**Summary of the Supreme Court of Ohio's Decision in the Appeal
of the Duke MPG Case**

PUCO Case Nos. 12-1685-GA-AIR, et al.
June 29, 2017

In March 2017, joint Appellants, OMA, the Office of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy, and the Kroger Company, requested that the Court overturn a PUCO order that awarded Duke $55.5 million from customers for cleanup costs associated with two former manufactured gas plants (MGP) that have not been in operation for 50-89 years. Appellants argued that the PUCO improperly applied the ratemaking statutes in Ohio that do not permit recovery of expenses associated with plants that were not used and useful in rendering service to Duke's distribution customers during the test year. On June 22, 2017, in a split 4:3 decision, the Court affirmed the PUCO's order.

1. **The Court Held that the "Used and Useful" Standard Does Not Apply to R.C. 4909.15(A)(4).**

In authorizing Duke to recover the cost to clean up the MGP plants, the PUCO relied on R.C. 4909.15(A)(4). In its decision, the Court held that because R.C. 4909.15(A)(4) contains neither the phrase "used and useful" nor any other language that ties recoverable costs to property that is used and useful, operating expenses are recoverable if they were incurred in rendering service during the test period and are prudent. The Court further explained that because Duke sought to recover costs and not its capital investment in the MGP plants, the Court agreed that the PUCO was correct to not require the plants to be "used and useful" during the test period. The Court also found that because Duke still had ongoing utility operations on the two MGP plant sites, this case was distinguishable from two prior PUCO cases where the PUCO denied recovery for environmental-remediation costs for plants that were no longer used to provide service to customers.

2. **The Court Found that Non-Recurring Expenses May be Recovered Under R.C. 4909.15(A)(4) and Duke's Remediation Costs were Related to its Current Distribution Service.**

In its brief, Appellants argued that in an earlier case, the Court had previously held that a public utility may recover only "normal, recurring expenses" under R.C. 4909.15(A)(4). However, the Court seemed to backtrack when it explained that its previous statement was dictum, and not part of the Court's holding. In other words, the Court found its prior statement was not binding on the Court here and that it was not required to follow that prior statement made in the earlier case.

Appellants also argued that Duke could not recover remediation costs under R.C. 4909.15(A)(1) because those costs were unrelated to Duke's provision of distribution service. In denying Appellants' assignment of error, the Court majority held that the PUCO had properly found that Duke was currently using the MGP sites for gas-distribution operations and that remediation was necessary for Duke to continue its operations at the properties.

3. Dissenting Decision

In the dissent, however, Justices Kennedy, O'Neill, and O'Donnell disagreed with the majority that Duke's limited ongoing utility operations at the MGP sites were sufficient to find that the remediation costs were related expenses. The dissenting justices noted that Staff had determined that most of the $62.8 million in environmental remediation costs Duke sought to recover were incurred in areas of the former MGP sites that are not currently used and useful for natural gas distribution service and are thus not recoverable in natural gas rates. The justices explained that because Duke's remediation costs may not have been entirely incurred to remediate the property that was used and useful in rendering public utility service for the test period, **the PUCO's order should be reversed in order for the PUCO to consider whether all, part, or none of the remediation costs were incurred to remediate the property that was used and useful in rendering public utility service during the test period**.