commission's Finding and Order, raising three assignments of error. As its first assignment of error, OCC/Kroger argues that the Commission unreasonably and unlawfully found that Duke established that exigent circumstances had occurred, which was manifestly against the weight of the evidence, violating R.C. 4903.09. In support of

its first assignment of error, OCC/Kroger relies on the comments submitted by Staff and notes that Duke's proffered exigent circumstances were foreseeable events and were well within the control of the Company to manage within the prescribed ten-year timeframe (Staff Comments at 12). As its second assignment of error, OCC/Kroger contends that the Commission failed to provide record support or justification for the three-year extension period or properly set forth the reasons prompting its decision as required by R.C. 4903.09. OCC/Kroger notes that, as OPAE, OCC/Kroger, and Staff all advocated for the denial of Duke's application, there is no record evidence to support the three-year deferral extension period and the Commission should have denied the application as a result. As its final assignment of error, OCC/Kroger argues that the Commission unlawfully and unreasonably 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, as these costs were never "used and useful" in providing public utility service to Duke's customers. OCC/Kroger further contends that the Commission was acting unlawfully when it approved cost recovery for the environmental investigation and remediation of the East End site in the *Duke Rate Case*, and, consequently, acted unlawfully when approving the deferral of unlawful costs for an additional three-year period.

{¶ 12} On January 30, 2017, Duke filed a memorandum contra OCC/Kroger's application for rehearing. Duke initially contends that the Commission rendered its decision after examining all of the relevant evidence and concluding that exigent circumstances existed warranting an extension of deferral authority. Duke notes that the only substantive evidence of exigent circumstances was provided by the Company and no contrary evidence was submitted on behalf of Staff or OCC/Kroger. Rather, Duke argues that OCC/Kroger is merely disagreeing with the Commission's decision, which Duke alleges is not an appropriate basis for rehearing. The Company further asserts that

the Commission's decision to allow an extension of three years was well supported by the record and the Commission's reasoning. Duke also argues that the Commission was well within its statutory authority to authorize the three-year extension period, pursuant to R.C. 4905.13. As a final matter, Duke contends that OCC/Kroger's argument regarding costs related to property that is not used and useful is misplaced, as that issue was not before the Commission or raised in its Finding and Order. Thus, Duke requests that the Commission deny OCC/Kroger's request for rehearing.

{¶ 13} As an initial matter, the Commission would like to take this opportunity to clarify its Finding and Order. While describing the contents of Duke's application, the Commission indicated that Duke was requesting the authority to modify its accounting procedures to reflect the deferral of the costs related to the environmental investigation and remediation, as well as the associated carrying charges. As Duke only requested an extension of its existing deferral authority, and in order to be consistent with our prior decisions in the *Duke Rate Case*, we note that Duke will continue to lack the authority to accrue carrying charges on the deferred amounts. *Duke Rate Case*, Opinion and Order (Nov. 13, 2013) at 71. Moving to the application for rehearing at issue, the Commission finds that OCC/Kroger's first assignment of error should be denied. In our decisions in the *Duke Rate Case*, we explicitly provided an opportunity for Duke to seek an extension of its deferral authority in the event the Company faced exigent circumstances during its remediation efforts. In its application for rehearing, OCC/Kroger attempts to modify the Commission's definition of an "exigent circumstance" to an unforeseeable event, rather than an unexpected circumstance that is outside the control of the Company. We cannot agree to this broad modification. In the Finding and Order, we explained that the unique subsurface complexities present in the Middle Parcel and area west of the West Parcel, which could not have been determined until the additional site assessments had been conducted, constituted exigent circumstances and warranted an extension of Duke's

deferral period. Finding and Order at 13-14. We also made it clear that any decision to grant an extension of deferral authority is in the sole discretion of the Commission and noted that Duke has demonstrated a consistent and ongoing commitment to carry out its remediation efforts in a prudent and responsible manner during the initial ten-year period. Finding and Order at 14. We have no reason to believe that Duke will not continue to do so for the additional three-year period.

{¶ 14} The Commission also finds that OCC/Kroger's second assignment of error should be denied. As discussed more thoroughly above, we found that Duke established that exigent circumstances had occurred, thus, warranting an extension of the deferral period. To hold that an extension was warranted, but deny the entire application simply because no party explicitly requested a three-year extension period would be contrary to both Commission practice and common sense. It is quite common for the Commission to balance the interests of participating parties when determining the resolution of issues, especially regarding time periods. In fact, when considering an appropriate amortization period for the collection of the deferred MGP costs from customers in the *Duke Rate Case*, the Commission evaluated the proposed timeframes of three and ten years and elected to establish a period of five years. The Commission noted that its decision appropriately weighed the interests of all parties. *Duke Rate Case*, Entry on Rehearing (Jan. 8, 2014) at 23-24. Similarly, in these proceedings, the Commission found it to be reasonable to reduce Duke's request for an extension period of five years to three years in order to balance the interests of all parties and ensure that the Commission's original intent to protect the public interest and hold Duke and its shareholders accountable, in part, for the remediation continues to be realized. Furthermore, the Commission agrees with Duke that allowing for the three-year extension of deferral authority was well within our authority, pursuant to R.C. 4905.13.

{¶ 15} Finally, the Commission finds that OCC/Kroger's third assignment of error should also be denied. These arguments are not appropriate for OCC/Kroger to raise in its application for rehearing as they are clearly beyond the scope of the Commission's Finding and Order. The issue of whether the Commission was required to determine if these costs were associated with MGP sites that were used and useful, pursuant to R.C. 4909.15, was thoroughly addressed in the Commission's decisions in the *Duke Rate Case* and those decisions are now under the review of the Ohio Supreme Court. *Duke Rate Case*, Opinion and Order (Nov. 13, 2013) at 53-54; *Duke Rate Case*, Entry on Rehearing (Jan. 8, 2014) at 4-7, 10-12.

{¶ 16} Furthermore, as we emphasized in our Finding and Order, deferrals do not constitute ratemaking. Finding and Order at 15, citing *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176. By granting Duke's request for a period of three years, Duke was only provided with the authority to modify its accounting procedures to reflect the deferral of the costs related to the environmental investigation and remediation. The Commission notes that OCC/Kroger's arguments address the possibility that Duke may request recovery of these deferred costs in a future rate proceeding. By granting Duke's application, the Commission did not determine what, if any, of these costs may be appropriate for recovery in a subsequent proceeding. Therefore, to the extent OCC/Kroger argues that the Commission authorized the future collection of these costs from customers, we find these arguments to be premature.

{¶ 17} Accordingly, for the reasons set forth herein, we find that OCC/Kroger's application for rehearing should be denied.

III. ORDER

{¶ 18} It is, therefore,

{¶ 19} ORDERED, That OCC/Kroger's application for rehearing be denied. It is, further,

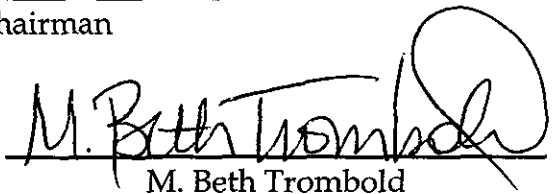
{¶ 20} ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



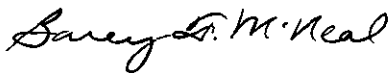
Asim Z. Haque, Chairman

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MJA/sc

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Barcy F. McNeal
Secretary