

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Natural Gas Rates.	)	Case No. 2024-1505
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Form of Regulation.	)	On Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Pub. Util. Comm. Nos. 22-507-GA-AIR, 22-508-GA-ALT, 22-509-GA-ATA, 22-510-GA-AAM

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I. INTRODUCTION

This appeal seeks to protect Duke Energy Ohio's ("Duke") 411,000 residential natural gas consumers from the PUCO's unlawful ratemaking. Ohio ratemaking law only permits utilities to charge consumers for utility investment if it is used and useful at date certain. R.C. 4909.15(A)(1) (Appx. 153). In the case below the PUCO evaded Ohio law when it allowed Duke to charge consumers approximately \$17¹ million for plant that was abandoned during the test year and not used and useful on date certain. The PUCO unlawfully permitted Duke to treat its investment in the abandoned plant as amortizable costs, violating this Court's precedent in *Office of Consumers' Counsel v. Public Utilities Comm.*, 67 Ohio St.2d 153, 164 (1981). The PUCO also misapplied the used and useful standard, notwithstanding the Court's recent reversal of the PUCO in *In re Suburban Nat. Gas Co.* 2021-Ohio-3224.

The PUCO also failed to protect consumers by refusing to make the abandoned plant rates subject to refund. The PUCO should have exercised its authority and ordered the charges to be collected subject to refund, pending any final decision by the Ohio Supreme Court.

OCC respectfully requests that the Court reverse and vacate that portion of the PUCO's decision related to the abandoned plant. The Court should direct the PUCO on remand to issue an order requiring Duke to adjust base rates taking out of rates the abandoned plant investment. Additionally, the Court on remand should order the PUCO to direct Duke to refund to consumers all revenues already charged for the abandoned plant.

¹ The total deferment included approximately \$17 million for the propane caverns, \$5 million for propane inventory and \$7 million in decommissioning costs. OCC is challenging only the \$17 million deferment for the net book value of the propane facilities.

II. STANDARD OF REVIEW

R.C. 4903.13 (Appx. 148) governs this Court’s review of PUCO orders. It provides in pertinent part, “[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable * * *.” The Court has interpreted this standard as turning upon whether the issue presents a question of law or a question of fact. *Office of Consumers’ Counsel v. PUC*, 58 Ohio St.2d 108, 118 (1979).

Where the issue before the Court presents a question of law, the Court will review the issue *de novo*, giving the Court “complete, independent power of review.” *Id.* Under a *de novo* review, the Court will pursue a “more intensive examination” of the legal issues than it would in a review of factual issues. *Id.* The Court can also reverse a PUCO order if its factual findings are “manifestly against the weight of the evidence” and “so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *Industrial Energy Users-Ohio v. Pub. Util. Comm.*, 2008-Ohio-990, ¶ 12. With mixed questions of law and fact, the Court must review the evidence to determine whether the findings of fact are reasonable and lawful. But the Court must also review whether the legal principles have been properly applied. *Motor Freight Inc. v. Pub. Util. Comm.*, 120 Ohio St. 1, 6, 165 N.E. 355 (1929).

OCC’s assignments of error raise questions of law and fact. The first Proposition of Law raises a question of law. That question is whether abandoned plant investment can be collected from consumers as an expense. The answer is no. The Court should review this assignment of error using a *de novo* standard. No deference should be accorded to the PUCO on this issue. *See TWISM Enters., L.L.C. v. State Bd. of Registration for Prof’l Eng’rs & Surveyors*, 2022-Ohio-4677, ¶ 3.

OCC's Second Proposition of Law raises a mixed question of law and fact. That question is whether abandoned plant can be found used and useful if it is "operational" at date certain. The answer is no. The Court will have to apply the law (R.C. 4909.15, Appx. 153). to the facts to determine whether the PUCO properly applied the used and useful test.

The third Proposition of Law raises a question of law. That question is whether the PUCO erred when it failed to make the abandoned plant charges to consumers subject to refund. The answer is yes. The Court should conduct a de novo review of this question. No deference should be accorded to the PUCO on this issue. *See TWISM Enters., L.L.C. v. State Bd. of Registration for Prof'l Eng'rs & Surveyors*, 2022-Ohio-4677, ¶ 3.

It is with these standards in mind that the Court should resolve the issues that directly impact Duke's consumers who have been charged unreasonable and unlawful charges under the PUCO's watch.

III. STATEMENT OF FACTS

Duke is a PUCO-regulated natural gas public utility that serves 411,000 consumers throughout Ohio. (R. 129 at ¶ 2, Appx. 9). OCC is the statutory legal advocate for Ohio's residential utility consumers, under R.C. Chapter 4911. (Appx. 124).

In September 2016, Duke filed an Application for Certificate of Environmental Compatibility and Public Need before the Ohio Power Sitting Board in Case No. 16-253-GA-BTX. (R. 94 at 6). In that proceeding, Duke sought approval to create the Central Corridor Pipeline for the purpose of "the retirement of the propane-air facilities that are based on old technology that is expensive to maintain and impractical to repair in a permanent fashion." (R. 106 at 5, OCC Ex. 9, K. Adkins Stip. Opp. Test., Supp. 1).

On November 21, 2019, the Ohio Power Siting Board approved the Central Corridor Pipeline project. *In re Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA-BTX, Opinion and Order (Nov. 21, 2019) 2019 OHIO PUC LEXIS 1497.

On October 7, 2021, Duke, in Case No. 21-986-GA-ABN and Case No. 21-1035-GA-AAM (“Abandonment Case”), sought authorization “to abandon certain propane-air facilities...” and “to defer approximately \$39 million stemming from the abandonment of the facilities as a regulatory asset ...” *See In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Change Accounting Methods*, Case No. 21-1035-GA-AAM, Opinion and Order at ¶ 4 (Oct. 5, 2022) 2022 OHIO PUC LEXIS 1038.

On January 6, 2022, in the Abandonment Case, the PUCO Staff issued a Review and Recommendation recommending that the PUCO deny the “deferral for the remaining net book value associated with the propane caverns.” (R. 94 at 8).

On March 14, 2022 the Central Corridor Pipeline began commercial operation. (R. 129 at ¶ 38, Appx. 21).

On April 27, 2022, in the Abandonment Case, Duke and the PUCO Staff filed a settlement that allowed Duke, among other terms, to defer many of the costs associated with the abandonment of the propane facilities. (R. 94 at 9-11).

On May 31, 2022, Duke filed its notice of intent to file an application for an increase in rates with the PUCO. (R. 1). The notice was docketed as PUCO Case No. 22-507-GA-AIR, et al. (“Duke rate case”). Also on May 31, 2022, Duke filed a motion to establish a test year and date certain. (R. 2, 3). Duke requested and the PUCO approved a test year of January 1, 2022 through December 31, 2022, with March 31, 2022 as the date certain for determining the rate base. (R. 6

at ¶ 5). On June 30, 2022, Duke filed its application to increase rates and charges and for approval of an alternative rate plan. (R. 8, 9, 10, 11, 36).

On June 14, 2022, in the Duke rate case, OCC filed a motion to intervene and memorandum in support. (R. 5). On February 24, 2023, OCC and other interested parties were granted intervention. (R. 81).

On October 5, 2022, the PUCO issued an order in the Abandonment Case approving Duke's request to abandon its propane facilities. *See In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Change Accounting Methods*, Case No. 21-1035-GA-AAM, Opinion and Order at ¶ 1 (Oct. 5, 2022), OHIO PUC LEXIS 1038. Its Order also approved the settlement reached by Duke and the PUCO Staff allowing Duke to defer the remaining net book value of certain of its propane caverns and related propane-air facilities. The PUCO's order included the following provision: "ORDERED, That, nothing in this Opinion and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation." *See In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Change Accounting Methods*, Case No. 21-1035-GA-AAM, Opinion and Order at ¶ 36 (Oct. 5, 2022), 2022 OHIO PUC LEXIS 1038.

On December 21, 2022, in the Duke rate case, the PUCO Staff filed a report with the recommendation of a "revenue increase of \$23,662,353 to \$36,434,162." (R. 42 at 7). In response to the staff report, OCC filed testimony and objections to the staff report from multiple witnesses including Kerry Adkins. (R. 91, 92, 93, 94, 95).

On April 28, 2023, Duke, PUCO Staff, and other signatory parties filed a settlement in the Duke rate case. (R. 90).² The purpose of the settlement was to “resolve all of the issues raised in these proceedings through the application filed by Duke Energy Ohio, Inc., on June 30, 2022 and the Staff Report filed on December 21, 2022.” (R. 90 at 1). The settlement, included among other things, a recommendation to include in the revenue requirement approximately \$2.9 million per year to collect \$29 million in deferred costs³ (collectively, “propane facilities”) over ten years. (R. 106 at 5, OCC Ex. 9, K. Adkins Stip. Opp. Test., Supp. 7). On May 12, 2023, OCC filed testimony in opposition to the settlement including the testimony of Kerry Adkins. (R. 102, 104, 105, 106, Supp. 1).

An evidentiary hearing in the Duke rate case was held May 23-24, 2023. (R. 129 at ¶ 13, Appx. 11). On June 16, 2023, OCC, Duke, and the PUCO Staff filed initial briefs. (R. 115, 118, 122). On July 14, 2023, OCC and Duke filed reply briefs. (R. 124, 127).

On November 1, 2023, the PUCO issued its Opinion and Order in the Duke rate case approving the Settlement. (R. 129 at ¶ 1, Appx. 9). Among other things, the PUCO ruled that the propane facilities were a “cost of service under R.C. 4909.15(A)(4).” (R. 129 at ¶ 44, Appx. 23). The PUCO also ruled that Duke should be allowed to recover from consumers approximately \$17 million in deferred propane facilities costs that would be amortized over ten years. (R. 129 at ¶ 44, Appx 23). Further, the PUCO noted that the “caverns would properly be considered used and useful.” (R. 129 at ¶ 45, Appx. 24).

² Signatory Parties include Duke Energy Ohio, Staff of the Public Utilities Commission of Ohio, the Ohio Energy Group, Interstate Gas Supply, LLC, Retail Energy Supply Association and People Working Cooperatively.

³ The \$29 million in deferred costs included approximately \$17 million for the propane caverns, \$5 million for propane inventory and \$7 million in decommissioning costs. (R. 106 at 5, OCC Ex. 9, K. Adkins Stip. Opp. Test., Supp. 7).

OCC filed an application for rehearing of the PUCO's November 1, 2023 order in the Duke rate case on December 1, 2023. (R. 133, Appx. 64). On December 11, 2023, Duke filed a memorandum contra to OCC's application for rehearing. (R. 134).

On December 13, 2023, in the Duke rate case, the PUCO granted OCC's application for rehearing "for further consideration of the matters specified in the application for rehearing." (R. 135 at ¶ 15). On January 4, 2024, OCC filed an application for rehearing of the PUCO's December 13, 2023 order. (R. 136). Duke filed a memorandum contra to OCC's application on January 16, 2024. (R. 137).

On August 27, 2024, the Supreme Court of Ohio issued a ruling in a separate, unrelated case on a motion to dismiss filed in *In re Application of Moraine Wind, L.L.C. In re Application of Moraine Wind, L.L.C.*, Slip Opinion No. 2024-Ohio-3224. In the ruling, the Supreme Court held that the PUCO lacks the authority to grant an application for rehearing for the purpose of granting itself more time to consider rehearing requests. *Id.*

On September 4, 2024, the PUCO issued a finding, in the Duke rate case, that OCC's December 1, 2023 application for rehearing was denied by operation of law. (R. 140 at ¶ 2, Appx. 50). The PUCO found that the Supreme Court "held that the Commission lacked statutory authority to grant more time for consideration of an application for rehearing; therefore, because the Commission did not rule on an application for rehearing within 30 days of the filing of the application for rehearing, the application was denied as a matter of law." (R. 140 at ¶ 3, Appx. 51).

On September 9, 2024, in the Duke rate case, OCC filed an application for rehearing of the PUCO's September 4, 2024 order. (R. 141, Appx. 97). On October 2, 2024, The PUCO denied OCC's application for rehearing. (R. 143 at ¶ 25, Appx. 61).

On October 25, 2024, OCC filed a Notice of Appeal with the Supreme Court of Ohio seeking an appeal of the PUCO’s November 1, 2023, Opinion and Order, its September 4, 2024 Entry and its October 2, 2024 Entry in the Duke rate case. (R. 144 at ¶ 1, Appx. 1).

On November 26, 2024, the Supreme Court of Ohio issued an Entry in *In re Application of Dayton Power & Light Co.* that the decision from *Moraine Wind* “will be applied prospectively to all cases currently pending on appeal from the Public Utilities Commission and the Power Siting Board.” *See 11/26/2024 Case Announcements*, 2024-Ohio-5529 at 2.

On January 24, Duke filed a motion to dismiss this proceeding with the Supreme Court. *See 2024-1505 Motion to Dismiss* (Jan. 24, 2025).

IV. ARGUMENT

The PUCO’s decision allows Duke to charge consumers, as an expense, \$1.7 million per year for ten years for Duke’s investment in abandoned propane facilities that were not used and useful at date certain. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 5, Supp. 7). The PUCO’s order is contrary to Ohio law and it should be reversed.

In its decision, the PUCO stated, “Largely at issue is whether this deferral falls under R.C. 4909.15(A)(1) and is considered property that must be used and useful as of the date certain, or whether the deferral is considered a cost of rendering utility service under 4909.15(A)(4), and not subject to the used and useful standard.” (R. 129 at ¶ 44, Appx. 23). The PUCO affirmed the Settlement’s treatment of the propane facilities as a cost of service under R.C. 4909.15(A)(4). (R. 129 at ¶ 44, Appx. 23). The PUCO also opined (*dicta*) that the propane facilities were used and useful at date certain. (R. 129 at ¶ 45, Appx. 24).

The PUCO was wrong on all counts. The PUCO also failed to make the rates collecting Duke's abandoned propane facilities investment subject to refund. That would have protected consumers. The PUCO's rulings should be reversed by the Court to protect consumers and to uphold Ohio law.

Proposition of Law No. 1: The Commission misapplies Ohio ratemaking law (R.C. 4909.15) and acts unreasonably and unlawfully when it allows a utility to collect abandoned plant investment as a "cost" of "rendering the public utility service for the test period." *Office of Consumers' Counsel v. Public Utilities Com.*, (1981) 67 Ohio St.2d 153, 164 (*Consumers' Counsel*); *In re Application of Duke Energy Ohio, Inc.*, 2017-Ohio-5536 (*Duke Energy*)).

With the Central Corridor Pipeline becoming operational, the propane facilities were no longer necessary and no longer used and useful in providing service in Duke's natural gas distribution system. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 5, Supp. 7). In fact, Duke did not seek rate base treatment of the propane caverns in its rate case application. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 14, Supp. 16). Instead, Duke sought to collect the investment as an expense item, charged to consumers over the next ten years. (R. 129 at ¶ 44, Appx. 23). The PUCO allowed Duke to do so, in violation of Ohio law.

Ohio law mandates a standard formula for the fixing consumers' utility rates. R.C. 4909.15(A) (Appx. 153) provides in relevant part:

The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

- (1) The valuation as of the date certain of the property of the public utility used and useful * * * in rendering the public utility service for which rates are to be fixed and determined. * * *
- (2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section; * * *
- (4) The cost to the utility of rendering the public utility service for the test period * * *.

Here, the asset Duke sought to collect from consumers was Duke’s investment in propane facilities that were abandoned during the test year. *See In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Change Accounting Methods*, Case No. 21-1035-GA-AAM, Opinion and Order at ¶ 26 (Oct. 5, 2022) 2022 OHIO PUC LEXIS 1038. The investment was the remaining net book value of propane facilities that had been used to store propane. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 9, Supp. 11) The utility’s propane facilities were a plant asset that should have been subjected to the used and useful standard under R.C. 4909.15(A)(1) (Appx. 153). Instead of following the law, the PUCO erroneously treated the utility’s investment as an expense. Duke was then allowed to collect the abandoned plant investment as an expense from consumers over a ten-year period. (R. 133 at 6, Appx. 74)

The PUCO misapplied the law when it treated the abandoned plant as an expense and allowed the utility to charge consumers for it as a cost of providing utility service. The Court should not defer to the PUCO’s misinterpretation of the law. Administrative agencies’ (such as the PUCO) interpretations of statutes are *not* entitled to deference. The Court recently held:

[I]t is the role of the judiciary, not administrative agencies, to make the ultimate determination about what the law means. Thus, the judicial branch is *never* required to defer to an agency’s interpretation of the law. As we explain, an agency interpretation is simply one consideration a court *may* sometimes take into account in rendering the court’s own independent judgment as to what the law is.

TWISM Enters., L.L.C. v. State Bd. of Registration for Prof’l Eng’rs & Surveyors, 2022-Ohio-4677, ¶ 3. “Under our system of separation of powers,” the Court wrote, “it is not appropriate for a court to turn over its interpretative authority to an administrative agency.” *Id.* at ¶ 42. The Court emphasized that “an administrative interpretation should never be used to

alter the meaning of clear text. If the text is unambiguous, the court should stop right there.” *Id.* at ¶ 44.

Before the Court considers deferring to an agency’s interpretation, it must find that the statute is truly ambiguous. *See, e.g., In re Determination of Significantly Excessive Earnings for 2017 Under Elec. Sec. Plan of Ohio Edison*, 162 Ohio St.3d 651, 2020-Ohio-5450, 166 N. E.3d 1191, ¶ 73 (DeWine, J. concurring). Under Ohio’s rules of statutory construction, ambiguity must exist before the Court is entitled to “consider” the agency’s interpretation. R.C. 1.49 (OCC Appx. 147.) As pointed out by Justice DeWine, “even then, we need not defer to that construction, we need only ‘consider’ it.” *In re Determination of Significantly Excessive Earnings*, at ¶ 74.

There is no ambiguity in R.C. 4909.15(A). *In re Application of Duke Energy Ohio, Inc.*, 2017-Ohio-5536 at ¶ 27 (*Duke Energy*). The PUCO had no authority to treat the abandoned plant as an expense when R.C. 4909.15(A) unambiguously required their treatment as investment.

Duke’s investment in abandoned plant was the subject of a 2016 Duke application to the Ohio Power Siting Board. In its application, Duke made clear (Case No. 16-253-GA-BTX (“2016 OPSB Application”)) that the propane facilities would be replaced by a new project, the Central Corridor Pipeline. As Duke explained:

[t]he Project is intended to allow for the retirement of the propane-air facilities that are based on old technology that is expensive to maintain and impractical to repair in a permanent fashion. It will also contribute to the improvement of the north/south balance of gas in the central Hamilton County area and will support the replacement of aging infrastructure. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 7, Supp. 9).

The Ohio Power Siting Board approved Duke’s project, finding that “the need for the Project [Central Corridor Pipeline] has been demonstrated *based on the need to retire the aged and*

outdated propane-air facilities.” (Emphasis added.) *In re the Application of Duke Energy Ohio, Inc.*, Case No. 16-253-GA-BTX, Opinion, Order, and Certification (Nov. 21, 2019).

The Ohio Power Siting Board further found “that the additional gas supply from the north and added pressure from the central corridor facilities will enable Duke to maintain service to customers on peak days and more effectively balance the overall system at all times, *while obviating the need for the continued operation of the propane storage caverns.*” *Id.* (Emphasis added). Clearly, the purpose of the Central Corridor Pipeline was to replace the propane caverns while maintaining safe and reliable service to consumers. The propane caverns were plant, replaced by other plant, the Central Corridor Pipeline.

Moreover, on October 7, 2021, prior to filing its rate case, Duke filed to abandon its propane facilities pursuant to R.C. 4905.20 and 4905.21 (Appx. 150, 151). Duke claimed that the facilities should be abandoned and replaced by alternative methods of providing natural gas distribution service. *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Abandon Certain Propane-Air Facilities*, Case No. 21-1035-GA-AAM, Opinion and Order at ¶ 4 (Oct. 5, 2022). Duke claimed that the alternative method, the Central Corridor Pipeline, approved by the Ohio Power Siting Board, would enable it to retire the propane facilities while still maintaining safe and reliable service. *Id.*

Knowing that its propane facilities would soon be abandoned and no longer used and useful, Duke simultaneously applied for authority from the PUCO to defer, as a regulatory asset on its books, \$39 million stemming from the abandonment of the facilities. *Id.* The bulk of that \$39 million represented investment by Duke—the \$17 million net book value remaining for the utility’s investment in the propane facilities. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 7, Supp. 9). Duke received the authority to abandon the plant during the test year. *See In the Matter*

of the Application of Duke Energy Ohio, Inc. for Authority to Change Accounting Methods, Case No. 21-1035-GA-AAM, Opinion and Order (Oct. 5, 2022), 2022 OHIO PUC LEXIS 1038.

That the \$17 million at issue in this appeal is a utility investment matters. Why? Because a utility's investments are governed by one statutory test; its expenses are governed by another. This important distinction was highlighted in this Court's decision in *In re Application of Duke Energy Ohio, Inc.*, 2017-Ohio-5536 (*Duke Energy*).

In *Duke Energy*, the PUCO granted Duke authority to defer future remediation costs for remediation of former manufactured gas plant ("MGP") sites. *Id.* at ¶ 7. Like the PUCO ruling in Duke's abandonment case, the PUCO ruled that it would not determine whether Duke could recover its deferred costs for the abandoned plant until Duke filed an application for cost recovery. *In re Application of Duke Energy, Inc.*, Pub. Util. Comm. Case No. 09-712-GA-AAM, 2009 Ohio PUC LEXIS 969 (Nov. 12, 2009).

Accordingly, when Duke filed its rate case application, it sought to recover its deferred remediation costs. *Duke Energy* at ¶ 8. The parties in that case entered into a settlement that resolved all issues except whether Duke could recover costs incurred to remediate the MGP sites. *Id.* ¶ 8.

The PUCO adopted the settlement and also authorized Duke to recover its remediation expenses as a cost of service, amortized over a number of years. *Id.* ¶ 9. The PUCO found that the costs of remediating the MGP sites were recoverable under R.C. 4909.15(A)(4), which allows utilities to recover "[t]he cost to the utility of rendering the public utility service for the test period." *Id.* The PUCO rejected parties' arguments that Duke could not recover remediation costs because the MGP sites were no longer "used and useful" in rendering utility service, as R.C. 4909.15(A)(1) requires. *Id.*

The Court affirmed the PUCO's decision determining that Duke was seeking to recover costs associated with the environmental remediation of MGP sites, not Duke's investment in the sites and facilities. *Duke Energy* at ¶ 18. The Court looked to the nature of the item for which recovery was sought and found that environmental remediation costs were properly chargeable under R.C. 4909.15(A)(4). *Id.* ¶ 18.

The Court's precedent reinforces the importance of properly identifying the nature of the item sought for recovery through utility rates — its either an expense or an investment. That identification controls the proper statutory test that must be met to include the item in rates paid by consumers.

In the instant case, the abandoned propane facilities are indisputably an investment by the utility, not an expense. Following the Court's logic in *Duke Energy*, utility investment is properly chargeable under R.C. 4909.15(A)(1). (Appx. 153).

The abandoned plant was an investment that had been included in Duke's rate base. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 14, Supp. 16). Duke's Application schedules in this case show that it retired the propane facilities on the date certain in this case. (R. 4, Schedule B-3.3). And Duke did not include the propane facilities in the proposed rate base in this case. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 14, Supp. 16). The PUCO cannot, under Ohio's ratemaking formula and the Court's precedent in *Duke Energy*, turn a utility investment into a recoverable expense for ratemaking purposes. For ratemaking purposes, R.C. 4909.15(A)(1) is and must be the governing standard for a utility investment.

This Court earlier clarified that a utility may not use an accounting mechanism to evade the statutory used and useful test. *See Office of Consumers' Counsel v. Public Utilities Comm.*, 67 Ohio St.2d 153, 164 (1981) ("1981 cancelled plant case"). The core issue in the 1981

cancelled plant case was whether the PUCO could permit a utility (Cleveland Electric Illuminating Co. or “CEI”) to charge consumers for its investment in terminated nuclear facilities as a cost of service under R.C. 4909.15.(A)(4). *Id.* at 161. To determine this issue, the Court had to examine the nature of the item sought to be recovered (terminated nuclear facilities) and decide whether they were costs to provide utility service for the test period. *Id.* at 165.

In reversing the PUCO’s decision allowing recovery of the utility’s cancelled plant as an expense, the Court defined “expenses” under R.C. 4909.15.(A)(4) as the normal, recurring expenses incurred by utilities to render service to the public during the test period. The Court declared that the statute covered normal expense items such as expenditures for repairs, maintenance, personnel-related costs, administrative expenses, and taxes. *Id.* at 164. The Court ruled that the utility’s investment in terminated nuclear facilities were not the type of normal, recurring expenses allowable under R.C. 4909.15(A)(4). *Id.* :

The extraordinary loss sustained by CEI in connection with the terminated nuclear plants cannot be transformed into an ordinary operating expense pursuant to R.C. 4909.15 (A)(4) by commission fiat. The commission’s statement that ‘[c]ancellation does not create a past loss, but gives rise to a current cost’ is unpersuasive. Under this rationale we question whether there could ever be a ‘past loss’ the return of which would not be recoverable in future ratemaking proceedings notwithstanding the commission’s assertion to the contrary. The commission’s characterization of the investment in the four terminated plants as ‘cost’ under R.C. 4909.15 (A)(4) in light of what we perceive to be the legislative intention underlying that section is unreasonable. Therefore, to the extent that the commission’s order in regard to the cancelled plants is predicated on R.C. 4909.15(A)(4), the order cannot stand. *Id.*

The Court’s holding in the 1981 cancelled plant case is compelling and controlling in this case. Like CEI in the cancelled plant case, Duke’s investment in this case is not providing service to consumers. CEI’s plant was cancelled; Duke’s plant was abandoned. Both plant cancellation and plant abandonment are extraordinary events, not normal recurring events. Both

CEI and Duke sought to amortize their investment over a number of years and treat the investment as a cost of service under R.C. 4909.15(A)(4). Both received PUCO authority to defer the investment through the PUCO's accounting authority.

The PUCO ruling in the cancelled plant case allowed the PUCO to transform utility investment into an ordinary operating expense. The Court in the cancelled plant case reversed the PUCO, noting that the PUCO cannot legislate but must apply the law:

This court has consistently recognized that the Public Utilities Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.” *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 307. See, also, *Werlin Corp. v. Pub. Util. Comm.* (1978), 53 Ohio St.2d 76, 80; *Ohio Public Interest Group v. Pub. Util. Comm.* (1975), 43 Ohio St.2d 175, 176, paragraph five of the syllabus; *Penn Central Transportation Co. v. Pub. Util. Comm.* (1973), 35 Ohio St.2d 97, paragraph one of the syllabus. Stated differently, the commission may not legislate in its own right. This, however, is what the commission has attempted to accomplish in the case at bar.

The commission order engrafts upon the statutory ratemaking scheme an exception that would allow utility companies to recover their investment in unfinished projects ineligible for rate base treatment if the original decision to build the facilities and the subsequent decision to cancel the projects are prudent under the circumstances. In so doing the commission has exceeded its statutory mandate. We hold that the commission unreasonably and unlawfully exceeded its statutory authority when it approved amortization of CEI's investment in the four terminated nuclear power plants. *Id.* at 166

The PUCO cannot engraft upon the regulatory scheme an exception that allows Duke to recover its investment in abandoned plant that is ineligible for rate base treatment. Yet that is just what the PUCO did below. Under Ohio's statutory ratemaking formula and the Court's precedent, turning an investment in abandoned plant into a recoverable expense for ratemaking

purposes is unlawful. For ratemaking purposes, R.C. 4909.15(A)(1) is and must be the governing standard applicable to the abandoned propane facilities.

The PUCO violated the law when it applied the wrong test to the abandoned plant.

Accordingly, the Court should reverse and vacate the PUCO's decision.

Proposition of Law No. 2: The Commission violated Ohio law and acted unreasonably when it misapplied the used and useful standard. (R.C. 4909.15 (Appx. 153)). *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 84 (*AK Steel*); *In re Suburban Nat. Gas Co.* 2021-Ohio-34 (*Suburban*). The PUCO's opinion was against the manifest weight of the evidence.

As explained above, the PUCO failed to follow Ohio law when it applied the wrong ratemaking standard to the utility's abandoned plant. Instead of applying the used and useful standard to the utility's investment, the PUCO wrongly treated the abandoned plant investment as though it were an expense and applied the expense standard found in R.C. 4909.15(A)(4).

That was unreasonable and unlawful.

In an attempt to hedge its bets, the PUCO, in dicta, found that, even though the used and useful standard did not apply to the abandoned propane facilities, the propane facilities would properly be considered used and useful. (R. 129 at ¶ 45, Appx. 24). Here is what the PUCO said :

While it is uncontested that the CCP [central corridor pipeline] began providing service, in some fashion, on March 14, 2022, weeks before the date certain of March 31, 2022, OCC provides no evidence that the caverns were not operational on the date certain. As explained by Duke, the caverns remained in service as a back-up option until April 12, 2022. OCC infers the options must be binary, and that if the CCP is operating, then the caverns must be closed. However, the evidence demonstrates otherwise. (R. 129 at ¶ 45, Appx. 24).

The Ohio Supreme Court has held that the PUCO's decision will not be disturbed unless the decision is "against the manifest weight of the evidence or is clearly unsupported by the record." *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 84. The PUCO's opinion (dicta) was against the manifest weight of the evidence and was unsupported by the record. In

fact, the record is replete with evidence to the contrary. The PUCO's dicta opinion that the propane facilities were "operational" (as some sort of back-up option) fails to meet the used and useful standard.

Moreover, contrary to the PUCO assertions otherwise, it is not OCC's burden to prove the negative. Rather it is Duke that bears the burden of proof to show that the propane facilities are used and useful. *In re Suburban Nat. Gas Co.* 2021-Ohio-3224 at ¶ 40 (citing R.C. 4909.18, 4909.19(C) and *Ohio Edison Co.*, 63 Ohio St.3d at 558-559). Duke failed to meet its burden and yet the PUCO let them off the hook.

As discussed above, R.C. 4909.15(A)(1) requires that in setting rates for consumers, all property that is included in rate base must be shown to be used and useful. (Appx. 153).

Recently, the Court reemphasized the importance of the used and useful test in *In re Suburban Nat. Gas Co.* 2021-Ohio-3224 at ¶ 17. The Court explained it succinctly:

The used-and-useful test allows a public utility to recover through rates the value of that portion of its property that is actually used and useful for the convenience of the public. Whether something is used and useful must be measured as of the date certain, not at some speculative unspecified point in time. Thus, a public utility is not entitled to include in the rate-base valuation property not actually used or useful in providing its public service, no matter how useful the property may have been in the past or may yet be in the future. *Id.* (Citations omitted.)

In *In re Suburban Nat. Gas Co.*, the PUCO approved a settlement between the PUCO Staff and Suburban, allowing Suburban to recover its entire investment in a 4.9 -mile pipeline extension over three years. *Id.* at ¶¶ 9-11. OCC opposed the settlement. Conceding that a two-mile extension may have been adequate to serve customers as of the date certain, the PUCO nonetheless concluded that the entire 4.9-mile extension was used and useful at date certain. The PUCO's finding was based on modeling that showed that without additional capacity, the

pipeline was at risk of falling below minimally adequate pressure levels during the 2018-2019 winter. *Id.* at ¶¶ 27-28.

The PUCO was reversed by the Court. The Court ruled that the PUCO misapplied the used and useful standard by conflating prudence and usefulness as applied to the pipeline extension investment. *Id.* at ¶ 40. The case was remanded with instructions that the PUCO apply the proper standard. *Id.* at ¶ 35. Once again, the PUCO has misapplied the used and useful test as it did in *Suburban*.

The Court’s analysis in *Suburban* is instructive of the mandatory used and useful test that is at issue in this appeal. The Court’s ruling was crystal clear that Ohio law requires utility investment to be both “used” and “useful.” The Court began its *useful* analysis by stating “[h]ere, there is no question that the entire 4.9-mile pipeline extension was used on the date certain—gas unquestionably flowed through the pipeline extension.” *Id.* at ¶ 21. The Court found that to satisfy the “useful” standard the property must be “beneficial in rendering service for the convenience of the public at date certain.” *Id.* at ¶ 25. The Court also went on to further discuss whether the pipeline extension was “necessary.” *Id.* at ¶ 38.

In contrast, Duke’s propane facilities, which Duke did not include as rate base in its application, were not used or useful on the March 31, 2022 date certain in this case. *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Abandon Certain Propane-Air Facilities*, Case No. 21-1035-GA-AAM, Opinion and Order at ¶ 36 (Oct. 5, 2022); (R. EX. Joint Exhibit 2, May 11, 2023, Duke Response to OCC INT 011-004); (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 14, Supp. 16). In fact, the facilities were abandoned during the test period. *See In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Change Accounting Methods*, Case No. 21-1035-GA-AAM, Opinion and Order (Oct. 5, 2022), 2022 OHIO PUC

LEXIS 1038. Simply stated, once the Central Corridor Pipeline was in operation, the propane facilities were no longer beneficial in rendering service to consumers. OCC Witness Adkins testified that with the Central Corridor Pipeline in commercial operation on March 14, 2022, the propane facilities were no longer used and useful. (R. 129 at ¶ 38, Appx. 21).

Duke had in fact, on October 7, 2021, filed an application to abandon the propane facilities that had been previously used to store propane to supplement natural gas during peak periods. In its Application Duke noted that the caverns could not be inspected or repaired and were to be replaced by alternative methods to provide reliable gas distribution service. The alternative methods mentioned in Duke's application was the Central Corridor Pipeline which Duke had received approval to construct through the Ohio Power Siting Board. *In the Matter of the Application of Duke Energy Ohio, Inc. for a Certificate of Environmental Compatibility and Public Need for the C314V Central Corridor Pipeline Extension Project*, Case No. 16-253-GA-BTX, Opinion and Order (Nov. 21, 2019). The PUCO approved Duke's abandonment of the propane facilities during the test period in Duke's rate case. *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Change Accounting Methods*, Case No. 21-1035-GA-AAM, Opinion and Order at ¶ 4 (Oct. 5, 2022) 2022 OHIO PUC LEXIS 1038.

The Ohio Power Siting Board, in approving Duke's application to construct the Central Corridor Pipeline, observed that "the additional gas supply from the north and added pressure from the central corridor facilities will enable Duke to maintain service to customers on peak days and more effectively balance the overall system at all times, *while obviating the need for the continued operations of the propane storage caverns.*" *Id.* at ¶ 58. In other words, once the Central Corridor Pipeline was in operation, the propane facilities would no longer be necessary to provide service to consumers.

OCC Witness Adkins testified that the abandoned propane caverns were no longer used and useful as of March 14, 2022 — the date the Central Corridor Pipeline went into commercial operation. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 14, Supp. 16). Mr. Adkins drew his conclusion from the facts and numerous statements made by Duke to regulators and federal officials in filings:

Duke has consistently told the public and regulators (including the PUCO) that the very purpose of the Central Corridor Pipeline was to replace the propane caverns while maintaining safe and reliable service. Duke has told the public and regulators (including the United States Securities and Exchange Commission) that the propane caverns were not necessary when the Central Corridor Pipeline became commercially operable. Duke has told the public and regulators (including the PUC) that the Central Corridor Pipeline became commercially operable on March 14, 2022. The propane caverns were not useful on March 31, 2022, the date certain in this case. They should not be charged to consumers. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 20, Supp. 22).

The Central Corridor Pipeline was constructed by Duke and went into commercial operation prior to the date certain set in Duke's rate case. Consumers were then stuck paying for the Central Corridor Pipeline and the abandoned propane facilities when they only needed one or the other. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 6, Supp. 8).

Even though Duke did not include the abandoned propane facilities as part of its rate base in its rate application, the PUCO noted, in dicta, that the facilities were used and useful. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 14, Supp. 16). The PUCO dicta was erroneous, with the PUCO conflating the term *operational* with used and useful.

In support of its opinion, the PUCO cited the testimony of Duke's regulatory strategist, Sarah Lawler. (R. 129 at ¶ 45, Appx. 24). Ms. Lawler did not testify from first-hand knowledge as to whether the abandoned propane facilities were in fact physically used and useful on the date certain. Ms. Lawler testified:

The Company took an impairment to the plant account for the propane cavern and facilities in early January 2022, to remove the assets from its plant accounts with the closing of its books on December 31, 2021. Notwithstanding this impairment, these facilities, however, continued operating through the winter and early spring of 2022, providing needed back up service, with propane being injected into the Company's natural gas system through the 2021/2022 winter season and remaining available for emergencies through mid-April 2022. (R. 101, Duke Ex. 11, S. Lawler Supp. Test. at 17.)

The PUCO was wrong to rely on Ms. Lawler's testimony when there was a significant evidence to the contrary. First, contrary to her testimony, the abandoned propane facilities did not provide any back-up service on the date certain. We know that from Duke's responses to OCC discovery, which were admitted into the record. (R. EX. Joint Exhibit 2, May 26, 2023, Duke Response to OCC INT 011-004). Duke's own words are enlightening and show that the abandoned propane facilities failed to meet the "used" standard. In fact, the evidence in the record showed that the abandoned propane facilities were last used to supplement the supply of natural gas and maintain system pressure (their back-up purpose (R. 99 at 7)) in January of 2020. (*Id.*). That was a full two-years before the date certain in Duke's application.

Second, the fact that Duke was injecting propane into its system through the 2021/2022 winter season (as Ms. Lawler testified) is not indicative of the caverns being used to provide utility service. Rather Duke was injecting propane into its system, intentionally depleting the propane from the caverns because the caverns were abandoned and no longer used (R. Ex. Joint Exhibit 2, May 26, 2023, Duke Response to OCC INT 011-004). In depleting its propane supply, Duke was doing the opposite of using the propane facilities for back-up. Depleted supplies would mean there would not be enough propane to use as a supplemental source of supply to serve consumers.

As to the claim that the abandoned propane caverns were useful in providing service to Duke's consumers, there was no evidence that showed the propane facilities were *necessary* for back-up after the Central Corridor Pipeline went into operation. *See In re Suburban Nat. Gas Co.*, at ¶ 38. In fact, OCC Witness Adkins provided contrary evidence from numerous statements made by Duke to regulators, including the PUCO and the U.S. Securities and Exchange Commission. (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 17, Supp. 19). Yet, the PUCO adopted Ms. Lawler's testimony in opining, in dicta, that the abandoned propane facilities were used and useful on the date certain. (R. 129 at ¶ 45, Appx. 24).

What is most compelling, and what the PUCO ignored, was Duke's application in this case. Duke did not include the abandoned propane facilities in its application as a rate base asset (when, in its prior distribution case, it had). (R. 106, OCC Ex. 9, K. Adkins Stip. Opp. Test. at 14, Supp. 16). In fact, Duke had to adjust its schedules to take the abandoned propane facilities out of rate base. In other words, Duke itself did not consider the abandoned propane facilities "used and useful" property when it filed its application.

A public utility is not entitled to include in the rate-base valuation property not actually used or useful in providing service to consumers, no matter how useful the property may have been in the past. *See, e.g., In re Suburban Nat. Gas Co.*, at ¶ 17. The PUCO's dicta that the abandoned propane facilities were used and useful at date certain was wrong and against the manifest weight of the evidence. The Court should reverse the PUCO's order.

Proposition of Law No. 3: The Commission abuses its discretion and acts unreasonably when it fails to make charges to consumers for the propane facilities investment subject to refund.

The PUCO's order fails to require Duke's rates for the abandoned propane cavern investment to be collected subject to refund. The PUCO should have ordered the rates to be

collected, subject to refund, pending the outcome of any final decision by this Court. The PUCO abused its discretion in failing to do so.

The PUCO has authority to make rates subject to refund. It has done so many times in the past. The PUCO has acted to prevent harm to consumers from occurring by ordering utilities, on an ongoing basis, to collect an existing rate increase subject to refund and subject to appropriate interest charges.

The PUCO has used this approach to permit it to explore the reasonableness of rates in light of events that occurred after the issuance of its orders. For instance, the PUCO granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company. *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982). In that rate case, one week after the issuance of the PUCO's rate order, the Nuclear Regulatory Commission issued an order that suspended construction at the Zimmer Nuclear Power Plant ("Zimmer"). The original Opinion and Order included a rate base allowance for construction work in progress ("CWIP") for Zimmer. *Id.*, Opinion and Order at 8-14 (November 5, 1982).

In its order setting the rehearing, the PUCO approved the utility's filed tariffs but expressly found the portion of the increase granted attributable to Zimmer CWIP "should be made subject to refund, pending a rehearing on the CWIP issue." *Id.*, Entry at 1 (November 17, 1982). A rehearing was held and the PUCO ordered that all of the Zimmer costs should be excluded from CWIP. The PUCO ordered the utility to file tariffs reducing the total revenue requirements by approximately \$13 million. *Id.*, Order on Rehearing (March 16, 1983) (Appx. 175). The utility appealed and sought a stay of the PUCO's Order on Rehearing from this Court. The Court granted the stay but subsequently affirmed the PUCO's denial of a CWIP allowance.

Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm., (1984), 10 Ohio St.3d 12, 15.

After the PUCO's action was upheld on appeal, *Id.*, the PUCO ordered the utility to refund approximately \$4.5 million to its customers. *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984) (Appx. 171). The PUCO ordered the collection, subject to refund, to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule, or reason.

Another example where the PUCO has collected rates subject to refund involved the Ohio Utilities Company. *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry at 2 (July 6, 1978). After a rate order was issued, legislation was enacted that changed Ohio's ratemaking formula. The PUCO opened an investigation to determine if the previously established rates were still reasonable in light of the new law. *Id.*, Entry (September 7, 1977). The PUCO determined that the rates were excessive in view of the new law and ordered the utility to withdraw its tariffs and file new lower rates consistent with the PUCO's findings. *Id.*, Opinion and Order at 27 (May 18, 1978) (Appx. 210). The utility sought a stay of the PUCO's order, pending further review, which was granted with the condition that the utility was required to collect rates subject to refund.⁴ *Id.*, Entry (July 6, 1978).

And in a more recent case involving AEP's Rate Stability Rider ("RSR"), the PUCO ordered that the RSR be collected subject to refund after the case was remanded by the Court. *In*

⁴ The utility was also required to file an "undertaking" consisting of a promise to refund any amount collected for service rendered after the date of the Entry by a method later determined by the Commission (either cash refund or as a credit to future bills). The undertaking was required to be under oath by an officer of the company and was to include a promise to include interest. The amount ordered for refund was the amount collected for service in excess of those rates ultimately determined to be lawful.

the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company, Case No. 10-2929-EL-UNC *et. al.*, Entry at ¶ 9 (May 18, 2016). The PUCO “direct[ed] AEP Ohio to file revised tariffs that provide that the RSR is being collected subject to refund” in order to protect consumers from irreparable harm – continuing to pay the RSR without the potential of getting a refund. *Id.*

The PUCO has the discretion to order rates collected from customers to be refundable. It should have acted within its discretion and required rates to be collected subject to refund. It should have avoided the travesty of justice for consumers that has become all too familiar when utilities charges are overturned by the Court and yet no refunds are available to customers.

The Court most recently advised the PUCO that this travesty of justice can be avoided if the PUCO makes rates refundable. In a recent opinion, the Court found that the PUCO was barred from ordering refunds because it had not made FirstEnergy’s tariffs subject to refund. *In re Alternative Energy Rider Contained in the Tariffs of Ohio Edison Co.*, 2018-Ohio-229, ¶¶ 15-20. In another recent denial of refunds, the Court found unlawful the PUCO’s allowance of a so-called distribution modernization rider (subsidy charge) for FirstEnergy. There, the Court denied half a billion dollars in refunds to two million consumers (where the PUCO had not protected consumers by making the charge subject to refund). *In re Application of Ohio Edison Co.*, 2019-Ohio-2401, ¶ 23.

Ohio Supreme Court Justice Pfeifer highlighted the extreme injustice to Ohio consumers when they are denied refunds for charges later found to be unlawful:

[T]he PUCO asserted that a refund under the circumstances would be tantamount to retroactive ratemaking, something it is not authorized to engage in.

It is unconscionable that a public utility should be able to retain \$368 million that it collected from customers based on assumptions that are unjustified. The problem stems from this

court's 1957 decision [in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*] Clearly the time has come to overturn this case.

...

[I]t boggles the mind that this court would ever countenance such a proposition: that a public utility should be allowed to fatten itself on the backs of Ohio residents by collecting unjustified charges.

...

Allowing AEP to retain the \$368 million that it collected based on charges that were not justified is unconscionable. Doing so because of a 50-year-old case that is not supported by the statute on which it is based is ridiculous. The ratepayers of Ohio deserve better. *In re Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶¶ 61-67.

Since the advent of the 2008 energy law that favors electric utilities in ratemaking, Ohioans have lost \$1.2 billion in denied refunds for electric charges after Supreme Court reversals of PUCO orders. *See In re Columbus S. Power Co.*, 2011-Ohio-1788, ¶ 17-20 (\$63 million); *In re Columbus S. Power Co.*, 2014-Ohio-462, ¶ 56 (\$368 million); *In re Application of Dayton Power & Light Co.*, 2016-Ohio-3490, ¶ 1 (\$330 million); *In re Application of Ohio Edison Co.*, 2019-Ohio-2401, ¶ 23 (\$456 million collected through June 2019).

The PUCO should have acted to protect Duke consumers by ordering the abandoned propane facilities investment to be collected subject to refund. There was no reason not to. The PUCO erred.

V. RELIEF REQUESTED

OCC respectfully requests that the Court reverse and vacate that portion of the PUCO's decision related to the abandoned propane facilities that allows Duke to charge consumers for rate base property that was not used and useful. The Court should direct the PUCO on remand to issue an order requiring Duke to adjust base rates taking out the recovery of the deferred propane

facilities investment. Additionally, the Court on remand should order the PUCO to direct Duke to refund to consumers all revenues collected for the deferred propane facilities.

- A. Where rates have not been fully collected and there is a means to adjust existing rates, without balancing one set of rates against the other, there is no prohibited retroactive ratemaking.

Generally, refunds in the post-appellate process are not ordered in Ohio. This can be attributed to a 1957 holding of this Court, *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957). The ruling in *Keco* prevented customers from seeking restitution for a rate increase originally approved by the PUCO but later found unlawful by the court. *Keco* at 259.

But *Keco* should not preclude the Court from prospectively adjusting the distribution rates that customers are bound to pay. The fact that the amortized propane facility charges will be collected over the next seven-years is an important point. That revenue stream provides the court with the tool it needs to discretely adjust the rates without running afoul of *Keco*. It is a distinguishing factor which the Court can use to address the no-refund rule of *Keco* and prevent a windfall to the utility.

Following the *Keco* decision, the Court issued a ruling in 1999 expounding upon *Keco* in a case called *Lucas County Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344. *Lucas County Commrs.* narrows the *Keco* decision by acknowledging a de facto exception that allows prospective rate adjustments when rates are continuing or where there is an adjustment mechanism built into the rates. *Lucas County Commrs.* at 348.

In *Lucas County Commrs.* the rates that the appellant sought to remedy, through a refund or credit, had expired. *Lucas County Commrs.*, at 349. The rates appealed in *Lucas County Commrs.* stemmed from an experimental mechanism called a “weather normalization adjustment program.” *Id.* The weather normalization program was agreed to in a stipulation and was a pilot

program effective for a limited time — December 1994 through April 1995. *Lucas County Commrs.* at 344. After the pilot expired, Lucas County filed a complaint with the PUCO alleging that the weather normalization adjustment mechanism was unjust and unreasonable, and caused customers to overpay the utility by \$8.5 million. *Id.* at 34. Lucas County sought an \$8.5 million refund, through a rebate or service credit. The utility, Columbia Gas, moved to dismiss the complaint, claiming that such a refund would violate *Keco*. *Id.* The PUCO granted the motion to dismiss and Lucas County appealed.

The Court noted that the weather normalization program was an experimental program. *Id.* at 348. The Court observed that the PUCO had not approved any mechanism for adjusting the rates of the weather normalization program. Additionally, the Court emphasized that Lucas County failed to seek relief during the time that the weather normalization program (and the rates) were in effect. *Id.* Instead, Lucas County filed its complaint after the weather normalization program had been discontinued. *Id.*

The Court affirmed the PUCO, concluding that “there simply was no revenue from the challenged program against which the utilities commission could balance alleged overpayments, or against which it could order a credit. *Absent such revenue*, the commission would be ordering Columbia Gas to balance a past rate with a different future rate and would thereby be engaging in retroactive ratemaking, prohibited by *Keco*.” *Lucas County Commrs.* at 348-349 (Emphasis added).

Under the reasoning set forth in the *Lucas County Commrs.* decision if there is revenue against which the PUCO could order a credit, then there would be no retroactive ratemaking. So if the rates sought to be prospectively adjusted continue and are not yet fully collected, a refund or credit could be issued without engaging in retroactive ratemaking. Such an adjustment would

not be balancing past rates with future rates — which is impermissible under *Keco*. Instead, rate adjustments would be occurring within the same continuing, existing rates.

The Court's ruling in *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, is consistent with the *Lucas County Commrs.*: that where rates are still being collected, adjustments can be made prospectively to those rates to account for past over-collection, without violating any prohibition against retroactive ratemaking. *Id.* at 64.

And the PUCO, as well, has embraced the notion that it can reset or prospectively adjust rates to make up for past under collection, so long as the rates remain yet to be collected. In *In re Application of Ohio Power Co.*, 2015-Ohio-2056, the Court found that the PUCO had wrongfully reduced the interest rate that customers paid to the utility (from 2012 to 2015) on certain electric security plan costs (deferred charges). On remand from the Court the PUCO approved AEP's proposal to increase prospective rates to customers to make up for the lower interest rates the utility received during the past three-year period. *See In the Matter of the Application of Columbus Southern Power for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Pub. Util. Comm. No. 11-4920-EL-RDR *et al.*, Entry at ¶¶ 8, 9 (June 29, 2016). The PUCO's ruling permitted AEP to collect more money (\$130 million) from customers in prospective rates to correct for the lower interest rates the PUCO had authorized for AEP in the previous three-year period.

In the case below the PUCO approved a ten-year amortization period to collect the utility's investment in abandoned propane facilities. (R. 133 at 6, Appx. 74). Prospective adjustments would not cause the PUCO to balance past rates with future rates as the rates continue for at least seven more years. As such, there is no retroactive ratemaking under *Keco*.

There is no balancing of one set of rates against another. Rather the rates are continuing, allowing them to be prospectively adjusted without engaging in retroactive ratemaking.

B. *Keco* should be overruled.

This Court has held that its prior decisions may be overruled where “(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶ 48. Under these standards, the Court could and should overrule *Keco*.

1. Changed circumstances no longer justify continued adherence to *Keco*.
 - a. The statutory balance between customers and utilities that was the cornerstone of *Keco* has been impaired by barriers to obtaining stays, which creates inequities for utility consumers that the Court should overcome.

A key to the *Keco* rule was the Court’s statutory analysis showing a balance between consumers and the utilities regarding remedies for rates that are later determined to be unlawful. *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 259 (1957). The Court discussed the statutory balance between consumers and utilities under these Ohio statutes that “keep the equities between the utility and the consumer in balance.” *Id.* at 259. It explained that a utility may not charge increased rates during proceedings before the PUCO to increase rates, while a consumer seeking a reduction in rates is not entitled to a refund of excessive rates paid. “Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance***.” *Id.* at 259.

But the equities that existed in 1957 between the utility and the consumer are out of balance 60-years later for a number of reasons. These reasons include changes in the law under

S.B. 221, and the difficulties with posting bond in cases involving hundreds of millions of dollars. In practice, given these factors, the justice that the General Assembly envisioned is far from being achieved.

Justice, though, can be restored in part if the Court overturns *Keco*, as Justice Pfeifer urged, several years ago after a utility received a \$368 million "windfall" because of *Keco*. *In re Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶¶ 61-67. (Pfeifer J., dissenting) (urging that *Keco* be overturned, after finding it "unconscionable" for the public utility to retain \$368 million from consumers). OCC urges the Court to overturn *Keco* and allow customers the remedy they are entitled to and stop these windfalls to utilities.

b. Barriers to obtaining a stay.

A bond is intended to compensate the prevailing party for the harm associated with staying implementation of the PUCO's order that would otherwise have been in effect while the appeal is pending. R.C. 4903.16 (Appx. 149) speaks to the bond being posted "conditioned for the prompt payment by appellant of all damages caused by the delay in the enforcement of the order." In today's public utility cases the issues appealed involve millions of dollars, if not hundreds of millions of dollars. Thus, "all damages" caused by the delay of the enforcement of an order can themselves require a bond of several millions of dollars. *See, e.g., In re Duke Energy Ohio Inc.*, S.Ct. Case No. 2014-328, Decision (Nov. 5, 2014) (requiring bond in the amount of \$2,506,295, which appellants were unable to post).

This Court has recognized it is difficult, if not virtually impossible, for consumer parties to secure a stay by posting bond. *See In re Application of Columbus S. Power Co.*, 2011-Ohio-1788, ¶ 20 (ruling that the PUCO unlawfully granted the utility a retroactive rate increase, but denying a refund to consumers, acknowledging the difficulty a public agency faces in dealing

with the bond requirement). The remedy the Court spoke of in *Keco* is, for consumers, illusory at best.⁵

2. There would be no undue hardship to the utilities if *Keco* were overturned.

There would not be undue hardship for utilities relying upon the *Keco* doctrine if *Keco* was overruled. There will be no ensuing chaos. Although utilities have relied upon *Keco* in traditional ratemaking context, there has always been a question of whether *Keco* applies under Ohio's 2008 energy law.

Various parties, including the PUCO, utilities, and consumers have argued that *Keco* does not apply to proceedings under the new regime of S.B. 221. *See, e.g., In re Columbus S. Power Co.*, 2011-Ohio-1788, ¶ 12 ("The appellees [AEP and PUCO] respond by arguing that *Keco*'s rule does not apply in proceedings under the statute of S.B. 221. We need not decide whether *Keco* continues to apply, as the ruling also violates ****).").

And the Court has also considered creating exceptions to *Keco*. *See, e.g., Indus. Energy Users-Ohio v. PUC*, 2008-Ohio-990, ¶¶ 43-46 (declining to deviate from *Keco* to create an exception based on the facts presented). And the Court has on occasions limited *Keco*, finding that there must be "ratemaking" for *Keco* to apply. *River Gas v. Public Utilities Co.*, 69 Ohio St.2d 509, 512 (1982).

The PUCO also has on occasion ruled that *Keco* does not preclude rate adjustments under certain circumstances. *See In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Pub. Util. Comm. No. 09-872-EL-FAC,

⁵ The possibility of a stay as an effective remedy may be more illusory than real when dealing with consumer's claims, because of the difficulties in posting a bond. *See E. Levin, Illinois Public Utility Law and the Consumer: A Proposal to Redress the Imbalance*, 26 DePaul L. Rev. 259, 268-269 (1977).

Opinion and Order at 33 (Jan. 23, 2012) (holding *Keco* does not apply to credits made against a deferral balance). *In re the Application of Duke Energy Ohio, Inc. for approval of its 2017-2019 Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Pub. Util. Comm. No. 16-576-EL-POR, Opinion and Order at 63 (Sept. 27, 2017) (*Keco* does not apply to Duke's energy efficiency/peak demand reduction rider mechanism); *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand reduction Program Portfolio Plan for 2017 through 2019*, Pub. Util. Comm. No. 16-649-EL-POR, Opinion and Order at ¶ 51 (Sept. 27, 2017) (*Keco* does not apply to costs collected under R.C. 4928.66, where there is an established recovery mechanism allowing the utility to pass variable costs directly to the consumers and does not apply to deferrals); *In re the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Pub. Util. Comm. No. 08-917-EL-SSO, Opinion and Order at 62 (Mar. 18, 2009) (holding that collecting carrying charges on prior years' investments was not retroactive ratemaking) .

Most recently, both the Court and the PUCO have created exceptions to *Keco*, allowing prospective adjustments to rates for over-or under-collections in the past. *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608 ¶ 40; *In the Matter of the Application of Columbus Southern Power for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Pub. Util. Comm. No. 11-4920-EL-RDR *et al.*, Entry at ¶¶ 8, 9 (June 29, 2016).

Thus, any reliance on *Keco* that has occurred over the years has been moderated by the many rulings distinguishing *Keco* or applying *Keco* with flexibility. There will be no undue hardship on the utilities if *Keco* is overturned. To the contrary, if *Keco* is not overruled, it will cause undue hardship for customers and create a windfall for Duke in this case. This is the type

of unfair result the Court can and should prevent.

VI. CONCLUSION

Duke's 411,000 residential consumers deserve just and reasonable rates that are set pursuant to law, not by PUCO fiat as was done in the case below. The propane facilities are investments and were not used and useful at date certain. The Court should not permit the PUCO to circumvent Ohio ratemaking law resulting in consumers' hard-earned dollars being eaten up through unlawful rates. The Court should protect Duke consumers and enforce the law as written.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this First Merit Brief of Appellant Office of the Ohio Consumers' Counsel, was served upon all parties of record via electronic transmission this 27th day of January 2025.

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