



## Ohio Supreme Court validates use of ratepayer funds for pollution clean up

June 29, 2017

The Ohio Supreme Court recently ruled that Duke Energy Ohio, Inc. can recover \$55.5 million from ratepayers to pay for cleaning up pollution at two long-closed manufactured gas plant (MGP) sites near downtown Cincinnati. In a 4-3 decision, the Court affirmed a Public Utilities Commission of Ohio (PUCO) decision to allow Duke to recover the costs of environmental remediation of the two sites.

The Office of the Ohio Consumers' Counsel, the Ohio Manufacturers' Association, Ohio Partners for Affordable Energy and the Kroger Company (appellants) appealed the PUCO's decision, because the MGP facilities were not "used and useful" when Duke sought recovery for the environmental remediation. One of the sites ceased operations in 1928, and the other in 1963. As such, the appellants argued that remediation costs were not incurred in "rendering the public utility service" to Duke's current customers. The majority disagreed. Interpreting R.C. 4909.15(A)(1), the majority held that the used and useful standard does not apply to recovery of expenses, such as operation, maintenance and remediation costs. Rather, the used and useful standard applies only when the utility is seeking recovery for capital investments, such as infrastructure investments. Because Duke incurred the remediation expenses during the applicable "test year" (the year-long period in which the PUCO examines when setting the utility's rates), the Court determined that Duke was entitled to recover the expenses.

In their dissent, the minority looked to a long line of PUCO precedent that interpreted R.C. 4909.15(A)(1), in which the PUCO determined that the "property related expenses must be associated with property that is used and useful." The minority concluded that the PUCO's decision was unlawful, because it failed to consider whether Duke incurred the costs to remediate property that was actually used and useful in rendering the public utility service.

This [decision](#) is important, because it may open the door for other utilities to recover "property related expenses" from ratepayers even if the property is not used in rendering public utility service to ratepayers.

# Authors

---



**Devin D. Parram**

Partner

Columbus

614.227. 8813

[dparram@bricker.com](mailto:dparram@bricker.com)