

**OPINION NO. 87-103**

**Syllabus:**

The Public Utilities Commission lacks the authority to recover costs incurred in the investigation, mitigation, minimization, removal, or abatement of any unauthorized spill, release, or discharge of material

into or upon the environment that requires emergency action to protect the public health or safety of the environment.

To: Thomas V. Chema, Chairman, Public Utilities Commission of Ohio, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1987

I have before me your request for my opinion concerning the authority of the Public Utilities Commission of Ohio to recover the costs it incurs in the protection of the public health and welfare after a hazardous materials spill. Your inquiry centers around the issue of whether the Commission is authorized to recover such costs from those persons or business entities responsible for the unauthorized release of hazardous materials. Your correspondence specifically refers to the recent amendment to R.C. 3745.13 contained in Sub. H.B. 19, 117th Gen. A. (1987) (eff. Oct. 20, 1987). As amended, R.C. 3745.13 expressly authorizes certain political subdivisions and civil defense organizations to recover such expenses. You wish to know whether the Public Utilities Commission shares this statutory authority to recover the costs it incurs in the investigation, mitigation, minimization, removal, or abatement of a hazardous materials spill, by a railroad or public utility under the Commission's jurisdiction.

The Public Utilities Commission has been granted broad authority under the express provisions of R.C. Chapter 4905. See Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Public Utilities Commission, 175 Ohio St. 130, 192 N.E.2d 52 (1963) (the Public Utilities Commission has plenary power under R.C. 4905.04 to promulgate and enforce orders relating to the protection and safety of railroad employees); Cooperative Legislative Committee v. Public Utilities Commission, 149 Ohio St. 511, 80 N.E.2d 159 (1948) (by virtue of R.C. 4905.04, the Public Utilities Commission possesses the authority and power to regulate and supervise all public utilities). However, as a creature of statute, the Public Utilities Commission is vested with only such authority as has been expressly granted to it by statute or may be necessarily implied therefrom. Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456 (1943); Penn Central Transportation Co. v. Public Utilities Commission, 35 Ohio St. 2d 97, 298 N.E.2d 587 (1973); Ohio Bus Line v. Public Utilities Commission, 29 Ohio St. 2d 222, 280 N.E.2d 907 (1972); Baltimore & Ohio R. Co. v. Public Utilities Commission, 16 Ohio St. 2d 60, 242 N.E.2d 577 (1968); Akron & Barberton Belt R.R. v. Public Utilities Commission, 165 Ohio St. 316, 135 N.E.2d 400 (1956); Toledo v. Public Utilities Commission, 135 Ohio St. 57, 19 N.E.2d 162 (1939). Thus, an answer to the question of whether the Public Utilities Commission may recover the costs it expends in the protection of the public welfare after a hazardous materials spill, must depend upon whether the authority to do so has been conferred upon the Commission by statute.

The provisions of R.C. 4905.10 set out a method through which the Public Utilities Commission may partially recover the expenses which it incurs in furtherance of its statutory duties. This statute provides in pertinent part:

(A) For the sole purpose of maintaining and administering the public utilities commission and exercising its supervision and jurisdiction over the

railroads and public utilities of the state, an amount equivalent to the appropriation to the public utilities commission for administration of the utilities division in each fiscal year shall be apportioned among and assessed against the railroads and public utilities within the state by the commission by first computing an assessment as though it were to be made in proportion to the intrastate gross earnings or receipts, excluding earnings or receipts from sales to other public utilities for resale, of the railroads and public utilities for the calendar year next preceding that in which the assessments are made....

Through this section, the General Assembly has provided the Public Utilities Commission with a method to recoup some of the costs the Commission incurs from the industries which it regulates. The statute is, however, silent as to the recovery of specific costs from individual railroads or public utilities<sup>1</sup> that cause or allow a spill, release, or discharge of a hazardous material. I am not aware of any other statutory provisions which might be interpreted as authorizing the Public Utilities Commission to recover such costs.

In attempting to ascertain the General Assembly's intention in the enactment of a statute, it is often helpful to compare

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<sup>1</sup> R.C. 4905.01(A) provides that the term "'railroad' has the meaning set forth in section 4907.02 of the Revised Code," which in turn defines a railroad as:

"includ[ing] any corporation, company, individual, or association of individuals, or its lessees, trustees, or receivers appointed by a court, which owns, operates, manages, or controls a railroad or part of a railroad as a common carrier in this state, or which owns, operates, manages, or controls any cars or other equipment used on such a railroad, or which owns, operates, manages, or controls any bridges, terminals, union depots, sidetracks, docks, wharves, or storage elevators used in connection with such a railroad, whether owned by such railroad or otherwise, and means and includes express companies, water transportation companies, freight-line companies, sleeping car companies, and interurban railroad companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state....

R.C. 4905.02 defines the term "public utility" as:

includ[ing] every corporation, company, copartnership, person, or association, their lessees, trustees, or receivers, defined in section 4905.03 of the Revised Code, including all telephone companies, but excepting such other public utilities as operate their utilities not for profit, such other public utilities as are owned or operated by any municipal corporation, and railroads as defined in sections 4907.02 and 4907.03 of the Revised Code.

the language employed elsewhere by the General Assembly with reference to related subjects. See Lake Shore Electric Ry. Co. v. Public Utilities Commission of Ohio, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (had the legislature intended a term to have a particular meaning, it could easily have found language to express that purpose, having used such language in other connections). As I noted above, your correspondence makes reference to Sub. H.B. 19. Subsequent to your request, the General Assembly has enacted Sub. H.B. 19, 117th Gen. A. (1987) (eff. Oct. 20, 1987). As enacted in Sub. H.B. 19, R.C. 3745.13 extends the authority to recover certain costs associated with incidents involving spills of hazardous materials to certain political subdivisions and civil defense organizations of the state. R.C. 3745.13 provides in pertinent part:

When emergency action is required to protect the public health or safety or the environment, any person responsible for causing or allowing an unauthorized spill, release, or discharge of material into or upon the environment is liable to the municipal corporation, county, township, or countywide or regional organization for civil defense created under section 5915.07 of the Revised Code, having territorial jurisdiction, for the necessary and reasonable, additional or extraordinary costs it incurs in investigating, mitigating, minimizing, removing, or abating the spill, release, or discharge in the course of its emergency action; but, to the extent criteria and methods for response action prescribed under 40 C.F.R. 300, as amended, may be applied to the type of material involved and the condition of the spill, release, or discharge, such person is liable for such costs only if the political subdivision or countywide or regional organization employed those criteria and methods in its emergency action.

Pursuant to this section, a municipal corporation, county, township, or a countywide or regional organization for civil defense may recover those costs which it has incurred in the investigation, mitigation, minimization, removal, or abatement of an unauthorized spill, release, or discharge of a hazardous material. By its express terms, however, the section does not provide the Public Utilities Commission with such authority.

The Ohio Environmental Protection Agency has also been granted similar authority under R.C. 3745.12. See 141 Ohio Laws 2761 (Am. Sub. H.B. 238, eff. July 1, 1985). R.C. 3745.12 specifically provides for the recovery of costs incurred by the Ohio Environmental Protection Agency in instances similar to those presented by your question:

(A) There is hereby created in the state [treasury] the immediate removal fund, which shall be administered by the director of environmental protection. The fund may be used to pay costs incurred by the environmental protection agency in investigating, mitigating, minimizing, removing, or abating any unauthorized spill, release, or discharge of material into or upon the environment that requires emergency action to protect the public health or safety or the environment.

(B) Any person responsible for causing or allowing the unauthorized spill, release, or discharge

is liable to the director for the costs incurred by the agency, regardless of whether those costs were paid out of the fund created under division (A) of this section or any other fund of the agency. Upon the request of the director, the attorney general shall bring a civil action against the responsible person to recover those costs. Moneys recovered under this division shall be paid into the immediate removal fund. (Emphasis added.)

Under R.C. 3745.12, the Environmental Protection Agency is expressly authorized to recover the costs it incurs in situations involving a spill, release, or discharge of a hazardous material. However, the provisions of this section again relate only to the Environmental Protection Agency and make no reference to the Public Utilities Commission.

The existence of these statutory provisions implies that the General Assembly did not intend for the Public Utilities Commission to have similar or concurrent authority. As exemplified by the provisions of R.C. 3745.12-.13, the General Assembly may authorize more than one agency to recover the costs it incurs in the investigation, mitigation, minimization, removal, and abatement of hazardous materials. However, the language employed by the General Assembly clearly expresses the intention that only specified governmental bodies be authorized to recover the costs they incur in the course of carrying out their duties with reference to hazardous materials spills. It is apparent, therefore, that if the General Assembly had intended for the Public Utilities Commission to have similar authority, it could easily have found the means to express that intention, having used appropriate language to effect that purpose in R.C. 3745.12 and .13. I imply from this lack of express authority that the General Assembly did not intend to confer such authority upon the Public Utilities Commission. See generally State ex rel. Alden E. Stilson & Assoc. v. Ferguson, 154 Ohio St. 139, 93 N.E.2d 688 (1950)(citing the general principle of statutory construction that the specification of one thing implies the exclusion of another).

Therefore, it is my opinion and you are hereby advised that the Public Utilities Commission lacks the authority to recover costs incurred in the investigation, mitigation, minimization, removal, or abatement of any unauthorized spill, release, or discharge of material into or upon the environment that requires emergency action to protect the public health or safety of the environment.