

**BEFORE
UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to Rider) Case No. 14-375-GA-RDR
MGP Rates.)

In the Matter of the Application of Duke) Case No. 14-376-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to Rider) Case No. 15-452-GA-RDR
MGP Rates.)

In the Matter of the Application of Duke) Case No. 15-453-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to Rider) Case No. 16-542-GA-RDR
MGP Rates.)

In the Matter of the Application of Duke) Case No. 16-543-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to Rider) Case No. 17-596-GA-RDR
MGP Rates.)

In the Matter of the Application of Duke) Case No. 17-597-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Adjustment to Rider) Case No. 18-283-GA-RDR
MGP Rates.)

In the Matter of the Application of Duke) Case No. 18-284-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

**MEMORANDUM CONTRA DUKE ENERGY OHIO'S MOTION TO CHARGE
CUSTOMERS FOR 2013-2017 COSTS OF REMEDIATING DEFUNCT
MANUFACTURED GAS PLANT SITES
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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After charging its customers more than \$50 million to date (about \$100 per customer) for the clean up of long defunct, nonregulated manufactured gas plants (“MGP”), Duke Energy wants to charge residential customers over \$7.5 million per year more¹ for the cleanup incurred from 2013-2017. Duke Energy seeks approval of these charges without the Public Utilities Commission of Ohio (“PUCO”) ruling on whether Duke acted prudently in cleaning up those plants, and without the PUCO ruling on whether the proposed charges are just and reasonable.² Duke’s proposal violates the law.

R.C. 4909.154 requires the PUCO to determine whether a utility’s costs were prudently incurred before the utility can charge customers. R.C. 4905.22 requires the PUCO to determine that rates are just and reasonable before a utility charges customers those rates. The PUCO previously approved charges to customers for MGP cleanup costs from 2008 to 2012, but it has never ruled that any costs incurred from 2013 to 2017 were prudently incurred, and it has never ruled that any charges based on 2013 to 2017 costs are just and reasonable.

Oddly enough, Duke’s Motion does not ask the PUCO to rule on the prudence of its 2013 to 2017 costs. Instead, Duke wants the PUCO to approve this new charge—\$1.62 per month per residential customer—and only later, at some unknown date, would the PUCO review Duke’s costs for prudence, and only later would the PUCO determine whether \$1.62 per month (or some other number) is just and reasonable.

There is no support for Duke’s unprecedented request for the PUCO to ignore longstanding ratemaking laws and principles. Duke wants to reverse the PUCO’s

¹ 390,000 residential customers * 1.62 per month * 12 months = \$7.58 million per year.

² Motion of Duke Energy Ohio, Inc. to Continue Rider MGP Recovery of Costs Incurred Since 2014 (May 10, 2018) (the “Motion”).

decades-long practice, where rates are not charged to customers unless first approved by the PUCO. Instead, Duke wants to charge now and ask questions later. But Ohio law is clear—a new charge cannot be imposed upon customers until and unless the PUCO determines the costs were prudently incurred and the charge is just and reasonable.

The Office of the Ohio Consumers' Counsel ("OCC") respectfully requests that the PUCO deny Duke's Motion.

I. BACKGROUND

A. In Duke's last base rate case, the PUCO authorized Duke to charge customers \$55 million for MGP-related cleanup costs from 2008 to 2012.

In Duke's most recent natural gas base rate case, the PUCO allowed Duke to charge customers around \$55 million for costs incurred through December 31, 2012 to clean up Duke's defunct manufactured gas plants.³ Each residential customer pays \$1.62 per month (nearly \$20 per year) under Duke's Rider MGP.⁴ As Duke explained in its Motion, later this year, Duke will have charged customers the entire \$55 million for pre-2013 MGP cleanup costs. After that, the utility can no longer charge customers for MGP-related costs incurred before 2013. That is, Rider MGP will be reset to zero.⁵

The Rate Case Order also addressed Duke's ongoing MGP-related cleanup costs, *i.e.*, costs that Duke expected to incur after December 31, 2012. Under the order, Duke was allowed to (i) defer costs related to MGP cleanup after December 31, 2012 and

³ *In re Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, Opinion & Order (Nov. 13, 2013) (the "Rate Case Order" in the "2012 Rate Case").

⁴ See Duke Tariff Sheet No. 69, available at <https://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Natural%20Gas/Duke%20Energy%20Ohio/PUCO%2018.pdf.pdf>. Non-residential customers pay anywhere from \$3.37 for Rate GS-S to \$158.54 per month for Rate IT. See *id.*

⁵ Motion at 3-4.

(ii) file an annual application to update Rider MGP.⁶ The Rate Case Order, however, placed certain limitations on these charges to customers.

First, the deferral authority was “limited to the East and West End sites.”⁷ Second, Duke was prohibited from charging customers for carrying costs on the deferred amounts.⁸ Third, in each annual application, “Duke shall bear the burden of proof to show that the costs incurred for the previous year were prudent.”⁹ Fourth, the PUCO limited the amount of time that Duke could charge customers for MGP cleanup “so that recovery through Rider MGP will be finite.”¹⁰

Cleanup of the East End was to be complete by December 31, 2016, and cleanup of the West End was to be complete by December 31, 2019.¹¹ In a subsequent case, the PUCO extended the timeframe for the East End Site cleanup to December 31, 2019 as well.¹² And more recently, Duke has sought another extension, this time of indefinite length.¹³

B. Since Duke’s last base rate case, Duke has filed annual applications to charge customers for MGP-related cleanup costs incurred after 2012, all of which remain pending.

Duke has filed six annual applications to charge customers for cleanup of its defunct MGP sites, five of which have been combined in this docket.¹⁴ From 2013 to

⁶ Rate Case Order at 71-72.

⁷ Rate Case Order at 71.

⁸ Rate Case Order at 71.

⁹ Rate Case Order at 72.

¹⁰ Rate Case Order at 59.

¹¹ Rate Case Order at 72.

¹² Case No. 16-1106-GA-AAM, Finding & Order ¶ 37 (Dec. 21, 2016).

¹³ See Case No. 19-1085-GA-AAM, Application (May 10, 2019).

¹⁴ The most recent case, which is not addressed in this combined docket, is Case No. 19-174-GA-RDR.

2017 (the time periods relevant to these combined cases), based on its applications, Duke incurred about \$26 million in costs to clean the defunct gas plants:¹⁵

Year	Amount
2013	\$8,346,698
2014	\$686,031
2015	\$1,061,056
2016	\$1,296,160
2017	\$14,651,798
Total	\$26,041,743

On September 28, 2018, the PUCO Staff filed a report (the “Staff Report”) based on its investigation of the \$26 million in costs from 2013 to 2017. The PUCO Staff found that the majority of Duke’s expenditures at the East End site were not prudent and recommended Duke only be permitted to charge customers \$4.77 million out of the \$16 million that Duke sought.¹⁶ The PUCO Staff also recommended downward adjustments for the West End cleanup totaling about \$639,000.¹⁷ In total, the PUCO Staff found that nearly half of Duke’s \$26 million in expenses should not be charged to customers.

OCC filed comments and reply comments. OCC supported the PUCO Staff’s view that Duke could not charge customers \$26 million for MGP cleanup costs, but OCC recommended that the PUCO disallow the entire \$26 million.¹⁸ OCC argued that allowing these charges would constitute unlawful single-issue ratemaking, thus requiring the PUCO to deny the entire \$26 million request.¹⁹ OCC also argued that Duke failed to

¹⁵ See Comments by the Office of the Ohio Consumers’ Counsel at 2 (Sept. 28, 2018) (summarizing the amounts in each application).

¹⁶ Staff Report at 5.

¹⁷ Staff Report at 5.

¹⁸ Reply Comments by the Office of the Ohio Consumers’ Counsel (Oct. 30, 2018) (the “OCC Reply Comments”).

¹⁹ OCC Reply Comments at 2-5.

meet its burden of proving that the costs were prudently incurred.²⁰ In fact, OCC can demonstrate through expert testimony that Duke used inappropriate remediation techniques that unnecessarily drove up the cleanup costs.²¹ OCC also stated that Duke should begin crediting customers for insurance proceeds that it has received for MGP cleanup, which Duke has yet to do.²² Finally, OCC recommended that this case proceed to hearing so that parties have an opportunity to present evidence regarding the prudence of Duke's MGP cleanup efforts.²³

C. Duke has now filed a motion asking to charge customers for 2013-2017 MGP cleanup costs without the PUCO determining the prudence of those costs, or the justness or reasonableness of such charges.

Duke proposes in its Motion to begin charging customers for MGP cleanup costs incurred from 2013 to 2017. Notably, Duke's Motion did not ask the PUCO to set a hearing to determine the prudence of the costs or the justness and reasonableness of the proposed charge. Nor did Duke ask the PUCO to rule on its pending applications to charge customers under Rider MGP. Instead, Duke wants the PUCO to allow it to charge customers the current MGP rate (\$1.62 per month for residential customers) while parties wait for a procedural schedule and eventual ruling in these cases. The \$1.62 per-month charge is based on the \$55 million in charges that were approved in Duke's Base Rate Case for costs incurred *before* 2013. It does not include, and is entirely unrelated to, any charges for MGP cleanup costs from 2013 to 2017, which are the subject of these combined cases. The PUCO should deny Duke's motion to charge customers for costs

²⁰ OCC Reply Comments at 5-10.

²¹ OCC Reply Comments at 5-10.

²² OCC Reply Comments at 10-11.

²³ OCC Reply Comments at 10.

that Duke did not prudently incur, at a rate that has not been determined to be just and reasonable.

II. RECOMMENDATIONS

A. **The PUCO should deny Duke’s Motion because the PUCO has not found that Duke’s MGP cleanup costs were prudently incurred, as required by R.C. 4909.154.**

R.C. 4909.154 provides that the PUCO “shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers imprudent.” In the Ohio Supreme Court appeal regarding Duke’s MGP charges, the Court found that Duke’s MGP costs were subject to this prudence standard and not the “used and useful” standard under R.C. 4909.15(A)(1).²⁴ Thus, for Duke to charge customers for MGP-related cleanup costs, those costs must be prudent.²⁵

Notably, Duke is *not* asking the PUCO to rule that its MGP-related cleanup costs from 2013 to 2017 were in fact prudent. Instead, Duke is asking the PUCO to simply allow it to charge customers for MGP-related cleanup costs on an interim basis until the PUCO, at some later date, rules on the issue of prudence.²⁶ This violates Ohio law. The PUCO must make an affirmative finding of prudence under R.C. 4909.154 before customers can be charged for Duke’s MGP-related cleanup costs.

²⁴ *In re Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, 441-42 (2017).

²⁵ OCC does not concede that they can be charged to customers, even if they are found to be prudent. As explained in OCC’s Reply Comments, OCC believes that charging customers any portion of the \$26 million would be unlawful single-issue ratemaking.

²⁶ Duke Motion at 5 (“Duke Energy Ohio respectfully requests that the Commission allow the Company to continue its Rider MGP at existing levels, until the Commission issues its decision on the pending six years of annual Rider MGP applications This will allow sufficient time for the Commission, the Company, Staff, and any other interested party, to address the disputed items in the Staff Report.”).

B. The PUCO should deny Duke’s Motion because the PUCO has not found that Duke’s proposed charges for MGP cleanup costs are just and reasonable, as required by R.C. 4909.22.

R.C. 4905.22 requires all rates charged to customers to be just and reasonable.²⁷

When a utility files an application to charge customers a certain rate, the PUCO provides due process and schedules a matter for hearing.²⁸ Only after due process is had, including a hearing in contested matters, does the PUCO rule on whether the proposed rates are appropriate and lawful, including whether they are just and reasonable under R.C. 4905.22.

But here, Duke is affirmatively *not* asking the PUCO to rule that its proposed charges for MGP-related cleanup costs are just and reasonable.²⁹ Instead, Duke is asking the PUCO to simply allow it to charge customers for MGP-related cleanup costs on an interim basis until the PUCO, at some later date, rules on the issue of justness and reasonableness.³⁰ This violates R.C. 4905.22. There is no presumption that a utility’s proposed charges are just and reasonable. The PUCO must make an affirmative finding

²⁷ R.C. 4905.22 (“All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.”).

²⁸ See R.C. 4909.18 (“If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing...”).

²⁹ Duke Motion at 5 (“Duke Energy Ohio respectfully requests that the Commission allow the Company to continue its Rider MGP at existing levels, until the Commission issues its decision on the pending six years of annual Rider MGP applications This will allow sufficient time for the Commission, the Company, Staff, and any other interested party, to address the disputed items in the Staff Report.”).

³⁰ Duke Motion at 5 (“Duke Energy Ohio respectfully requests that the Commission allow the Company to continue its Rider MGP at existing levels, until the Commission issues its decision on the pending six years of annual Rider MGP applications This will allow sufficient time for the Commission, the Company, Staff, and any other interested party, to address the disputed items in the Staff Report.”).

under R.C. 4905.22 that charges are just and reasonable before customers can be charged.³¹

Not only is Duke's proposal unlawful, but it would be bad public policy. The whole point of Title 49 is to protect customers from being charged rates by monopoly utilities without sufficient PUCO oversight. If Duke's Motion were granted, it would set a bad precedent allowing utilities to charge customers rates that have not been adequately reviewed by the PUCO for prudence, subject only to, at best, some later adjustment at an unknown time.

C. Duke grossly misstates the parties' positions, suggesting that there is little dispute regarding the prudence of its MGP cleanup efforts.

Throughout the Motion, Duke suggests that at least some of its MGP cleanup costs from 2013 to 2017 are undisputed, and thus, Duke should be allowed to charge customers. On page 4 of the Motion, for example, Duke states, "it is indisputable that most of remediation expense incurred through December 31, 2017, if not all, of such expense incurred during said period, is indeed recoverable."³² This is inaccurate.

First, as Duke itself acknowledged, the PUCO Staff recommended denying Duke the ability to charge customers for nearly \$12 million out of the \$26 million total cleanup cost.³³ Second, Duke cites Staff's recommended disallowance, but Staff is not the only party to these cases. OCC, for example, recommended disallowing the entire \$26 million

³¹ OCC does not concede that any additional charges would be just and reasonable. *See* OCC Reply Comments.

³² Motion at 4. *See also* Motion at 12 (incorrectly stating that "it cannot be denied that some amount of ongoing investigation and remediation cost recovery [sic] is recoverable").

³³ Motion at 4, n. 11.

as imprudent and unlawful.³⁴ And both OCC and Kroger argued that Duke should be required to start passing insurance proceeds to customers, which Duke has not yet done, and which Duke does not propose to do in its Motion.³⁵ While Duke may not agree with OCC's position, there is no denying that OCC vigorously disputes the prudence of Duke's MGP cleanup costs. Duke's suggestion that "most, if not all" of the costs are "indisputably" prudent is simply false.

D. Duke's claim that it has lost \$4.7 million in time-value of money is unfounded.

Duke claims in its Motion that it has been "harmed by an additional \$4.7 million in lost time-value of money through December 31, 2018" as a result of the PUCO not ruling on its MGP applications.³⁶ First, Duke does not provide any supporting calculations for this number.³⁷ But more importantly, the PUCO affirmatively ruled on this issue in Duke's rate case. There, the PUCO found that it was appropriate for Duke's shareholders to bear some of the responsibility for MGP cleanup costs, and thus, it ruled that Duke could not charge customers for carrying costs.³⁸

Nothing has changed since that time. Duke's claim that it has been "harmed" by loss of time value of money is contradicted by the Rate Case Order, which found that it was appropriate for Duke's shareholders to bear the risk of any delay by not being

³⁴ See OCC Reply Comments.

³⁵ *Id.* at 10-11; Case No. 18-283-GA-RDR et al., Reply Comments of The Kroger Co. at 4-5 (Oct. 30, 2018).

³⁶ Motion at 14.

³⁷ Motion at 14, n. 31 (stating that Duke used deferred balances and costs from January 1, 2013 through December 31, 2018 at its approved cost of debt, but not providing any additional assumptions or details about its calculations).

³⁸ Rate Case Order at 59, 71.

awarded carrying costs. Duke cannot claim to be harmed by the loss of something that it was not entitled to have in the first place.

E. The PUCO should reset Rider MGP to zero to avoid customer confusion.

Duke suggests that it be allowed to continue charging residential customers \$1.62 per month under Rider MGP, rather than resetting the rider to zero once all pre-2013 charges have been collected, to avoid “customer confusion.”³⁹ This concern is overstated at best.

First, customers routinely experience at least some volatility in their monthly natural gas bills. While a \$1.62 monthly rider charge for Rider MGP is a material charge to customers, if a customers’ bill rises or falls by that amount, it would likely be within the reasonable expectation that customers have for monthly bill fluctuations.

Second, while some customers may prefer consistency in their monthly bills, all customers welcome a lower bill. Duke seems to suggest that customers would prefer to keep paying \$1.62 per month instead of \$0 per month, simply because they’ve gotten used to paying \$1.62 per month. This obviously isn’t true. Customers are more likely to experience relief, rather than confusion, when their utility bills go down.

Third, there is no line item on customers’ bills for Rider MGP. If there were, then perhaps customers would see it and wonder why the rate changed. That is true for most riders. Many riders change on a yearly basis, if not more often, and there is no way to keep them precisely the same every month solely to avoid customer confusion. If Duke were concerned with customer transparency, it would consider putting a line item for

³⁹ Motion at 14.

each rider on its customers' bills so that customers have better information about their distribution charges.

Finally, even if there is some small amount of customer confusion, it is much more harmful to charge them rates that have not yet been found just or reasonable.

F. The continuation of Duke's electric security plan does not provide support for Duke's Motion.

In support of its proposal to continue Rider MGP based on 2008 to 2012 costs, even though the 2008 to 2012 costs will be fully recovered, Duke cites the PUCO's order in its electric security plan ("ESP") case.⁴⁰ In that case, Duke's third ESP was set to expire before its fourth ESP would be approved, and Duke sought to continue the third ESP while parties litigated the fourth ESP.⁴¹ The PUCO granted Duke's request. But the facts of that case are so distinct from the current case involving remediation of defunct manufactured gas plants that the ESP Entry does not support the Motion.

Under today's statutory regime, an electric distribution utility's ability to offer its customers a standard offer is an essential and important aspect of providing electric distribution service. The standard service offer is a conservative, market-based offer of generation that allows many residential (and other) customers to take service without having to shop with a marketer. By approving Duke's request to extend its third ESP during the pendency of litigation regarding the fourth ESP, the PUCO was allowing Duke to continue offering the critically important standard service offer to its customers.

⁴⁰ Motion at 15-16 (citing Case No. 14-841-EL-SSO).

⁴¹ *In re Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer*, Case No. 14-481-EL-SSO, Entry (May 30, 2018).

The situation here is quite different. This case does not involve core natural gas utility service, but environmental cleanup at gas plants that have not actually produced gas for more than fifty years. Plainly said, while Duke may be required by law to clean up the MGP sites, cleaning up those sites is not central to the operation of a natural gas utility in the way that providing a standard service offer is to an electric utility. If Duke is not permitted to charge residential customers \$1.62 per month for Rider MGP, its natural gas distribution system will continue to function and deliver natural gas to its customers.

G. The PUCO should deny Duke’s motion and instead schedule this matter for hearing.

Duke wants these MGP cases resolved. OCC does not oppose the PUCO resolving these cases. Indeed, in its reply comments filed late last year, OCC suggested that the PUCO hold an evidentiary hearing to allow parties an opportunity to provide evidence on the prudence of Duke’s MGP cleanup efforts.⁴² After such a hearing, the PUCO can rule on these cases, and a new rider rate can go into effect (whether OCC’s recommended rate of zero or some other rate). There is no reason for the PUCO to issue an interim ruling authorizing Duke to charge millions of dollars for 2013 to 2017 MGP cleanup costs before the PUCO rules on the merits of these cases. If Duke’s priority is moving these cases along, the proper motion is a motion for a procedural schedule, not a motion to allow Duke to charge customers for costs that may never in fact be ruled to be prudent.

⁴² OCC Reply Comments at 10 (Oct. 30, 2018).

H. The PUCO should order Duke to amend the Rider MGP tariff sheet to ensure that customers are entitled to refunds.

The PUCO has ordered utilities to add “refund” language to many rider tariffs in the past two years. For example, Duke’s Uncollectible Expense Rider includes the following language: “This Rider is subject to reconciliation, including, but not limited to, refunds or additional charges to customers, ordered by the Commission as the result of annual audits by the Commission ... if determined to be unreasonable or imprudent by the Commission....”⁴³ Duke’s Rider MGP tariff, however, contains no refund language.

In the Motion, Duke argues that customers will not be harmed by new Rider MGP charges for 2013-2017, even if it results in overcollections, because “any over or under collections that could occur could easily be corrected through the Commission’s decisions in the subsequent Rider MGP annual review cases.”⁴⁴ It is not clear whether this is true unless the PUCO orders Duke to add refund language to the Rider MGP tariff, similar to the language added to other tariffs.

III. CONCLUSION

The law requires all charges to customers to be just and reasonable. It also requires all utility expenses to be prudently incurred before they can be charged to customers.

Yet Duke is asking the PUCO to allow it to charge residential (and other) customers millions per year for 2013-2017 MGP cleanup costs, *without* making those

⁴³ See Duke Tariff Sheet No. 67.11, available at <https://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Natural%20Gas/Duke%20Energy%20Ohio/PUCO%2018.pdf.pdf>.

⁴⁴ Motion at 15.

critical rulings regarding prudence, justness, or reasonableness. This unprecedented request should be denied.

Duke's Rider MGP should be reset to zero once Duke has charged customers the full \$55 million in MGP cleanup costs from 2008 to 2012. Customers should not be charged anything for 2013 to 2017 MGP cleanup costs until after the PUCO holds a hearing in this case and affirmatively rules on prudence, justness, and reasonableness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electric transmission this 28th day of May 2019.

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Summary: Memorandum Memorandum Contra Duke Energy Ohio's Motion to Charge Customers for 2013-2017 Costs of Remediating Defunct Manufactured Gas Plant Sites by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.