BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.	)))	Case No. 12-1685-GA-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	))))	Case No. 12-1687-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-1688-GA-AAM

POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

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I. INTRODUCTION

Since 1911, Ohio utility customers have been protected against paying utilities for costs that are not incurred for providing those customers with utility service. Duke's 380,000 residential customers are protected by that good law, R.C. 4909.15(A), against Duke's request to charge them $62.8 million for two former sites of manufactured gas plants. And fortunately for those customers in southern Ohio, PUCO Staff witness Adkins testified to the PUCO Staff's expert opinion that the law prohibits $57 million (9/10ths) of Duke's request. Similarly, the evidence of the Office of the Ohio Consumers' Counsel ("OCC"), for customers to pay no more than $8 million, is based partly on that law.

OCC and the Ohio Partners for Affordable Energy ("OPAE") file this Brief to protect Duke Energy Ohio's ("Duke" or "Utility") natural gas residential consumers in the greater Cincinnati area from paying the investigation and remediation costs associated with two manufactured gas plant ("MGP") Sites. OCC, OPAE and other parties reached a settlement[1] on all issues, except one. The settlement provides for a zero increase, subject to litigation of Duke's request to make customers pay $62.8 million for costs to clean-up the two MGP sites. OCC and OPAE recommend that the Public Utilities Commission of Ohio ("PUCO" or "Commission") determine that customers owe Duke nothing for the costs of cleaning up Duke's two long-shuttered Manufactured Gas Plant ("MGP") sites.

MGPs began appearing in the United States in the early 1800s and in some cases (but not in this case) continued to be used into the 1970s.[2] As the name implies, these plants manufactured gas (as well as other by-products). The manufactured natural gas was used for illumination (as in gas lamps before electricity was introduced) and eventually for other purposes. The MGPs used various raw materials as the feedstock to produce the natural gas, including coal, oil, and in some cases blending with natural gas to assure a consistent quality.[3] The manufacturing process created pollutants that have been in the ground of MGP sites since the beginning of manufactured gas, up to 200 years ago.

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[1] Signatory Parties are Duke, the PUCO Staff ("Staff"), OCC, OPAE, The Greater Cincinnati Health Council ("GCHC"), Cincinnati Bell Telephone Company, LLC ("CBT"), the Kroger Company ("Kroger"), Direct Energy Services, LLC, Direct Energy Business, LLC, People Working Cooperatively ("PWC").

[2] In this case, the West End Site was operated until 1928 and the East End Site was operated until 1963.

[3] OCC Ex. No. 14, (Direct Testimony of Bruce Hayes) at 17 (February 25, 2013), citing New York State Department of Environmental Conservation, 2008.*New York State's Approach to the Remediation of Former Manufactured Gas Plant Sites*, available at <http://www.dec.ny.gov/docs/remediation_hudson_pdf/nysmgpprogram.pdf>, last accessed, Jan. 16, 2013.

In this case, Duke has sought PUCO authority to collect from its customers deferred investigation and remediation costs for two former MGP Sites (East End and West End Sites) ("MGP Sites"). The Utility deferred $62.8 Million[4] in investigation and remediation costs for the MGP sites through the end of 2012, including carrying costs. Duke is now proposing to collect those costs from customers over three years through a newly created Rider ("MGP Rider').

OCC and OPAE recommend the PUCO deny or substantially limit Duke's proposal for customers to pay $62.8 million for MGP cleanup costs because:

1. The Ohio rate making formula, under R.C. 4909.15, does not allow collection of MGP-related investigation and remediation costs from Duke's customers.
2. The underlying MGP facilities that gave rise to the contamination that was the subject of Duke's environmental investigation and remediation efforts were not used and useful in providing natural gas service to current natural gas customers during the period the costs were incurred. If any facilities were used and useful at the MGP site, those facilities did not cause the contamination that Duke has remediated.
3. The MGP-related investigation and remediation expenses were not incurred in the rendering of public utility service to current customers.
4. Duke failed to document the process that led to the remediation decisions at the MGP sites, resulting in Duke's inability to meet its burden of proof

[4] Duke Ex. No.19C (Third Supplemental Testimony of William Don Wathen) at 3 (April 22, 2013) See also Tr. Vol. III at 746 (Wathen) (May 1, 2013).

to demonstrate in these proceedings that the remediation expenses were prudently incurred.

5. Duke employed a remediation approach that was far in excess of more cost effective and reasonable remedial options. In doing so, Duke spent significantly more money than was necessary. The Utility's management decisions to exceed reasonable, cost effective and protective remediation, to spend excessively to conduct remediation, and to fail to document the Utility's decision process on remediation options were imprudent and violative of R.C. 4909.154;

OCC and OPAE submit that Duke's MGP recovery claims should be denied in whole or in part for the above-stated reasons. If the PUCO decides to grant Duke some recovery of MGP-related investigation and remediation costs, then OCC and OPAE recommend that the PUCO protect customers as follows:

1. The permitted level of costs should be borne equally by the Utility's shareholders and its customers;
2. Any third-party liability recovery should be applied to reduce the MGP-related costs before they are split between the Utility and customers;
3. Any insurance policy proceeds should be applied against the MGP-related costs;[5]
4. Any MGP-related investigation and remediation costs allocated to customers should be amortized over a period of at least 10 years to

[5] OCC Ex. No. 14 (Direct Testimony of Bruce M. Hayes) at 6 (February 25, 2013).

moderate the impact on customer bills and more closely align the recovery period with the period over which this liability was incurred.

5. The implementation of the MGP Rider should be used only for the collection of the permitted level of MGP-related investigation and remediation costs that were deferred through December 31, 2012.

II. CASE HISTORY

On August 10, 2009, Duke filed an Application with the PUCO to defer environmental investigation and remediation costs.[6] The Commission granted Duke's Application on November 12, 2009.

On June 7, 2012, Duke filed its Prefiling Notice for its request to increase natural gas distribution rates. As part of the Utility's Rate Case Application, subsequently filed on July 9, 2012, Duke sought the authority to collect from its customers investigation, remediation and carrying costs associated with the Utility's environmental concerns at its MGP sites.[7]

On January 4, 2013, the PUCO Staff filed its Staff Report of Investigation ("Staff Report"). On February 4, 2013, OCC, as well as other interested parties, filed Objections to the Staff Report as required by R.C. 4909.19. Included within the 31 Objections filed by OCC were five Objections pertaining to Duke's request to collect MGP-related costs from Duke's customers.[8]

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[6] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM (August 10, 2009). ("Duke Deferral Case").

[7] Duke Ex. No. 2 (Application, Schedule) at C-3.2 (July 9, 2012).

[8] OCC Ex. No. 18 (OCC Objections to the PUCO Staff Report of Investigation, Objection Nos. 25-29) (February 4, 2013).

On January 18, 2013, the Attorney Examiner issued an Entry that established a procedural schedule for these proceedings. The Entry separated the filing dates for Objections to the Staff Report (February 4, 2013) from the filing of expert testimony that supports those Objections to the Staff Report (February 25, 2013). As a result of this three-week separation between the filing of objections to the Staff Report and expert testimony, parties had the opportunity to review the Objections to the Staff Report filed by other parties and to address those issues in their own testimony if they elected to do so. Despite this opportunity, Duke did not file any testimony addressing the objections raised by OCC relating to Duke's MGP claims, which OCC advised would be addressed in the testimony of Dr. James Campbell, Ph.D., Bruce Hayes and Dave Effron.

On February 25, 2013, OCC filed the testimony of a number of expert witnesses in support of its Objections. Included was testimony supporting OCC's MGP-related objections. Mr. Hayes filed testimony in support of OCC Objection No. 25,[9] Dr. Campbell filed testimony in support of OCC Objection No. 26,[10] Mr. Effron filed testimony in support of OCC Objection Nos. 27 and 28,[11] and Scott J. Rubin filed testimony in support of OCC Objection No. 29.[12]

On April 2, 2013, a Stipulation and Recommendation ("Stipulation") was entered into between Duke, the PUCO Staff, OCC, OPAE and other interested parties for all of the issues except for MGP-related cost recovery. As part of the Stipulation, the Signatory Parties bifurcated the issue of MGP-related cost recovery and collection, and instead

[9] OCC Ex. No. 14 (Direct Testimony of Bruce M. Hayes) at 17-40 (February 25, 2013).

[10] OCC Ex. No. 15 (Direct Testimony of James R. Campbell, Ph. D.) at 5 (February 25, 2013).

[11] OCC Ex. No. 22 (Direct Testimony of David J. Effron) at 9 (February 25, 2013).

[12] OCC Ex. No. 23 (Direct Testimony of Scott J. Rubin) at 24 (February 25, 2013).

agreed to litigate the MGP issues.[13] OCC's position relative to the MGP issues to be litigated was as stated in its Objections to the Staff Report.[14] The Stipulation noted that:

> The Parties agree to litigate their positions at the evidentiary hearing in the above-captioned proceedings, for resolution by the Commission in its order in these cases.[15]

On April 4, 2013, the Attorney Examiner issued an Entry that established the date for the evidentiary hearing. In addition, despite the fact that no party had made a request to file any additional testimony, the Entry stated: "Staff and all parties shall file any additional expert testimony by April 22, 2013." On April 22, 2013, Duke filed the additional expert testimony of William Don Wathen,[16] Gary J. Hebbeler[17] and Shawn S. Fiore.[18] Although the Utility did have ample opportunity to present the information in Mr. Fiore's and Mr. Hebbeler's testimony from the date of filing its Application on July 9, 2012 through February 25, 2013, when testimony in response to the Staff Report was due, the Utility sprung on the parties this significant testimony on highly technical matters only one week before the evidentiary hearing, and eight and a half months after filing its Application.

The Commission held local public hearings in Hamilton on February 19, 2013, Middletown on February 25, 2013, and Cincinnati on February 20 and 28, 2013.[19] The evidentiary hearings were conducted on April 29 through May 2, 2013. The Attorney

[13] Joint Ex. No. 1 (Stipulation and Recommendation) at 8 (April 2, 2013).

[14] OCC Ex. No. 18 (OCC Objections to the Staff Report) at 11-14 (February 4, 2013).

[15] Joint Ex. No. 1 (Stipulation and Recommendation) at 8 (April 2, 2013).

[16] Duke Ex. No. 19C (Third Supplemental Testimony of William Don Wathen) (April 22, 2013).

[17] Duke Ex. No. 22B (Supplemental Testimony of Gary J. Hebbeler) (April 22, 2013).

[18] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) (April 22, 2013).

[19] Entry at 2 (January 18, 2013).

Examiners established a briefing schedule with Initial Briefs due on June 6, 2013, and Reply Briefs due on July 20, 2013.[20] OCC and OPAE hereby submit this Initial Brief within the schedule established by the Attorney Examiners.

III. BURDEN OF PROOF AND STANDARD OF REVIEW

A. Burden of Proof

In a rate case, the Utility has the burden of proving that its Application is just and reasonable. R.C. 4909.18 states that, "[A]t such hearing, **the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility**."[21] R.C. 4909.19 also states, "[A]t any hearing involving rates or charges sought to be increased, **the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.**"[22] Duke is a public utility as defined in R.C. 4909.01 and R.C. 4905.02. The current proceeding includes rates or charges sought to be increased by the Utility's Application. This is further established by the fact that the case was filed in Case No. 12-1685-GA-AIR, where "AIR" is the PUCO's designation for an application to increase rates.

In this case, Duke has the burden of proving that it is entitled to collect from customers its MGP-related investigation and remediation expenditures under the PUCO's ratemaking formula, and that its expenditures were prudently incurred.

[20] Tr. Vol. IV at 1010 - 1011 (Pirik) (April 2, 2013).

[21] R.C. 4909.18. (Emphasis added).

[22] R.C. 4909.19. (Emphasis added).

B. Standard of Review

The Commission has the responsibility to approve rates that are just and reasonable. R.C. 4909.19 states:

> Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall * * *. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems **just and reasonable**.

In addition, R.C. 4909.15 states that rates must be just and reasonable:

> The public utilities commission, when fixing and determining **just and reasonable** rates, fares, tolls, rentals, and charges, shall determine * * *.[23]
>
> When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be**, unjust, unreasonable**, unjustly discriminatory, unjustly preferential, or in **violation of law** * * *
>
> (2) With due regard to all such other matters as are proper, according to the facts in each case,
>
> * * *
>
> (b) * * *, fix and determine the **just and reasonable** rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected * * *. .[24]

Furthermore, R.C. 4909.154 states that the PUCO shall not allow utilities to collect expenses from customers that are imprudently incurred:

> In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission shall consider the management policies, practices, and organization of the public utility. The commission shall require such public

[23] R.C. 4909.15 (A). (Emphasis added).

[24] R.C. 4909.15 (D)(2). (Emphasis added)

> utility to supply information regarding its management policies, practices, and organization. If the commission finds after a hearing that the management policies, practices, or organization of the public utility are inadequate, inefficient, or improper, the commission may recommend management policies, management practices, or an organizational structure to the public utility. In any event, **the public utilities commission 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**.[25]

Duke was given accounting authority to defer these costs. But the PUCO must determine if the collection of such deferred costs from customers is allowed under the PUCO's rate-making formula (R.C. 4909.15). And the PUCO must determine if the cost collection should be limited because the costs were not prudently incurred (R.C. 4909.154).

IV. THE STIPULATION

OCC and OPAE are Signatory Parties to the Stipulation, reflecting the settlement of all issues except for Duke's issue to charge customers $63,000,000 for manufactured gas plant site cleanup. The standard of review for consideration of a stipulation has been discussed in a number of Commission cases and by the Ohio Supreme Court in *Duff v. Public Utility Commission of Ohio*:

> A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.[26]

[25] R.C. 4905.154. (Emphasis added).

[26] *Duff v. Pub. Util. Comm*. (1978), 56 Ohio St.2d 367.

The Court in *Consumers' Counsel* also provided guidance as to the following factors to be considered in determining whether a stipulation is just and reasonable: (1) whether the settlement is a product of serious bargaining among capable, knowledgeable parties; (2) whether the settlement benefits customers and the public interest; and (3) whether the settlement violates any important regulatory principle or practice.[27]

OCC supports[28] the Stipulation, as per the April 22, 2013 testimony of OCC witness Beth Hixon. She recommended that the PUCO adopt the Stipulation as consistent with the three-prong test.[29]

V. THE STRICT LIABILITY PROVISIONS OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT ("CERCLA") APPLY TO OWNERS AND OPERATORS, NOT CUSTOMERS.

A. CERCLA Imposes Strict Liability on Duke, But Not On Its Customers.

Duke acknowledges that it faces strict liability for remediating contamination at both the East End and West End MGP sites under CERCLA.[30] The West End site is located on the west side of downtown Cincinnati and it was constructed by the Cincinnati

[27] *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d at 126, 592 NE 2d at 1373.

[28] There is an amendment pending in the General Assembly (SC3469X1 for H.B. 59) that, in some cases, would excuse natural gas utilities from time-honored regulatory law, including R.C. 4909.15(A), that has protected Ohio utility consumers in the ratemaking process over the last hundred years. In this case, Signatory Parties (including Duke, OCC and OPAE) agreed to litigate their positions on whether Duke can collect $63 million from its Ohio customers for manufactured gas plant remediation. But should the amendment become law and if Duke (or any party) claims that the amendment is applicable to this case, then OCC and OPAE will assess (based on the law, any such claims by Duke and other factors) whether the changed circumstances affect OCC and OPAE's support for the settlement (Stipulation). In this regard, OCC and OPAE predicated our signing the settlement on the balance and consumer protection of current law that would guide the PUCO's decision on Duke's request to charge customers $63 million for manufactured gas plant clean-up.

[29] OCC Ex. No. 1 (Direct Testimony of Beth E. Hixon) at 3, 10 (April 22, 2013).

[30] Duke Ex. No. 21A (Supplemental Direct Testimony Jessica Bednarcik) at 4 (February 25, 2013). See also Tr. Vol. I at 183 (Bednarcik) (April 29, 2013).

Gas Light and Coke Company in 1841. Gas for lighting was first produced at the plant in 1843, and the manufacture of gas ceased in 1928.[31] The East End site is located about four miles east of downtown Cincinnati. Construction of the East End site began in 1882 and commercial operations began in 1884, with the manufacture of gas ceasing in 1963.[32]

CERCLA is the federal statute that authorizes the EPA to respond to releases, or threatened releases, of hazardous substances that may endanger public health, welfare, or the environment.[33] CERCLA also enables the EPA to force parties responsible for environmental contamination to clean it up or to reimburse Superfund for response or remediation costs incurred by the EPA. However, in these proceedings, Duke is voluntarily undertaking the remediation actions at the MGP Sites.[34] Duke has not faced an enforcement action from the U.S. EPA or the Ohio EPA.[35]

B. Duke's Customers Are Not A Responsible Party under CERCLA.

CERCLA identifies four categories of actors upon whom it imposes liability. None of the four categories extend liability to actors uninvolved with the property. Under CERCLA, liable parties include 1) the owner or operator of a site where the contamination release occurred, 2) past owners or operators at the time of the release, 3) "arrangers" which are actors, who were often the generator of the hazardous substance, that arranged for the transportation and disposal of the waste at the site where the release occurred, and finally 4) transporters who selected the site for disposal where the

[31] Duke Ex. No. 20A (Supplemental Testimony of Andrew Middleton) at 2-5 (February 25, 2013).

[32] Duke Ex. No. 20A (Supplemental Testimony of Andrew Middleton) at 7 (February 25, 2013).

[33] 42 USCS § 9607 (a)(1)-(4).

[34] Duke Ex. No. 21 (Jessica Bednarcik) at 6-7 (July 20, 2012).

[35] Tr. Vol. I at 139 (Margolis) (April 29, 2013).

hazardous release occurred.[36] The customers of a utility do not fall within any of the four above-listed categories, and are not liable for these costs.

Under these categories there is no dispute that Duke is the current owner or operator of the site where the contamination releases occurred. There is also no dispute that Duke's predecessor was the past owner or operator of the site where the contamination releases occurred. However, according to Duke, Columbia Gas of Ohio, Inc. ("Columbia") may also have been the owner or operator of the sites at the time of the contamination release from 1909 to 1946.[37] With regard to the third category of liable parties -- arrangers -- the generator of the hazardous substance that arranged for disposal and release of the contamination – this is also Duke and possibly Columbia. Finally, under category four -- the transporter who selected the site for disposal of the hazardous material -- again this is Duke and possibly Columbia. Duke's customers do not fall under any of the four CERCLA categories of liable parties.

In addition to the CERCLA categories not applying to Duke's customers, the legislative intent of CERCLA points to Duke as the party responsible for the release of hazardous substances and thus the party that should pay the costs associated with a clean-up or remediation, and not the taxpayers.[38] The legislative history of CERCLA also shows that forcing taxpayers to pay for the cleanup of contaminated sites was thought to "unfairly force those most likely to suffer personal health and property damage to bear the additional cost of removal" and that Congress did not want to "allow the responsible

[36] 42 USCS § 9607 (a)(1)-(4).

[37] OCC Ex. No. 7 (OCC INT No. 15-577).

[38] 96 Cong. House Debates 1980; CERCLA Leg. Hist. 17. (Statement of National Association of Attorney Generals) (Statement of Mr. Jeffords).

parties to evade the costs of cleanup at the expense of the taxpayers."[39] In this case, the Utility's customers are analogous to taxpayers and should not be held responsible for the costs of cleanup, and thus allow Duke to evade liability.

C. It Would Be Inequitable For Duke's Customers to Be Held Liable For The MGP Site Remediation Costs.

Furthermore, CERCLA legislative history seeks to impose liability for the cleanup costs on those that have "benefited most directly from cheap, inadequate disposal practices, and which have generated the wastes which imposed the risks on society * * *."[40] It was Duke's shareholders who benefited from the operation of the MGP sites, because, without the manufacturing of natural gas, Duke would have had no product to sell and thus, shareholders would have had no business. Moreover, shareholders also benefited from the sale of the numerous manufactured gas by-products.[41] While shareholders benefited, Duke has provided no evidence that customers ever benefited from the sale of these by-products.

Finally, one of the sponsors of CERCLA stated that the Act had four goals including making "those persons who cause or contribute to hazardous waste releases at inactive sites strictly liable for cleanup costs."[42] The sponsor further stated that CERCLA's liability provision assured "the costs of chemical poison releases are borne by those responsible for the releases" and "creates a strong incentive for both prevention of

[39] Id.

[40] 96 Cong. House Debates 1980; CERCLA Leg. Hist. 16. (Statement of Mr. Florio).

[41] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 29 (February 25, 2013).

[42] 96 Cong. House Debates 1980; CERCLA Leg. Hist. 16 (Statement of Mr. Florio).

releases and voluntary cleanup of releases by responsible parties."[43] As concluded by Duke's own witness,[44] the CERCLA liability falls on the Utility.

The Ohio Supreme Court has stated that the Commission is a creature of the General Assembly and cannot ignore statutes and legislate in its own right.[45] The Court has held that the statutes the Commission relied upon contained no provisions insulating investors from the type of losses that occurred and that absent explicit statutory authorization the Commission "may not benefit the investors by guaranteeing the full return of their capital at the expense of the rate payers."[46]

Similarly, in this case, the Utility identifies the statutes (CERCLA and R.C. 3746) that create its liability. Those statutes contain explicit provisions about who is liable for the costs of investigation and remediation. The Utility may seek to recover the costs it has incurred from insurance carriers or other potentially responsible third parties, but not from its customers. In fact, Duke has only preliminarily begun to explore the possibility of recovering remediation costs from any third party that may have some liability, or from the insurance carriers that may be liable under excess liability policies.[47] Duke seems to prefer a path of what it considers to be least resistance -- and has focused primarily on recovering costs from current and future customers.

Duke's customers played no part in releasing any hazardous substance at the East End or West End sites and as such are not liable under CERCLA or the Voluntary Action

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[43] Id.

[44] Duke Ex. No. 23 (Direct Testimony of Kevin Margolis) at 12 (February 25, 2013). See also Tr. Vol. I at 145 (Margolis) (April 29, 2013).

[45] *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 67 Ohio St.2d 153, 166 423 N.E.2d 820 (1981) ("*Consumers' II*").

[46] Id. at *167.

[47] Tr. Vol. II at 303-305, 380-391 and 398-399, (Bednarcik) (April 30, 2013).

Program ("VAP").[48] Under *Consumers' II*, the Commission cannot ignore these statutory requirements and rewrite the legislation such that it would allow the Utility to recover costs it incurred from a non-liable actor, i.e. customers. Liability springs from ownership or control of the either the hazardous substance or the land on which it was released, but not from purchasing a product decades after the plants ceased operations that has nothing to do with the underlying liability.

Collecting MGP-related costs from customers in this case would be an inequitable outcome because it would permit the Utility's shareholders to profit from the use of the MGPs in the past while avoiding any of the business risk associated with their past use of the plants. The Commission should, therefore, disallow Duke's request to collect from its customers the MGP-related investigation and remediation costs. The costs should instead be borne by Duke's shareholders.[49]

VI. THE PROPOSED INVESTIGATION AND REMEDIATION COSTS ARE NOT RECOVERABLE FROM CUSTOMERS UNDER THE PUCO'S RATEMAKING FORMULA -- FIXATION OF REASONABLE RATES UNDER R.C. 4909.15(A).

The PUCO authority to regulate natural gas utilities was created in 1911. The initial operations of the MGP sites (for the East End from 1884 to 1963, and for the West End from 1843 to 1928)[50] pre-date the PUCO.[51] In fact, the majority of manufactured gas production -- and in turn the pollution from that production -- also occurred prior to

[48] Ohio Adm. Code 3745-300, et seq.

[49] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 36 (February 25, 2013).

[50] Duke Ex. No. 20A (Supplemental Testimony of Andrew Middleton) at 2-5 (February 25, 2013); See also, Tr. Vol. I at 183 (Bednarcik) (April 29, 2013) (West End Site stopped manufacturing gas in 1928).

[51] http://www.puco.ohio.gov/puco/index.cfm/consumer-information/consumer-topics/90

PUCO regulation of natural gas utilities.[52] Moreover, no one in this case disputes that the underlying MGP facilities that caused the contamination are no longer used and useful.[53] The land and any natural gas facilities at the MGP sites determined to be used and useful as of date certain in these proceedings did not cause the contamination.[54] The investigation and remediation expenses were not incurred in rendering public utility service. Therefore, as argued in more detail below, the proposed investigation and remediation expenses are not recoverable from customers under the PUCO's ratemaking formula.[55]

A. The PUCO's Ratemaking Formula Balances The Interests Of Ohioans And Their Public Utilities.

The PUCO's ratemaking statute requires utility plant to be "used and useful" before customers are required to pay for it. The statute also requires utility expenses to be the cost of "rendering the public utility service * * *" to current customers if they are to pay for it. Properly interpreted and enforced, the above standards in R.C. 4909.15(A) balance the interest of customers and public utilities in the PUCO ratemaking process. Therefore, the collection of deferred MGP-related investigation and remediation costs from customers should be denied under the Commission's rate making formula contained in R.C. 4909.15. R.C. 4909.15 states:

> (A) 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 or, with respect to a natural gas**

[52] Tr. Vol. II at 413 (Bednarcik) (April 30, 2013).

[53] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 32 (February 25, 2013).

[54] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 32 (February 25, 2013).

[55] Tr. Vol. III at 769 (Wathen) (May 1, 2013).

> **company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined.** The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.
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> * * *
>
> (4) **The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section**, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period. (Emphasis added).

The PUCO Staff's determination of the reasonableness of the MGP-related expenses is based upon the stated purpose of its investigation: "to ascertain the reasonableness of the proposed expenses, determine if the proposed expenses are recoverable in natural gas distribution rates under the Commission's rate-making formula"[56] Under Ohio's ratemaking formula, R.C. 4909.15,[57] and Ohio Supreme Court precedent, all MGP-related investigation and remediation expenses should be disallowed in order to prevent the collection of unjust and unreasonable costs from Duke's customers.

B. The Facilities That Caused The Contamination, At The MGP Sites, Are Not Currently Used And Useful. The Facilities That Are Currently Used And Useful Did Not Cause The Contamination.

1. MGP facilities that caused the contamination are not used and useful.

The East End and West End MGP facilities are not used and useful. It was Duke's operations of those MGP facilities that caused the contamination that Duke is

[56] PUCO Staff Ex. No. 1, (Staff Report of Investigation) at 40 (January 4, 2013).

[57] See also R.C. 4909.154.

now investigating and remediating at those MGP Sites. Based on those facts, OCC witness Bruce Hayes explained:

> There are several reasons why I take exception to the Staff's [interpretation of the used and useful standard and] recommendation. First, the MGP sites have not been used for MGP production since 1963 (East End) and since [1928] (West End).[58] It is my understanding, based on my knowledge of the rate making formula in O.R.C. 4909.15 and on advice of counsel, that R.C. 4909.15(A)(1) requires the valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. However, no MGP-related investment could be considered used and useful in rendering the public utility service to customers as of the date certain, under the Commission's rate-making formula.[59]

Therefore, the costs of investigation and remediation contamination arising from the past operations of facilities that are no longer used and useful cannot be collected from customers under the PUCO's rate making formula.

The Ohio Supreme Court has interpreted R.C. 4909.15 to mean that only the facilities that are "actually used and useful" may be included in rates for recovery from customers.[60] In *Consumers' I*, the Court reviewed whether a utility's nuclear power plant that had not yet become operational should have been included in the utility's rate base.[61] The Court held that the nuclear power plant was not includable in base rates because the requirements of R.C. 4909.15 had not been met.[62] The Court stated that the statutory

[58] Duke Ex. No. 20A (Supplemental Testimony of Andrew Middleton) at 2-5 (February 25, 2013). See also Tr. Vol. I at 183 (Bednarcik) (April 29, 2013) (West End Site stopped manufacturing gas in 1928).

[59] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 32 (February 25, 2013).

[60] *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 58 Ohio St.2d 449, 453, 391 N.E.2d 311 (1979) ("*Consumers' I).*

[61] Id. at *452.

[62] Id. at *457.

language incorporated the generally accepted principle, given by the United States Supreme Court, "that a utility is not entitled to include in the valuation of its rate base property not actually used or useful in providing public service, **no matter how useful the property may have been in the past** or may yet be in the future."[63]

The Ohio Supreme Court further stated that it would be inequitable to prematurely shift the risk of the failure of an asset not yet proven from the shareholders to the customer.[64] The Court's rationale for that statement was that the shareholders stand to gain from the success of the plant so it is appropriate for them to bear the risk of its failure as opposed to the customers, who gain nothing if the plant succeeds and therefore should not also be expected to bear the risk of its failure.[65]

Assuming *arguendo* that the remediation costs in question are related to utility property that is no longer in use, then applying the United State Supreme Court principle as recognized by the Ohio Supreme Court in *Consumers' I*, Duke is not entitled to the inclusion of MGP property in its rate base. Following the rationale of *Consumers' I*, where the Court held it would be inequitable to prematurely shift the risk of failure of a utility asset to the customer before the asset has provided anything for the customer, it is equally inequitable to shift the risk of residual liability of an asset, that has not been used and useful in over seventy years, to the customer. Any benefit that past customers might have enjoyed from over seventy years ago from the MGPs, has long since ceased. Current and future customers do not receive and will continue to not receive a benefit from the MGPs. However, Duke's shareholders have benefited in the past from the

[63] Id. (citing to *Denver Union Stock Yard Co. v. United States*, (1938), 304 U.S. 470). (Emphasis added).

[64] Id. at *456.

[65] Id.

MGPs Sites, and have continued to benefit through past rates. Therefore, it is only equitable that the Utility bears the costs incurred to remediate the MGPs.

2. Facilities at the MGP Sites that are used and useful for utility service to customers did not cause the contamination.

Based on its own review, PUCO Staff evaluated the MGP sites by looking at the individual parcels that the Utility established to assist in its investigation and remediation efforts.[66] At the East End site, PUCO Staff concluded that within the eastern parcel the only areas that were used and useful were the portions of the parcel providing access to underground natural gas pipelines and the pipelines themselves.[67] To address this very limited use, PUCO Staff allowed a 25-foot corridor on either side of the centerline of the pipe to also be considered used and useful.[68] The PUCO Staff also concluded that the entire central parcel of East End site was used and useful, but that the only part of the western parcel that was used and useful was an area contained within a 50-foot buffer around an existing vaporizer building.[69]

Even though the PUCO Staff concluded that certain portions of the property housing the former MGPs contain facilities that it considers to be used and useful today, the facilities used today bear no relationship to the MGP facilities that caused the contamination. OCC witness Hayes explained:

> the facilities that the PUCO Staff determined to be used and useful on the MGP sites (the areas that provide access to the underground natural gas pipelines and the pipelines themselves,[70] the buffer

[66] PUCO Staff Ex. No. 1 (Staff Report of Investigation) at 41 (January 4, 2013).

[67] Id.

[68] Id.

[69] Id. at 42.

[70] PUCO Staff Ex. No. 1 (Staff Report of Investigation) at 41 East End MGP Site Eastern Parcel (January 4, 2013).

> around the Vaporizer Building,[71] etc.) did not cause the contamination being remediated nor were these facilities the reason that Duke undertook the remediation activities at these MGP sites. The need for remediation was precipitated by construction projects near each of the sites that would potentially result in increased exposure to impacted material.[72]

Because recovery is being sought for costs incurred for the remediation of former MGPs, the only property that should be considered is any portions of the MGPs that are still used and useful to provide natural gas service to current customers. However, the evidence offered by the Utility shows that no portions of the MGP Sites are still used and useful.

Under the Commission's rate making formula (R.C. 4909.15 (A)(1)), none of the remediation costs should be collected from Duke's customers, because none of the underlying MGP facilities that gave rise to the cleanup costs were used and useful in the provision of utility service at date certain or during the deferral period.[73] In addition, any of the facilities on the MGP Sites that are currently used and useful did not cause the contamination being remediated.[74] Therefore under the PUCO's rate making formula, Duke should be denied the opportunity to collect any investigation and remediation costs from its customers.

[71] PUCO Staff Ex. No. 1 (Staff Report of Investigation) at 42 East End MGP Site Western Parcel (January 4, 2013).

[72] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 32 (February 25, 2013) citing Duke Ex. No. 21, (Direct Testimony of Jessica L. Bednarcik) at 8, lines 7-23 (July 20, 2012).

[73] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 32, (February 25, 2013).

[74] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 32, (February 25, 2013).

C. Customers Should Not Be Charged For Duke's Expenditures Because Remediation Costs Were Not Incurred By Duke In Rendering Public Utility Service During The Test Year Or At The Date Certain For Which Rates Are To Be Fixed And Determined.

In addition to the used and useful standard in the PUCO's rate making formula, an additional standard exists that requires that claimed expenses be incurred in rendering public utility service. R.C. 4909.15(A)(4) states:

> The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section * * *.

Duke's collection from customers for environmental investigation and remediation costs of its two former MGP sites is contrary to longstanding ratemaking principles because the facilities that these costs relate to are not being used to provide current service to customers. Instead, the capital investment and costs associated with the MGPs were collected from customers through past rates.

Since the MGP facilities are no longer used to provide utility service, environmental remediation costs associated with them would not relate to the provision of current service and should not be allowed. Moreover, the past costs associated with operating these facilities included a return on capital given in recognition of the risk associated with utility operations **and** insurance cost for liabilities associated with such operations. Those costs were designed to compensate the utility for the risks associated with operating those facilities, including any liabilities related to them.

OCC witness Bruce Hayes testified in support of this position:

> The costs that Duke is seeking to collect from customers in this case cannot be tied to rendering any current service for Duke's customers. Instead, the costs Duke is seeking to collect are related to the environmental investigation and remediation of former manufactured gas plant sites that produced gas that was used to

> render utility service over 50 years ago. For costs to be eligible for recovery from customers under the rate making formula in the law, the costs must be incurred for property that is used and useful, as of the date certain, in rendering utility service or for rendering service during the test period.[75] As explained above, MGP-related costs are neither. The requirements of R.C. 4909.15, therefore, have not been satisfied.[76]

Mr. Hayes further testified on this point:

> Counsel advises (and I am aware) that a rate making standard is that expenses to be considered as a basis for setting rates should be normal and recurring. An example of such normal and recurring expenses incurred typically by utilities would be expenditures for company operations, maintenance, personnel related costs, administrative expenses, taxes and depreciation. Thus, under the Ohio rate making formula (per R.C. 4909.15(A)(4)), in order for the MGP-related investigation and remediation costs to be collected from customers, the costs must be normal and recurring in the course of rendering utility service. There has been no showing or even a claim that the investigation and remediation costs were normal or recurring, or that they were incurred in the course of Duke providing utility service. In fact, the Staff recognized the non-recurring nature of these costs in the Staff report by stating: "except for certain ongoing environmental monitoring costs, the MGP costs **are one-time nonrecurring expenses** * * *." The very nature of the MGP-related costs for investigation and remediation, which Duke proposes for recovery from customers, is that these costs are not normal or recurring.[77]

Because the MGP investigation (except for ongoing monitoring costs) and remediation costs are not incurred in the provision of public utility service and are nonrecurring costs, they are not proper for collection from Duke's customers under the PUCO's rate making formula, and Duke's request should therefore be denied.

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[75] R.C. 4909.15.

[76] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 33-34 (February 25, 2013).

[77] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 34-35 (February 25, 2013).

VII. THE PUCO SHOULD NOT ALLOW DUKE TO CHARGE CUSTOMERS FOR MGP-RELATED INVESTIGATION AND REMEDIATION COSTS BECAUSE THE UTILITY DID NOT PROVE THE PRUDENCE OF ITS MGP SITE ASSESSMENT AND REMEDIATION EXPENDITURES.

Duke has not met its burden of proof to demonstrate the reasonableness and prudence of its MGP costs. Duke offered absolutely no documentation into evidence in these proceedings that documents the decision process supporting the remediation options chosen. In this regard, Duke did not put any such analysis into writing, and more importantly into the record of these proceedings. Duke offers the PUCO only after-the-fact self-serving testimony that its chosen option was reasonable in a weak attempt to justify its excessive MGP-related investigation and remediation expenditures.[78]

A. Duke's Failure To Document The Prudence Of Its Expenditures Is Indicative Of The Imprudence of Its Selection of Remedial Options.

Duke has the burden of proof to show that its request to collect MGP-related investigation and remediation costs from its customers is just and reasonable.[79] Duke must demonstrate to the Commission that such costs were prudently incurred. However, the rationale offered by Ms. Bednarcik for not documenting the evaluation process was that "written documentation related to looking at evaluated options is not required by the Ohio VAP, and also in [Ms. Bednarcik's] personal [opinion such] evaluation would have been an imprudent use of money * * *."[80] If Duke fails to make the necessary showing, then cost recovery must be denied. Duke did not meet its burden in this case.

In determining prudence, the Commission uses the following standard:

> A prudent decision is one which reflects what a reasonable person would have done in light of conditions and circumstances which

[78] Tr. Vol. I at 215 (Bednarcik) (April 29, 2013).

[79] *See* R.C. 4909.18 and R.C. 4909.19.

[80] Tr. Vol. I at 213 (Bednarcik) (April 29, 2013).

> were known or reasonably should have been known at the time the decision was made. The standard contemplates a retrospective, factual inquiry, without the use of hindsight judgment, into the decision process of the utility's management.[81]

In these cases, Duke did not produce a single written report documenting the analysis or evaluation of the remedial options that the Utility allegedly considered to support its decision making.

Because Duke did not produce, and apparently does not have, any such documentation, there is no objective evidence from which the PUCO or the parties can evaluate Duke's decision making process at the time the remedies for the East End and West End MGP Sites were selected. As Duke witness Jessica Bednarcik admitted on cross-examination, there are no documents for the PUCO to review.[82] Ms. Bednarcik testified it would have been an imprudent use of funds to create such a document.[83]

She also testified that it would have been imprudent to document Duke's assessment of alternatives (i.e., to perform a formal or informal feasibility study) despite the fact that she could not even testify as to how much such a document would have cost to create.[84] Absent documented analysis of remedial options and the costs associated with them, OCC and OPAE submit that the PUCO cannot put itself in Duke's shoes at the time the decisions were made and determine, in light of the conditions and circumstances, the reasonableness of Duke's decisions. Therefore, Duke has not met its burden of proof.

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[81] *Cincinnati Gas & Electric Company v. Pub. Util. Comm.,* (1999) 86 Ohio St. 3d. 53, 1999 Ohio Lexis 1887.

[82] Tr. Vol. I at 215 (Bednarcik) (April 29, 2013).

[83] Tr. Vol. I at 215 (Bednarcik) (April 29, 2013).

[84] Tr. Vol. I at 219 (Bednarcik) (April 29, 2013).

The absence of documentation supporting Duke's decision making is a significant gap in the Utility's case that cannot be overcome by after-the-fact testimony that opines on the prudence of Duke's decision-making without any objective factual evidence to support such statements. Nonetheless, OCC and OPAE discuss below Duke's attempts to support its claim in these regards.

1. Duke's Witnesses Neither Reviewed, Nor Performed, Any Documented Analysis of Options Considered and Rejected by Duke To The Excessive and Imprudent Excavation Option Selected by Duke.

Duke presented the testimony of three technical witnesses regarding the reasonableness and prudence of its assessment and investigation activities.

a. Duke witness Bednarcik

Duke has alleged that it considered a variety of technology options for remediating the East End and West End MGP sites. According to Duke witness Ms. Bednarcik, the following technologies were considered by Duke:

> Technologies considered included, but were not limited to, monitoring natural attenuation, excavation, solidification, in-situ chemical oxidation, thermal heating, containment, engineering controls, and institutional controls. Combinations of technologies were also considered.[85]

With regard to the process Duke used to evaluate these options, Ms. Bednarcik testified that when deciding upon the course of action for investigation and remedial action scope of work, Duke worked with the Ohio EPA Certified Professionals (CPs) and environmental consultants. This work was to evaluate different options based upon various criteria, including but not limited to compliance with environmental regulations,

[85] OCC Ex. No. 2 (Duke response to OCC Interrogatory Nos. 11-441 and 11-452).

best practices, feasibility, constructability, safety, prior experience, and cost.[86] Ms. Bednarcik further identified the selection of remediation approaches as a collaboration between the VAP CP, technical people, construction engineers, environmental engineers, Duke electric and gas operation personnel, and herself.[87]

In terms of the balance sought in the selection process, Ms. Bednarcik admitted on cross-examination that in endeavoring to achieve the two most important threshold remediation considerations -- protective of human health and the environment and meeting applicable standards -- there are different technology options available to reach those remediation goals.[88] And each of the available technology options involves a different cost,[89] a different short-term risk profile,[90] and a different long term risk profile.[91]

Nevertheless, despite identifying some of the available remediation alternative technologies, the process utilized and people involved in selecting options, the options selected and the analysis performed "was not explicitly documented."[92] There are no such documents available for the PUCO to review with regard to remediation of the East End or West End sites.[93]

Nor could Ms. Bednarcik provide any detail of the analysis that Duke or its design consultants allegedly conducted to select such options.

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[86] Duke Ex. No. 21, (Direct Testimony of Jessica Bednarcik) at 20-21 (July 20, 2012).

[87] Tr. Vol. I at 201-202 (Bednarcik) (April 29, 2013).

[88] Tr. Vol. I at 210 (Bednarcik) (April 29, 2013).

[89] Tr. Vol. I at 210 (Bednarcik) (April 29, 2013).

[90] Tr. Vol. I at 210 (Bednarcik) (April 29, 2013).

[91] Tr. Vol. I at 210 (Bednarcik) (April 29, 2013).

[92] Tr. Vol. I at 212 (Bednarcik) (April 29, 2013).

[93] Tr. Vol. I at 215 (Bednarcik) (April 29, 2013).

The culmination of Duke's evaluation of the remedial technology options led to the Remedial Action Plan ("RAP") for the East End site[94] and the Basis of Design Memorandum for the West End site.[95] These documents defined the remediation approach decided upon by Duke for remediating the MGP sites. But these documents lack any explanation or analysis of different remediation options considered or the costs of such other options.

The East End site investigation phase initially involved a firm -- AMEC, and a Certified Professional ("CP") hired by AMEC.[96] In 2007, additional investigation was conducted by Burns & McDonnell and Tom Shalala, a CP with Bureau of Veritas.[97] Burns & McDonnell was involved in the development of the Remedial Action Plan for the East End site.[98] Notably, Duke did not call as witnesses in these proceedings any of the people involved in the development of the Remedial Action Plan to testify to the prudence of the scope and necessity of the East End site remediation.

The West End site was investigated by AECOM, a firm retained by Duke.[99] AECOM employed a CP, whom Ms. Bednarcik could not recall by name.[100] AECOM and its CP were involved in the development of the Basis of Design Memorandum for the West End site.[101] However, Duke did not call any of the CPs or environmental consultants who were involved in the development of the Basis of Design Memorandum

[94] Tr. Vol. I at 201 (Bednarcik) (April 29, 2013).

[95] Tr. Vol. I at 201 (Bednarcik) (April 29, 2013).

[96] Tr. Vol. I at 198-200 (Bednarcik) (April 29, 2013).

[97] Tr. Vol. I at 198-199 (Bednarcik) (April 29, 2013).

[98] Tr. Vol. I at 199 (Bednarcik) (April 29, 2013).

[99] Tr. Vol. I at 201 (Bednarcik) (April 29, 2013).

[100] Tr. Vol. I at 201 (Bednarcik) (April 29, 2013).

[101] Tr. Vol. I at 201 (Bednarcik) (April 29, 2013).

as witnesses in these proceedings to testify to the prudence of the West End Site remediation.

Instead, Duke offered the testimony of Mr. Shawn Fiore,, a CP employed by Haley and Aldrich.[102] Haley and Aldrich was hired by Duke to implement the Remedial Action Plan at the East End site.[103] Duke has spent approximately $25 million remediating the East End site, much of those costs paid to Haley & Aldrich and their subcontractors.[104] However, Mr. Fiore was not involved in the selection of the remedial options for either the East End or West End sites and relied entirely upon Ms. Bednarcik for information regarding the different options considered.

OCC and OPAE fundamentally disagree with Ms. Bednarcik that documentation of the different options Duke considered for its more than $60 million remediation plan was not absolutely necessary. Duke is asking the Commission to allow it to collect from customers $62.8 million dollars, and despite the fact that Duke understands that the Commission must find Duke's expenditures to be prudent,[105] Duke is stubbornly sticking to a story that either the VAP didn't require such a documented analysis, or that such an analysis would have been a waste of money. Duke finds itself with only self-serving testimony stating that its actions were prudent and asking the Commission to trust them because there is no independent factual evidence in the record to substantiate Duke's claims of prudence.

[102] Tr. Vol. II at 543 (Fiore) (April 30, 2013).

[103] Id.

[104] Staff Ex. No. 1 (Staff Report of Investigation) at 36-39 (January 4, 2013).

[105] Tr. Vol. III at 769 (Wathen) (May 1, 2013).

Duke witness Kevin Margolis was questioned about the reasonableness of pursuing third-party liability as a means of covering the cost associated with environmental remediation.[106] Interestingly, Mr. Margolis found that due to the expense associated with pursuing a third-party liability he would expect his client to have performed a "cost benefit analysis to demonstrate the effort to be worthwhile."[107] It is almost inconceivable that a Duke witness would need a cost benefit analysis to decide whether it would be prudent to pursue a third party liability claim, but Duke does not see a problem asking the Commission to authorize collection of $62.8 million from its customers without presenting comparable evidence of a cost benefit analysis documenting the prudence of Duke's decision-making on remediation options.

Absent testimony in these proceedings containing documentation of analysis demonstrating the prudence of Duke's decision making, the Utility has not met its burden of proof. Therefore, the Commission should deny Duke recovery from customers of the investigation, remediation and carrying costs associated with the clean-up at the East End and West End MGP Sites.

b. Duke witness Middleton

Duke's witness Andrew Middleton, Ph. D. was initially presented only to discuss general background information regarding MGP histories, recognition of MGP contamination, and industry practices to manage and remediate such contamination. Subsequently -- and very briefly – he opined regarding Duke's assessment and

[106] Tr. Vol. I at 125-126 (Margolis) (May 29, 2013).

[107] Tr. Vol. I at 126 (Margolis) (May 29, 2013).

remediation.[108] Specifically, he opined that Duke's remediation has been "prudent and consistent with current common industry practices."[109] He also opined that it was reasonable for Duke to initiate and proceed with remediation, with respect to both sites, following changes in the use of the properties "to address conditions in advance of the development of the new exposure pathways."[110]

However, Dr. Middleton provided no analysis of alternative remedial options available to Duke. He did not provide any site investigation or remediation services for those sites.[111] He did not discuss Ohio EPA's VAP, the applicable exposure pathways, the remedies available to Duke, or provide any analysis of the cost of different remedial options. Dr. Middleton admitted that he did not even read all of Ohio EPA's VAP Rules, and that he had only had an "overview" of them by Duke witness Fiore.[112] Yet his opinion appears categorical in nature, without meaningful consideration of whether Duke's expenditures were prudent. Dr. Middleton was not asked to respond to Dr. Campbell's testimony and provided no rebuttal or response to it.[113] His testimony does not specifically address either the Phase I or Phase II reports for either site.[114] Dr. Middleton did testify that, while he reviewed the Phase I and Phase II reports for the East End and West End sites, he did not recall any "consideration of alternatives" in those

[108] Duke Ex. No. 20A (Supplemental Direct Testimony of Andrew C. Middleton, Ph.D.) at 2, 11-12 (February 25, 2013).

[109] Duke Ex. No. 20A (Supplemental Direct Testimony of Andrew C. Middleton, Ph.D.) at 2 (February 25, 2013).

[110] Duke Ex. No. 20A (Supplemental Direct Testimony of Andrew C. Middleton, Ph.D.) at 11 (February 25, 2013).

[111] Tr. Vol. I at 81 (Middleton) (April 29, 2013).

[112] Tr. Vol. I at 48, 69 (Middleton) (April 29, 2013).

[113] Tr. Vol. I at 36-37 (Middleton) (April 29, 2013).

[114] Tr. Vol. I at 41-42 (Middleton) (April 29, 2013).

reports.[115] Nor did he recall any documentation of costs associated with different alternatives.[116]

Dr. Middleton acknowledged that different alternatives that are protective of human health and the environment can have different costs associated with them.[117] He testified:

> A. Alternatives are intended to reduce exposure of receptors, be they human or be they environmental receptors, to chemicals in the environment or those exposures down to acceptable levels. The containment alternatives that [prevent] that exposure in itself can do that and a removal can do that.[118]

Dr. Middleton testified that his only understanding of Duke's consideration of alternatives was based upon Ms. Bednarcik's testimony and upon conversations with Ms. Bednarcik.[119] Those conversations had to do only with field determinations of whether materials should be removed or solidified.[120] He also testified that, with respect to his clients, they generally "seek to spend what is necessary to obtain applicable standards" and do not "intend or seek" to spend more than is necessary to meet applicable standards.[121]

Dr. Middleton's testimony regarding the issue of prudence is without merit, reflects little or no consideration of alternatives or the cost of alternatives, and pertains only to the general process followed by Duke and not to any site-specific assessment or

[115] Tr. Vol. I at 41-43 (Middleton) (April 29, 2013).

[116] Tr. Vol. I at 53 (Middleton) (April 29, 2013).

[117] Tr. Vol. I at 43-44 (Middleton) (April 29, 2013).

[118] Tr. Vol. I at 44 (Middleton) (April 29, 2013).

[119] Tr. Vol. I at 46, 52-53 (Middleton) (April 29, 2013).

[120] Tr. Vol. I at 53 (Middleton) (April 29, 2013).

[121] Tr. Vol. I at 49-50 (Middleton) (April 29, 2013).

evaluation of alternatives.[122] OCC and OPAE submit that the absence of any evaluation of the cost of various alternatives, while recognizing that different alternatives can have much different costs, leaves his testimony without any substance when it comes to Duke's MGP sites. In sum, Dr. Middleton's testimony has no value in terms of the Commission's review in this proceeding and should be rejected in considering the issue of prudence for its lack of substantive analysis.

c. Duke witness Fiore

On April 22, 2013, Duke filed the Direct Testimony of Shawn S. Fiore.[123] Mr. Fiore's testimony, although titled Direct Testimony, was presented ostensibly to rebut OCC witness Campbell's testimony. Nonetheless, **at no point in his testimony did Mr. Fiore specifically rebut any claim made by Dr. Campbell**. And Duke never presented testimony to specifically rebut Dr. Campbell. Mr. Fiore's testimony is focused on certain limited topics. First, he discusses Ohio EPA's Voluntary Action Program and the role and requirements of Ohio EPA CPs in the VAP program.[124] Second, he discusses Urban Setting Designations ("USD") under the VAP.[125] Third, Mr. Fiore discusses VAP requirements for "free product."[126] Fourth, Mr. Fiore provides his assessment of whether Duke's site assessment and remediation activities have been "prudent and reasonable, and in conformance with VAP regulations" at both sites.[127]

[122] Tr. Vol. I at 45 (Middleton) (April 29, 2013).

[123] Duke Ex No. 26 (Direct Testimony of Shawn S. Fiore) (April 22, 2013).

[124] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 5-14 (April 22, 2013).

[125] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 14-17 (April 22, 2013).

[126] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 17-19 (April 22, 2013).

[127] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 20 (April 22, 2013).

Fifth, Mr. Fiore gives an opinion as to whether engineering controls (asphalt or concrete capping) would be a sufficient remedy for Duke's MGP sites.[128] His opinion on this - in short -"No." Sixth, he gave an opinion as to whether institutional controls (land use restrictions) would be a sufficient remedy for Duke's MGP sites.[129] Again, his answer is "No." Seventh, Mr. Fiore emphasizes the value of a "No Further Action" ("NFA") letter under the VAP.[130]

Eighth, Mr. Fiore discusses the various considerations for selection of a remedial option, including cost, within the scope of a VAP remediation.[131] He specifically states that "VAP does not specify or prescribe remedial options" and that "[i]t is up to the remediating party to determine how best to achieve those standards following the VAP regulations."[132] He acknowledges that "different approaches carry with them different costs."[133] Finally, he contends that "[t]o meet VAP criteria, including leaching to groundwater, surface water protection, and Protection of Groundwater Meeting Unrestricted Potable Use Standards ("POGWMPUS"), for example, removal or stabilization of the coal tar was necessary."[134]

With respect to Ohio EPA's VAP, what is most significant about that program for purposes of this proceeding is, as Mr. Fiore recognizes, that VAP does not prescribe a remedy but gives remediating parties a range of options to protect human health and the

[128] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 20-21 (April 22, 2013).

[129] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 21 (April 22, 2013).

[130] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22 (April 22, 2013).

[131] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013).

[132] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013).

[133] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 23 (April 22, 2013).

[134] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 23 (April 22, 2013). See O.A.C. 3745-300-10(D).

environment.[135] It is "up to the remediating party to determine how best to achieve" applicable standards.[136] While Mr. Fiore does not discuss the range of options that can be used to address particular exposure pathways under the VAP, Dr. Campbell discusses them at length and points to specific VAP standards in addressing the available approaches to remediation.

Mr. Fiore discusses Urban Setting Designations ("USD") and emphasizes the requirements and limitations of USDs.[137] Presumably, Mr. Fiore discusses USDs at length because Dr. Campbell indicates in his testimony that USDs were an option that Duke might have considered to extend the point of compliance for potable groundwater beyond Duke's property by as much as ½ mile.[138]

Mr. Fiore's discussion, however, is misplaced. Dr. Campbell discusses a USD as an option to meeting groundwater potability standards beyond the property boundaries if other measures are not sufficient to meet this standard. As Dr. Campbell noted, however, because a City ordinance exists in the area prohibiting the use of groundwater for potable use and because groundwater is not used for potable purposes at the property, consideration of groundwater for potable use purposes is not a required remediation[139]

Further, Duke's reports, cited by Dr. Campbell, make clear that groundwater for potable use consumption -- even beyond the property boundaries -- may not be an issue at

[135] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013).

[136] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 23 (April 22, 2013).

[137] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 14-17 (April 22, 2013).

[138] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 18 (February 25, 2013).

[139] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 17 & n.27 (February 25, 2013), *citing* Attachment JRC-11 (DEO-MGP 014094), Attachment JRC-15 (DEO-MGP 002005, and Attachment JRC-16 (DEO-MGP 001261).

all for cleanup. Groundwater, according to Cincinnati City Ordinance, cannot be used for potable uses.[140]

Dr. Campbell also himself emphasizes the use of Environmental Covenants as an Institutional Control to prevent use of groundwater in the area.[141] Dr. Campbell recognizes that a USD may not be necessary to address groundwater Unrestricted Potable Use Standards ("UPUS") but it should be considered if Environmental Covenants and the City Ordinance re insufficient. Mr. Fiore's comments on the applicability of USDs are misplaced.

Mr. Fiore also points out that USDs only address potable use of groundwater and do not address either surface water requirements or non-potable uses of groundwater beyond property boundaries.[142] However, as discussed above, there is no evidence that surface water standards have been or would be violated by the MGP sites. Thus, Mr. Fiore's suggestion that Dr. Campbell has not sufficiently analyzed this issue is misplaced. If there is a surface water standard that is violated, then the surface water issues can and should be addressed only when such an issue is determined to exist.

Furthermore, Mr. Fiore cites to O.A.C. 3745-300-10(E)(2)(a)(ii) to support his position, but this paragraph is not applicable where a USD has been obtained as clearly stated in that regulation.[143] And while Mr. Fiore argues that standards related to non-

[140] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 17 & Attachment JRC-16 (February 25, 2013).

[141] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 28 (February 25, 2013).

[142] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 17 (April 22, 2013).

[143] O.A.C. 3745 300-10(E)(2)(a) titled "Critical resource ground water without an urban setting designation." This rule states clearly that it is only applicable where "an urban setting designation has not been made." O.A.C. 3745-300-10(E)(2)(a).

potable uses must be met even if a USD is granted,[144] he cites to no authority for this position.

Mr. Fiore's discussion of "free product" is similarly in error and does not rebut Dr. Campbell's position that limited remediation of free product is necessary. Dr. Campbell acknowledged that "free product" has been measured on the west parcel of the East End site. Mr. Fiore and Dr. Campbell disagree as to definition of the term "free product." Dr. Campbell takes the position that "free product" must be mobile, and can , only properly be identified and measured in a monitoring well, where its mobility has been demonstrated[145]). Regardless, there is no sound basis for further clean-up of free product since the City Ordinance, use restrictions, and a USD designation, if necessary, would be adequate remediation under the circumstances to protect human health and the environment. As Dr. Campbell has recommended, monitoring should be continued to ensure that this is an adequate remedy.

The issue here is what has to be done about free product to meet compliance requirements. The purpose of remediating free product is to prevent future groundwater exposures.[146] However, where groundwater is already contaminated, the remedy for "free product" is subject to the same remediation as groundwater. Dr. Campbell recommended limited excavation of the tar pit along with Institutional and Engineering Controls.

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[144] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 17 (April 22, 2013).

[145] OCC Ex. No. 15A, (Direct Testimony of James R. Campbell, Ph.D.) at 22 (February 25, 2013), *citing* VAP Rule 3745-300-01 (Definitions).

[146] O.A.C. 3745-300-08(B)(2)(c), stating that "Properties with free product exceed applicable standards for unrestricted potable use of ground water" and, therefore, must follow response requirements in compliance with UPUS groundwater requirements.

Mr. Fiore's opinion that Duke's remediation was "prudent and reasonable, and in conformance with VAP regulations" is fundamentally lacking in merit for reasons similar to those detailed above with respect to Dr. Middleton's testimony on the issue of prudence. First, Mr. Fiore's opinions reflect little or no consideration of alternatives or the cost of alternatives. Neither Mr. Fiore nor his firm participated in the Phase 1 investigation of either site that led to the selection of a remedy.[147] Nor did they participate in the remediation that was part of Duke's claim in these cases.[148] He testified that he did not review any "documentation that showed an analysis of different options that Duke had available as far as remediation techniques."[149] He was not aware of any "sufficient documentation" of such options.[150]

Furthermore, Mr. Fiore did not know either the options that his own firm -- Haley & Aldrich -- had suggested for the East End site or the options that had been put forth by Burns & McDonnell for the West End site.[151] And Mr. Fiore himself was never asked to examine the reasonableness of costs at the MGP sites.[152] Thus, it is difficult to understand how Mr. Fiore could make a determination of prudence without knowing what alternatives were examined or the cost of such alternatives.

As noted above, Mr. Fiore also opined that neither Engineering Controls nor Institutional Controls alone would be adequate to meet applicable standards at Duke's

[147] Tr. Vol. II at 548-49 (Fiore) (April 30, 2013).

[148] Id.

[149] Tr. Vol. II at 553 (Fiore) (April 30, 2013).

[150] Tr. Vol. II at 553 (Fiore) (April 30, 2013).

[151] Tr. Vol. II at 556 (Fiore) (April 30, 2013) Burn & McDonnell did the Phase II and RAP for the East End Site. Tr. Vol. I at 201 (Bednarcik) (April 29, 2013) AECOM did the Phase II and Design Basis for the West End Site).

[152] Tr. Vol. II at 555 (Fiore) (April 30, 2013).

MGP sites.[153] It is unclear what point Mr. Fiore was making here since, as he admitted, no witness in this proceeding -- certainly not Dr. Campbell -- has suggested that they would be adequate.[154] Rather, Dr. Campbell has recommended some limited excavation, along with Institutional and Engineering Controls, and continued groundwater monitoring.

Mr. Fiore also emphasizes in his testimony the value of a No Further Action letter under the VAP, as well as a Covenant Not to Sue ("CNS").[155] But Dr. Campbell has not disputed the benefits of an NFA or a CNS. Indeed, Dr. Campbell has endorsed the VAP approach. It is Duke's failure to use cost-effective remediation tools, consistent with the VAP, that has been imprudent, not its decision to use the VAP program to implement its remediation.

Mr. Fiore testified that the VAP does not prescribe remediation options but gives the remediating party the ability to select the remediation option that is most suitable -- and prudent.[156] Dr. Campbell does not disagree with that point from Mr. Fiore. Importantly, Mr. Fiore recognizes that cost is a consideration. And he recognizes that cost should be evaluated in conjunction with protecting human health and the environment, as well as other goals.[157] It is Duke's failure to weigh the costs of alternative remedial technologies to a measurable extent that is the problem with its approach.

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[153] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 20-21 (April 22, 2013).

[154] Tr. Vol. II at 620 (Fiore) (April 30, 2013).

[155] Tr. Vol. II at 551 (Fiore) (April 30, 2013).

[156] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013); OCC Ex. No. 15A, (Direct Testimony of James R. Campbell, Ph. D.) at 8 (February 25, 2013).

[157] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22- 23 (April 22, 2013).

Finally, Mr. Fiore's assessment appears to turn on his opinion that "to meet VAP criteria, including leaching to groundwater, surface water protection and POGWMPUS, for example, removal or stabilization of the coal tar was necessary."[158] That is wrong. It is contrary to the facts. Removal or stabilization of the coal tar was not necessary.

The facts are, as discussed above, that Duke first determined that the "leaching to groundwater" exposure pathway was "not applicable" at Duke's MGP sites because groundwater was already contaminated.[159] There is no way to protect this exposure pathway at this point in time and it, therefore, could not be addressed.

Second, Mr. Fiore discusses "surface water protection."[160] But, as he repeatedly admitted, surface water testing has not been done -- despite years of opportunity to test. Therefore, it is not even known whether any remediation actions will need to be taken with respect to surface water.[161]

Finally, Mr. Fiore discusses "POGWMPUS." Perhaps he thinks that the length of this acronym will be scary to those reviewing his claim. But POGWMPUS simply means "Protection of Groundwater Meeting Unrestricted Potable Use Standards."[162] It means that if ground water meets Unrestricted Potable Use Standards, then remedial activities have to ensure the protection of that ground water. It states:

> (D) Protection of ground water meeting unrestricted potable use standards.

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[158] Duke Ex No. 26 (Direct Testimony of Shawn S. Fiore) at 23. As discussed below, POGWMPUS stands for Protection of Groundwater Meeting Unrestricted Potable Use Standards.

[159] OCC Ex. No. 15A, (Direct Testimony of James R. Campbell, Ph.D.) at 15, n.21 and n.22, citing to Attachments JRC-11 (DEO-MGP 023230), JRC-15 (DEO-MGP 002006), and JRC-16 (DEO-MGP 001262) (February 25, 2013).

[160] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 23.

[161] Tr. Vol. III at 599-603, 605-606, 624 (Fiore) (May 1, 2013).

[162] O.A.C. 3745-300-10(D).

> (1) When any ground water in a saturated zone underlying the property complies with the unrestricted potable use standards as determined by a phase II property assessment conducted in accordance with rule 3745-300-07 of the Administrative Code, the remedial activities undertaken in connection with a voluntary action at or upon the property must ensure that migration of hazardous substances or petroleum from source or source areas on the property will not result in unrestricted potable use standards being exceeded anywhere within the groundwater zone.

But, as noted above, groundwater is already contaminated. POGWMPUS is, therefore, not applicable to Duke's remediation to the extent that it refers to contamination of groundwater. To the extent that POGWMPUS is intended to protect the bedrock aquifer, Duke did no testing of the bedrock to determine if it is contaminated or threatened; nor did Duke analyze whether the remedy it implemented was needed to protect the bedrock aquifer or that it could be protected.

d. Summary

None of the three witnesses presented by Duke to support its MGP claims presented any sound evidence that Duke, in fact, made a substantive, cost-based assessment of remedial options. No feasibility study or other objective analysis was prepared.[163] Ms. Bednarcik considered it imprudent to spend $250,000 to determine whether more cost-effective alternatives, such as identified by Dr. Campbell, could be effective in protecting human health and the environment.[164]

Rather, Duke's witnesses only point to "presumptive remedies," as if remedial options could be ruled out and the best remedial option selected without a thoughtful,

[163] Tr. Vol. I at 215 (Bednarcik) (April 29, 2013).

[164] Tr. Vol. I at 215-17 (Bednarcik) (April 29, 2013).

written analysis and cost-benefit assessment.[165] Duke's witnesses did not identify, nor explain, other remedial options, the price of those options, or why they were rejected. The absence of documentation or support of remedial options for a project that has cost over $60 million to date and could well cost twice that sum,[166] is imprudent, and demonstrates the utter failure of Duke to meet its burden of proof in these cases. Duke's decision-making and lack of documentation for its decisions paints a picture of a utility that was not conservative with spending other peoples' money (meaning its customers' money).

2. Duke has Systematically Failed to Provide Proper Oversight of the Remediation Process to Ensure that Charges to Customers are Reasonable.

In 2009, Duke requested authority to create accounting entries to defer investigation and remediation costs associated with its MGP Sites.[167] OCC asked the PUCO to require Duke to provide annual updates of its investigation and remediation expenses.[168] OCC's request was consistent with a Commission requirement in Columbia Gas of Ohio Inc.'s MGP Deferral Order.[169] However,[170] Duke objected to OCC's request,[171] and the Commission denied OCC's request.[172] Duke then failed to exercise appropriate oversight of its expenditures.

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[165] Tr. Vol. II at 560 (Fiore) (April 30, 2013); Tr. Vol. III at 642-43 (Fiore) (May 1, 2013).

[166] Tr. Vol. II at 573-574 (Fiore) (April 30, 2013).

[167] *In re Duke MGP Deferral Case*, Case No. 09-712-GA-AAM, Application at 1-2 (August 10, 2009).

[168] Tr. Vol. III at 758 (Wathen) (May 1, 2013).

[169] Tr. Vol. III at 758 (Wathen) (May 1, 2013).

[170] Tr. Vol. III at 758 (Wathen) (May 1, 2013).

[171] OCC Ex. No. 11, (*In re Duke MGP Deferral Case*, Case No. 09-712-GA-AAM, Duke Memo Contra Applications for Rehearing) at 10-11 (December 18, 2009).

[172] *In re Duke MGP Deferral Case*, Case No. 09-712-GA-AAM, Entry on Rehearing at 7 (January 7, 2010).

There is an absence of sound managerial oversight in the budget process employed by Duke. Duke witness, Ms. Bednarcik, admitted she had responsibility for preparing budgets for Duke's MGP-related investigation and remediation activities.[173] Between 2008 and 2011, the approved annual budgets for Duke's investigation and remediation expenditures increased from $210,000 (2008), to $2.5 million (2009), to $10.5 million (2010) to $34.8 million (2011).[174]

Despite the exponential increases in the annual budget amounts between 2008 and 2011, Ms. Bednarcik admitted that she was not given any special instructions or guidelines,[175] management did not give her labor cost adjustments or inflation factors,[176] and she was not required to provide management any special written reporting to explain or justify year to year increases.[177] Instead, she was given a blank check for use of other peoples' (customers') money that Duke now is asking its customers to pay.

Ms. Bednarcik testified that she had quarterly meetings with Duke management within the gas department, power delivery, and environmental services to discuss what had been completed and what was expected to occur.[178] She also, at a minimum, held monthly meetings with her management to discuss changes in the field that might necessitate a change order.[179] But none of these activities resulted in a written report to document the process that resulted in the budget, other than the annual budget itself.[180]

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[173] Tr. Vol. I at 239 (Bednarcik) (April 29, 2013).

[174] OCC Ex. No. 3 (OCC POD No. 15-156).

[175] Tr. Vol. I at 244-245 (Bednarcik) (April 29, 2013).

[176] Tr. Vol. I at 245 (Bednarcik) (April 29, 2013).

[177] Tr. Vol. I at 245 (Bednarcik) (April 29, 2013).

[178] Tr. Vol. I at 250 (Bednarcik) (April 29, 2013).

[179] Tr. Vol. I at 250 (Bednarcik) (April 29, 2013).

[180] Tr. Vol. I at 251-252 (Bednarcik) (April 29, 2013).

Furthermore, in response to OCC discovery,[181] Duke admitted that there was no written actual versus budget variance reporting to management.[182] In fact, all discussions between MGP remediation project managers and Duke's management concerning variances from budget were done verbally.

It is not acceptable or sufficient to expect that Duke's management, by being informed verbally, can actually know that there can be variability in the incurrence of remediation expenditures, despite Ms. Bednarcik's testimony to the contrary. [183] Fiscal responsibility requires that issues causing variability between actual expenditures and budgeted dollars be identified, explained, and appropriately documented in writing. Yet, according to Ms. Bednarcik she was not required to put such actual versus budget variance explanations in writing to her management.[184]

Duke clearly failed to exercise appropriate management oversight over its MGP investigation and remediation expenditures.

3. Duke is aware of the importance of documenting its decision-making for purposes of demonstrating the prudence of its actions and for collecting lots of money from customers.

As explained above, there was no written documentation of the decision-making process resulting in the choice of one remediation option versus another.[185] Consistent with such lack of documentation justifying the scope and necessity of the remediation activities, Duke opposed annual reporting of its investigation and remediation deferral, and also employed relaxed budget/financial reporting requirements.

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[181] OCC Ex. No. 3 (OCC POD No. 15-156).

[182] Tr. Vol. I at 252 (Bednarcik) (April 29, 2013).

[183] Tr. Vol. I at 253-254 (Bednarcik) (April 29, 2013).

[184] Tr. Vol. I at 254 (Bednarcik) (April 29, 2013).

[185] Tr. Vol. I at 252 (Bednarcik) (April 29, 2013).

In addition, there was no management reporting to justify an increase in annual spending between 2008 and 2011 from $210,000 to $34.8 million. And finally, no actual versus budget written variance explanations to management were required. These shortcomings in Duke's management of its expenditures make it all the more unreasonable for the Commission to authorize collection of $62.8 million from Duke's customers. Duke cannot demonstrate its MGP-related expenditures were prudently incurred.

Duke understands and has experience with the PUCO's prudence review process. Duke experiences the PUCO's prudence review every two years as part of its gas cost recovery Management/Performance Audit ("M/P Audit") proceedings. On cross-examination, Mr. Wathen admitted that the M/P Audit of Duke's Gas Purchasing Practices and Policies constituted a "pretty extensive" review.[186] Through the M/P Audit proceedings Duke is aware of the importance of a well-documented decision making process, since in a recent Duke case the M/P Auditor opined:

> Exeter Associates, Inc. (Exeter) was selected by the Public Utilities Commission of Ohio through a request for proposal (RFP) to perform a management performance audit of the gas purchasing practices and policies of Duke Energy Ohio, Inc. (DE-Ohio or the Company) for the period September 2009 through August 2012. **Exeter has found that DE-Ohio's audit period gas purchasing policies and practices were reasonable**, **conducted in a manner consistent with least cost acquisition principles**, and provided reliable service. Exeter has reviewed DE-Ohio's audit period and planned gas supply and capacity portfolios and has determined that these portfolios are reasonable in light of the Company's audit period and anticipated service requirements and obligations. The terms and conditions of the Company's sales and transportation service offerings provide for an appropriate allocation of costs between sales and transportation customers and minimize any

[186] Tr. Vol. III at 744 (Wathen) (May 1, 2013), See also OCC Ex. No. 10, (M/P Audit Report) at i through ii (November 15, 2012).

> potential adverse impact of customer choice on GCR customers, while promoting customer choice and ensuring service reliability. **DE-Ohio's decision processes are well documented**.[187]

The opinion by the M/P Auditor that included a finding that Duke's decision making processes were well documented was not insignificant. Duke could potentially have risked a significant disallowance had such documentation not been available for the auditors' review.

Duke has been before the Commission seeking cost recovery in the past. In 2009, Duke was before the Commission seeking authority to collect nearly $30 million in deferred storm restoration costs from customers.[188] In that case, the Commission allowed Duke to recover roughly half the amount requested, finding that several of Duke's requests lacked adequate supporting evidence. The Commission stated:

> The Commission notes that, pursuant to the stipulation approved in the Duke Electric Rate Case**, Duke-Ohio bears the burden of proving that the costs associated with the 2008 Storm were prudently incurred and reasonable**. In the present case, we find that Duke has not met its burden with respect to all of the costs for which it is requesting recovery. For example, when considering the evidence presented by Duke regarding supplemental compensation, the Commission notes that overtime for salaried employees was not a general practice and was within the company's discretion; therefore, we have determined that it was an inappropriate expense for recovery. **With respect to the expenses incurred for contractor labor, we find that OCC demonstrated the presence of some unexplained discrepancies in the documentation provided by Duke, which called into question whether the costs Duke sought to recover for contractor expenses were prudent and reasonable**. Duke requested recovery of $28,473,244 through Rider DR-IKE. With the reductions in this order of $14,368,667 for labor expense, the Commission has determined that, based on the record in this case, the total amount

[187] OCC Ex. No. 10, (M/P Audit Report) at vi (emphasis added).

[188] *In re Duke Storm Cost Recovery Case ("Hurricane Ike Case)"*, Case No. 09-1946-EL-RDR. (The deferred costs related to restoration from the 2008 windstorm Hurricane Ike.)

> that Duke-Ohio should be authorized to recover through Rider DR-IKE is $14,104,577 * * *.[189]

Duke appealed the Commission's Opinion and Order and the Supreme Court affirmed the Commission, and in the Court's decision repeatedly pointed to the lack of supporting evidence necessary to document Duke's request.[190] The Court found that "**Duke had not been given a blank check, but an opportunity to prove to the Commission that it had reasonably and prudently incurred the costs it sought to recover.** And in certain respects it failed to make the most of that opportunity**"**[191]

In light of the Hurricane Ike Case, it would seem reasonable to believe that Duke understands and appreciates what it means to have the burden of proof. It is for that very reason that the lack of documentation of Duke's decision making processes on MGP-related investigation and remediation costs is significant. Duke's lack of documentation and lack of budget management is persuasive. Duke failed to exercise the managerial oversight to ensure that appropriate remedial options were analyzed before tens of millions of dollars were spent. Therefore, Duke's request to collect $62.8 million from its customers should be denied.

B. The PUCO's Authorization of Deferrals of MGP-Related Investigation and Remediation Costs Was An Accounting Order And Did Not Ensure Recovery of MGP Costs From Customers.

On August 9, 2009, Duke filed an Application for authorization to defer certain costs related to environmental investigation and remediation.[192] Duke argues that the

[189] Id. Opinion and Order at 24 (January 11, 2011) (emphasis added).

[190] Duke Energy Ohio v. Pub. Util. Comm. (2012), 131 Ohio St.3d 487, 2012 – Ohio – 1509 at Paragraphs 11, 12, 13, 17, 18, 21, 22, 23, 25, 26, 27, 28 and 31.

[191] Id at Paragraph 9.

[192] Duke Deferral Case, (Application) (August 10, 2009).

PUCO's authorization to defer MGP-related investigation and remediation costs is the equivalent to a guarantee of future collection from its customers absent a demonstration of imprudence.[193] Wrong. Duke's argument blatantly ignores language the PUCO included in the Duke Deferral Case Order – language the PUCO includes in all deferral orders – in which the PUCO specifically reserved the right to rule on the appropriateness of any rate recovery to a future base rate case.[194] Duke also contradicts the arguments that it made in its deferral case, where it argued that any rate impact would be determined in a future rate case and not in the deferral case.[195]

Despite facing this explicit PUCO and Supreme Court language,[196] Duke witness Wathen testified that upon granting a deferral, the PUCO has to give a utility some assurance of recovery, because the Utility relies on the deferral.[197] Mr. Wathen questioned how the PUCO could issue a deferral authority "knowing that it was not going to ultimately grant -- the authority because of the condition that it knew at the time wasn't met would just undermine all deferral authority."[198] Under cross-examination, Mr. Wathen ultimately acknowledged that he understood that cost recovery of deferrals was NOT guaranteed just because deferral authority was granted.[199]

PUCO Staff witness Adkins emphasized this point throughout his cross-examination by Duke when he noted that the PUCO grant of deferral

[193] Tr. Vol. III at 767 (Wathen) (May 1, 2013)

[194]Duke Deferral Case, Finding and Order at 3-4 (November 12, 2009)

[195] OCC Ex. No. 11, Duke Deferral Case, (Duke Memorandum Contra) at 3 (December 18, 2009).

[196] Duke Deferral Case (Finding and Order) (November 12, 2009). The PUCO cited an Ohio Supreme Court case *Elyria Foundry Co. v. Pub. Util. Comm*. (2007), 114 Ohio St.3d 305 for this conclusion.

[197] Tr. Vol. III at 801-802 (Wathen).

[198] Tr. Vol. III at 802 (Wathen).

[199] Tr. Vol. III at 803 (Wathen) (May 1, 2013).

authority was separate from any rate review.[200] As argued above, the PUCO's granting of deferral authority to Duke for its investigation and remediation costs was not a ratemaking order, and thus did not ensure or guarantee Duke would be authorized to subsequently collect such deferred costs from its customers.

VIII. DUKE'S INVESTIGATION AND REMEDIATION OF THE MGP SITES HAS BEEN IMPRUDENT.

A. The PUCO Staff's Decision Not To Investigate The Scope And Necessity Of Duke's Remediation Activities Does Not Preclude OCC From Conducting Such A Review.

As discussed above, the PUCO Staff recommended that Duke be permitted to recover costs related to remediating land that was currently used and useful in the provision of public utility service to Duke's natural gas distribution customers. The PUCO Staff's investigation of the MGP-related activities was limited to verification and eligibility of the expenses for recovery from natural gas distribution customers.[201] The Staff did not investigate or make any finding or recommendations regarding the prudence (scope, necessity, and urgency) of the remediation costs that Duke incurred.[202] For example, the PUCO Staff offered no opinion as to whether in-situ solidification might have been adequate and less costly than excavation and soil replacement in a particular area, or that excavation to a depth of 35 feet was sufficient to address MGP impacts as opposed to the 40 feet that Duke determined. [203]

[200] Tr. Vol. IV. at 868, 871, 873, (Adkins) (May 2, 2013)

[201] PUCO Staff Ex. No. 1 (Staff Report of Investigation) at 40 (January 4, 2013).

[202] Id.

[203] PUCO Staff Ex. No. 1 (Staff Report of Investigation) at 40 (January 4, 2013).

The PUCO Staff could have expanded the nature of its investigation to include prudence (urgency, scope and necessity) of the remediation activities for both sites.[204] Regardless, OCC has proved that Duke's remediation activities were imprudent and excessive (and too costly for customers to pay).[205] The PUCO Staff recommended allowing the Utility to collect from customers certain costs of remediation activities that were performed on the eastern parcel of the East End MGP site (Staff Report Attachment MGP-5), the western parcel of the East End MGP site (Staff Report Attachment MGP-7) and other infrastructure at the East End MGP site (confidential facilities). But the Staff's recommendation did not include an exclusion for imprudence. Duke's remediation activities far exceeded what was reasonable and prudent under the circumstances. Since Duke has been imprudent, the PUCO Staff's recommended costs are excessive.

As discussed below, OCC witness Campbell identified the prudent expenditures that should be permitted to be recovered from customers. There should be no recovery from customers if the PUCO finds, as it should, that the ratemaking law does not permit any portion of the investigation and remediation costs to be collected from customers.

B. The PUCO's Prudence Standard.

In considering Duke's request to collect deferred investigation and remediation costs the PUCO must determine if the costs were prudently incurred. Duke concurs with this Commission's requirement. R.C. 4909.154 states:

> In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission shall consider the management policies, practices, and organization of the public utility. The commission shall require such public

[204] Tr. Vol. IV at 928 (Adkins) (May 2, 2013).

[205] OCC Ex. No. 15 (Direct Testimony of James Campbell, Ph. D.) at 7 (February 25, 2013).

> utility to supply information regarding its management policies, practices, and organization. If the commission finds after a hearing that the management policies, practices, or organization of the public utility are inadequate, inefficient, or improper, the commission may recommend management policies, management practices, or an organizational structure to the public utility. In any event, the public utilities commission 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 determining prudence, the Commission uses the following standard:

> A prudent decision is one which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made. The standard contemplates a retrospective, factual inquiry, without the use of hindsight judgment, into the decision process of the utility's management.[206]

Application of this prudence standard should result in a significant disallowance in Duke's request to collect investigation and remediation costs from its customers.

C. The Law's Prudence Standard Requires A Significant Disallowance of What Duke Proposes to Charge Customers for Remediation Costs.

OCC has provided evidence in contrast to the above argument regarding Duke's lack of documented evidence to support the prudence of its remediation options decision process. OCC witness James Campbell provides detailed available low-cost options for Duke's remediation which were consistent with Ohio EPA requirements. Dr. Campbell's recommendations would have effectively addressed Duke's liability. Using what it perceived to be other people's (customers') money, Duke ignored these low-cost options. Instead, Duke made remediation decisions which lacked common sense and resulted in costs that significantly exceeded what could be considered prudent.

[206] *Cincinnati Gas & Electric Company v. Pub. Util. Comm.*, (1999) 86 Ohio St.3d. 53, 1999 Ohio Lexis 1887.

1. According to Duke, it has spent a lot of its money -- $62.8 million -- to investigate and remediate these two MGP Sites. And it wants the money it spent to become money that its customers will pay.

Duke can spend whatever it wants to clean-up former plant sites that date back to the 1800s. But Ohio laws, such as R.C. 4909.15(A) and 4909.154, limit what Duke can collect from customers. The law requires a utility such as Duke to prove that the costs it seeks to collect from customers are reasonable, prudent and actually used for providing utility service. Duke didn't prove that. While the expenditures may fit some objectives of Duke, the expenditures are not reasonable and not prudent, and do not fit the Ohio standards for charging the money to Duke's customers. And the law requires that the costs be used and useful and for current utility service, which Duke also cannot show.

OCC presented the testimony of an expert, Dr. Campbell, in environmental remediation. OCC placed in evidence Dr. Campbell's testimony showing the much less expensive techniques available as alternatives to Duke's remediation approaches. Again, Duke may spend what it wants of its own money. But, for ratemaking, Dr. Campbell testified to a more prudent and common sense approach to the remediation of these MGP Sites.

Collection of these costs from Duke's customers should be denied or be significantly reduced from the $62.8 million Duke requested. In the sections of the Brief that follow, OCC will describe a more cost-effective and prudent remediation approach that would have greatly reduced costs while meeting the environmental standards that are the subject of OCC witness Dr. Campbell's expertise.

2. Duke Failed To Perform Remediation In A Manner That Would Minimize Costs for Customers While Protecting Human Health and The Environment.

Protection of human health and the environment is the primary goal of the VAP MGP site assessment and remediation activities. Protecting utility customers from imprudent and unreasonable costs is a primary objective of the ratemaking process under R.C. 4909.15. Moreover, for most MGP sites, there are a number of ways to "meet applicable standards." Some of those ways are very expensive and imprudent – as Duke has amply demonstrated.

No technical witness in this proceeding disagreed that prudence turns on both protecting human health and the environment and doing so in a cost-effective manner. Where Duke seems to have lost its way is in its disregard for the availability of far more cost-effective options to achieve such protection. Dr. Campbell testified:

> * * * Duke's expenditures were excessive and imprudent for MGP remediation. Indeed, it would have been prudent for Duke to have developed remedial action plans incorporating cost-effective, protective measures for the MGP Sites, instead of the much more expensive excavation and disposal approach employed by Duke.[207]

Indeed, Duke witness Middleton acknowledged that cost was an appropriate factor to consider in site assessment and remediation, when he testified:

> Q. Okay. And is it also appropriate in considering alternatives to evaluate the cost of various alternatives to remediate a particular site?
>
> A. That's one -- one factor to evaluate. The other factor -- there are other factors to evaluate in selecting a remedial alternative in terms of the overall future of the site, where the site is, and I've identified some of those. It's a site situation, so cost

[207] OCC Ex. No. 15A (Direct Testimony of James R. Campbell , Ph.D.) at 5 (February 25, 2013).

is one of those factors. That's even true in the formal federal USEPA process where they have I think it's something in the order of 8 to 10 factors that you consider in selecting an alternative. Cost is one of those.

The threshold factors are protection of human health and environment and, you know, compliance with applicable state laws and regulations, community acceptance is another one in the federal statute. And these are all reasonable to consider when you're cleaning up at the state level.

Q. Well, I appreciate your answer, Dr. Middleton. I was just asking you specifically about cost. It's not necessary for you to go far beyond that but cost, you agree, is an appropriate alternative to consider in performing a site accessibility and remediation?

A. Cost is an appropriate factor to consider.[208]

Duke witness Bednarcik described the "general process used to ensure the reasonableness of costs" and acknowledged cost as one of the considerations in determining the selection of a remediation option.[209] Duke witness Fiore also agreed that cost was an appropriate consideration in the context of Ohio EPA's VAP remediation, in particular with respect to the remediation of "free product."[210]

The fact is that different approaches to assessment and remediation have different costs and an evaluation of alternatives is, therefore, necessary in determining whether a particular site assessment and remediation was done prudently. As noted below, site assessment and remediation engenders the protection of different human and environmental exposure pathways -- from soil to water to air -- and each of these

[208] Tr. Vol. I at 39-40 (Dr. Andrew Middleton, Ph.D.) (April 29, 2013)

[209] Duke Ex. No. 21 (Direct Testimony of Jessica L. Bednarcik at 20-21); Tr. Vol. I at 206-207 (Bednarcik) (July 20, 2013).

[210] Tr. Vol. II at 622-23 (Fiore) (addressing the cost of remediating free product) (April 30, 2013).

exposure pathways can be protected in different, more or less costly ways. As discussed by Dr. Campbell, Duke's selected course, when compared to other actions that could have been taken, showed utter disregard for utilizing cost-effective remediation approaches. Duke consistently opted for more costly approaches -- without any documentation of the reason for doing so:

> In this case, Duke employed a remediation approach that was far in excess of more cost effective and reasonable remedial options provided for in Ohio EPA's VAP Rules. In doing so Duke spent significantly more money than was necessary. The Utility's management decision to exceed reasonable, cost effective and protective VAP requirements, and to spend excessively to conduct remediation that was not necessary under Ohio EPA's VAP Rules, constitutes imprudence on Duke's part.[211]

Duke's claims for $62.8 million in MGP site assessment and remediation costs for its MGP sites far exceeded the reasonable and necessary costs which should have been incurred to clean up these sites. Duke expended, by a significant measure, more remediation costs than prudent management would have authorized to be incurred for these sites.

3. Duke Failed to Adequately Document An Evaluation of the Alternatives That Could Have Been Much Less Costly for Consumers.

As previously discussed, Duke did not document the reasons for its selection of its costly remediation approach for its MGP sites. This absence of documentation was admitted by Ms. Bednarcik.[212] None of Duke's other technical witnesses -- Middleton,[213]

[211] OCC Ex. No. 15A (Direct Testimony of James R. Campbell. Ph.D.) at 8 (February 25, 2013).

[212] Tr. Vol. I at 212-215 (Bednarcik) (April 29, 2013).

[213] Tr. Vol. I at 42-43, 45-46 (Middleton) (April 29, 2013).

Margolis,[214] or Fiore[215] -- were aware of any documentation of alternatives or the costs thereof. Yet Dr. Middleton and Mr. Fiore assert that alternatives were considered, because Ms. Bednarcik told them they were.[216] These hearsay statements have no value, especially with Ms. Bednarcik available to testify. Moreover, Ms. Bednarcik, while testifying that alternatives were considered, never identified any specific alternatives, the cost of alternatives, or the reasons why any particular alternative was or was not used. Rather, her testimony was simply that alternatives were considered. It is not sufficient to support a claim of prudence by saying that alternatives were considered, in the face of the evidence that the selected alternatives far exceeded what was required under Ohio EPA's VAP Rules.

4. OCC Witness Campbell's Education and Experience Make Him Highly Qualified to Address the Prudence of Duke's MGP Site Remediation, Including The Utilization of Remediation Strategies Under Ohio EPA's VAP Requirements.

OCC's environmental engineering expert, Dr. Campbell received a Civil Engineering Degree from Youngstown State University, and an M.S. and Ph.D. from Carnegie Mellon University.[217] Since 1991, he has been a Registered Professional Engineer and holds that licensing in both Michigan and Pennsylvania.[218] He has significant experience addressing environmental issues associated with MGP and coal tar industry sites spanning more than three decades.[219] Dr. Campbell worked on more than

[214] Tr. Vol. I at 99 (Margolis) (April 29, 2013).

[215] Tr. Vol. III at 639-40 (Fiore) (April 29, 2013).

[216] Tr. Vol. I at 46, 52-53 (Middleton) (April 29, 2013); Tr. Vol. III at 663-64 (Fiore) (May 1, 2013)

[217] OCC Ex. No. 15A, (Direct Testimony of James R. Campbell, Ph.D.) at 1-3 & Attachment JRC-1 (February 25, 2013).

[218] Id. Dr. Campbell also was previously a licensed professional engineer in Ohio. (Tr. Vol.IV at 950.

[219] Id.

50 MGP/coal tar sites for Koppers Company, which designed and built many of the MGP plants in North America, from 1984-1990.

In 1992, Dr. Campbell started Engineering Management, Inc. ("EMI") to provide project management and expert services related to environmental liabilities.[220] During his career, he has worked on the analysis and/or environmental assessment and cleanup of over 100 sites.[221] He has provided expert analysis in approximately 20 Superfund cases, 12 of which were MGP sites.[222] His experience includes "working with, and interpreting, many federal and state environmental regulations."[223] At EMI, among other things, he provides "coordination and oversight of investigation, design, construction, emergency response and operation and maintenance work."[224] His experience is further detailed on Attachment JRC-1.

5. Duke's Own Decision to Sell the Western Parcel of its East End Property in 2006 Was Imprudent, as It Changed The Property Use So As To Cause or Accelerate The Need for Remediation and Potentially Heighten The Level of Remediation.

Duke's sale of the western parcel at the East End site in 2006, and planned residential development at adjoining properties to the east and west of the site, primarily led to Duke's "reprioritization" of the MGP assessment and remediation at the East End site.[225] Duke also granted an ingress-egress and landscape easement across the western parcel which, as Ms. Bednarcik recognized, "altered the 'limited accessibility'

[220] Id. at 2.

[221] Id.

[222] Id.

[223] Id.

[224] Id.

[225] Duke Ex. No. 21A (Supplemental Direct Testimony of Jessica Bednarcik) at 17-19 (February 25, 2013); Duke Ex. No. 17 (Supplemental Direct Testimony of Andrew C. Middleton, Ph.D.) at 11-12 (February 25, 2013); Tr. Vol. I at 2 (Margolis) (April 29, 2013).

engineering control."[226] It was Duke's voluntary sale of the property and granting of easements that led to an acceleration of remediation.[227]

The determination to sell this property was within Duke's managerial discretion. The sale transaction was designed to benefit shareholders alone. And the need for remediation was something that Duke brought upon itself. With this background, the cost of that remediation should not be recovered from customers. Even if the fact that this transaction was only designed to benefit shareholders doesn't itself disqualify the remediation for recovery, however, the Commission should recognize it was Duke's own actions that brought about the acceleration of the claimed need to remediate the East End site. Given that the initial sale of the property was plainly imprudent, the scope and necessity of remediation was also imprudent.

6. Prior to Duke's Sale of the Western Parcel of the East End Property, Its Control of the Property Limited the Need for the Remediation for Which Duke Wants Customers to Pay.

Before the sale of the western parcel of Duke's East End MGP site, Duke itself had treated both the East End and West End MGP sites as lower priority and, thus, further down in the site assessment and remediation queue. In response to OCC's discovery, Duke explained:

> The two Duke Energy Ohio MGP Sites were initially considered lower priority sites because a) they were owned by Duke Energy Ohio or predecessor companies and therefore Duke was able to limit access to the potential residual by-products on the sites; b) groundwater was not used as a source of drinking water at the sites or by the surrounding properties; c) **the sites were essentially "capped" by asphalt, concrete, or soil layers (for example, the**

[226] Duke Ex. No. 21A (Supplemental Direct Testimony of Jessica Bednarcik) at 18 (February 25, 2013).

[227] Id.

permitted Clean Hard Fill located on the east parcel of East End), which limited human contact with potential residuals.[228]

In other words, the property had protection as a result of existing Institutional Controls (City Ordinance prohibiting groundwater use) and Engineering Controls (existing fencing and surface capping) that were in place. At that time, Duke did not see a current need for remediation.

As Dr. Campbell testified, "[u]nder OHIO EPA's VAP Rules those Engineering Controls should have limited the scope of the remediation" that was necessary at these sites.[229] In evaluating the prudence of Duke's remediation activities, the Commission should account for the existence of in-place Engineering Controls. Those controls were considered adequate prior to Duke's sale of the property and related easements.

7. Customers Should Not Have to Pay for Duke's Imprudent Approach to Excavation at 20 Feet to 40 Feet Below Ground Surface (BGS) When Excavating 2 Feet Would Have Generally Sufficed.

a. Introduction

All parties are in agreement that, in evaluating the reasonableness and prudence of Duke's expenditures for site assessment and remediation, the Commission must determine whether a particular remedy would have met "applicable standards." No party has advocated that the remedy should not meet applicable standards.

Duke's remediation was being conducted pursuant to Ohio EPA's VAP. Dr. Campbell, therefore, reviewed the VAP standards. And his testimony methodically

[228] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 14-15, *quoting* Duke Response to OCC Interrogatory No. 653 (emphasis added) (February 25, 2013).

[229] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 15 (February 25, 2013).

addresses, with appropriate citation to the VAP Rules, how remediation at Duke's MGP sites could have been conducted to cost effectively meet applicable standards.

Dr. Campbell outlines "a more reasonable and cost effective remedial approach that is consistent with the VAP Rules and protective of human health and the environment."[230] Neither Duke witness Fiore, nor any other witness to this proceeding, provided any evidence demonstrating that Dr. Campbell's proposed remediation approach was not consistent with the VAP Rules or would not protect human health and the environment.

Dr. Campbell testified that the VAP Rules, specifically VAP Rule 3745-300-07, require that a remedy be implemented if chemicals of concern ("COC") are present in "soil, sediment or groundwater (media) at concentrations above applicable standards."[231] These standards are developed "based on existing or reasonably anticipated future exposure pathways for each media."[232] In turn, "exposure pathways" describe how a person (or flora or fauna) could be exposed to contaminated media, such as dermal contact, ingestion or inhalation.[233] But "VAP Rules do not mandate a specific approach or time frame for how and when remediation should be conducted," leaving this determination to the entity conducting assessment and remediation.[234]

So the first step in evaluation under VAP is to look at whether there are chemicals of concern, in what media they exist, and what exposure pathways are implicated.

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[230] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 8 (February 25, 2013).

[231] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 8-9 (February 25, 2013).

[232] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 9 (February 25, 2013).

[233] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 9, n.8 (February 25, 2013).

[234] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 9 (February 25, 2013).

b. Soil Remediation Was Only Necessary to 2 Feet Below Ground Surface (BGS) in Most Locations.

For soil (media 1), since the property use was non-residential, Duke determined that compliance should be based on commercial and industrial use exposure pathways, including construction and excavation exposures.[235] Where Institutional Controls are applied in a non-residential setting, the point of compliance for soil is **from ground surface to two feet** and to depths greater than two feet "when it is reasonably anticipated that exposure to soil will occur through excavation, grading or utilities maintenance."[236] Where excavation, grading or other construction activities are anticipated, the point of compliance is from the ground surface to the "maximum depth reasonably anticipated" for such activities.[237]

But Duke did not limit its excavation to two feet except where other activities were reasonably anticipated. Rather, Duke excavated to depths of 20 to 40 feet below ground surface.[238] Because of the depth of this excavation, costly excavation shoring, water management and disposal, off-site disposal of soil, site security, and air and vibration monitoring were required to be performed.[239]

Dr. Campbell testified that Duke's soil remediation in this manner "failed to use more reasonable and cost-effective approaches under Ohio EPA's VAP," such as

[235] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 10 & n.10, *citing* Attachment JRC-16 (DEO-MGP 01262), Attachment JRC-15 (DEO-MGP 002006), and Attachment JRC-11 (DEO-MGP 014095) (February 25, 2013).

[236] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 10, *citing* VAP Rule 3745-300-07 (Phase 2 Property Assessments) (February 25, 2013).

[237] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 10, (February 25, 2013).

[238] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 11, n.12 (February 25, 2013).

[239] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 11, n.12 (February 25, 2013).

Institutional Controls and soil covers, as discussed in more detail below.[240] And it is the dismissal of these more cost-effective approaches that makes Duke's actions fundamentally imprudent.

c. There Is No Evidence That Groundwater Remediation, Beyond Institutional and Engineering Controls, and Monitoring, Was Necessary Under VAP Rules.

i. The Leaching to Groundwater Exposure Pathway Was Not Applicable Since Groundwater Was Already Contaminated And Duke Need Not Have Spent Money Remediating a Problem It Couldn't Fix.

For groundwater (media 2), there are several considerations for protection under the VAP. First, groundwater can be protected by preventing chemicals of concern from reaching groundwater.[241] This exposure pathway, "leaching to groundwater," however, can only be protected if groundwater is not already contaminated. Unfortunately, for Duke's MGP sites, groundwater was already contaminated and, therefore, Duke determined that the "leaching to groundwater" exposure pathways for both MGP sites were "not applicable."[242] In other words, the "leaching to groundwater" exposure pathway could not be protected as groundwater was already contaminated.

[240] OCC Ex. No. 15A (Direct Testimony of James R. Campbell Ph.D.) at 11 (February 25, 2013).

[241] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 15 (February 25, 2013).

[242] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 15, n.21 and n.22, citing to Attachments JRC-11 (DEO-MGP 023230), JRC-15 (DEO-MGP 002006), and JRC-16 (DEO-MGP 001262) (February 25, 2013).

ii. The Soil Saturation Standards Do Not Apply to MGP Tars Because Tars Are Not Single Compound Products.

A second groundwater protection exposure pathway provided by the VAP Rules is "soil saturation."[243] Dr. Campbell described the "soil saturation" component of the VAP Rules and explained why the soil saturation rules are not applicable to MGP tars:

> Single compound soil saturation concentrations apply to compounds that are liquids at ambient temperatures. Soil saturation concentrations are meant to be an indicator for when pure organic liquids (e.g. a solvent such as acetone (nail polish remover)) could be present and thus be a threat to groundwater quality. Contamination at the MGP Sites is the result of releases of tar, a **mixture of multiple compounds (most of which are solids at ambient temperature).** As such, single compound saturation does not apply to the MGP Sites.[244]

Thus, because of the characteristics of tars, they are generally not subject to "soil saturation" standards, including the VAP soil saturation standards. Although VAP Rules apply soil saturation standards to petroleum releases, forensic sampling from the East End MGP Site confirmed that the sites were contaminated with manufactured gas tars and not petroleum.[245] Only one sample contained petroleum, but it also contained manufactured gas tar.[246] Thus, Dr. Campbell concluded that the soil saturation standards were not applicable.[247] Even if the one petroleum sample location were considered applicable, Dr. Campbell noted that it is not in the area that PUCO Staff determined to be

[243] VAP Rule 3745-300-08.

[244] OCC Ex. No. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 15-16 (February 25, 2013) (emphasis added).

[245] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 16 (February 25, 2013).

[246] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 16, n.26, *citing* Attachment JRC-18 (DEO-MGP 044402-044449) (February 25, 2013).

[247] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 16 (February 25, 2013).

used and useful in providing natural gas distribution service.[248] Thus, limited, if any amounts, would have had to be spent on remediation to meet soil saturation standards.

iii. Groundwater at the MGP Sites Is Not Used for Consumption, Is Prohibited by City Ordinance And, Therefore, Neither Were (Nor Is) An Exposure Pathway Necessary to be Protected by Spending Money.

Given the contaminated state of the groundwater at the MGP sites, the point of compliance for groundwater remediation also needed to be determined. Duke's reports indicated, however, that groundwater at the sites for potable use consumption is not a complete exposure pathway.[249] Specifically, Duke's report on the East End West Parcel states:

> Potable use of groundwater at the Site will not be considered a complete pathway for evaluation because:
>
> - Groundwater at the Site has not been and is not currently used as a drinking water source; and
>
> - a City Ordinance (City of Cincinnati Ordinance §00053-3) prohibits use of private water supplies (i.e. water wells) when water is available from the municipal system. Water from the municipal system is available and supplied to the Site and the area around the Site.
>
> If needed, land use restriction prohibiting the use of groundwater as a potable water source may be placed on the Site in the future.[250]

Thus, possible consumption of groundwater at the MGP sites, as documented for both the East End (both east and west parcels) and West End sites, was not a complete

[248] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 16 (February 25, 2013).

[249] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 17 & n.27, *citing* Attachment JRC-11 (DEO-MGP 014094), Attachment JRC-15 (DEO-MGP 002005, and Attachment JRC-16 (DEO-MGP 001261) (February 25, 2013).

[250] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.), at Attachment JRC-16 (DEO-MGP 001261) (February 25, 2013).

exposure pathway. In other words, it did not need to be protected because of potable use considerations at the sites since it was not being consumed and was not expected to be consumed in the future.[251] Thus, it was not necessary for Duke to spend money to protect groundwater when its use was already restricted.

iv. There Is No Evidence of Groundwater or Surface Water Contamination At or Beyond The Property Boundaries of the MGP Sites And, Therefore, No Remedy Was (or Is) Necessary To Be Addressed.

If unrestricted potable use standards ("UPUS") are exceeded at the property boundaries, remediation beyond property boundaries has to be considered "except where groundwater discharges to surface water, in which case surface water standards apply."[252] That approach is in addition to evaluation of protection of groundwater for potable use on-site, VAP Rules require that groundwater beyond property boundaries "be restored to UPUS or a reliable alternate water supply be provided to affected users" if UPUS are or will be exceeded at the "property, surface water or USD area boundary."[253] However, "[i]f UPUS or surface water standards are not exceeded at the property boundary, no additional groundwater remedy (i.e., in addition to institutional controls and engineering controls) is required."[254]

With respect to Duke's MGP sites, however, there is no evidence at this point in time that groundwater standards are exceeded at the property or surface water

[251] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 17 & n.27, *citing* Attachment JRC-11 (DEO-MGP 014094), Attachment JRC-15 (DEO-MGP 002005, and Attachment JRC-16 (DEO-MGP 001261) (February 25, 2013).

[252] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 18 (February 25, 2013).

[253] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 18 (February 25, 2013).

[254] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 18 (February 25, 2013).

boundaries.[255] Dr. Campbell explained the evidence on groundwater exceedences at property boundaries in detail:

> Groundwater at the MGP Sites basically flows south to the Ohio River.[256] There is no indication in the MGP Site environmental reports provided by Duke that groundwater discharging from the southern site boundaries into the Ohio River has or will cause surface water standards in the Ohio River to be exceeded. The northern property boundaries are upgradient to the groundwater flow direction.[257] Groundwater from the MGP Sites cannot flow upgradient (groundwater does not flow uphill) across the northern boundaries. There is no indication in the MGP Site environmental reports provided by Duke that groundwater upgradient of the MGP Sites exceeds UPUS. The eastern and western property boundaries are basically side gradient to the groundwater flow direction (especially at the East End MGP Site).[258] Flow in the eastern and western directions at the West End MGP Site is indicated by some water level measurements.[259] However, given the proximity to the Ohio River, it is unlikely that groundwater flows across side gradient boundaries (eastern and western) to any great extent. Groundwater monitoring data do not show that groundwater to the east or west on the MGP Sites exceeds UPUS.[260]

Thus, in the absence of evidence of groundwater or surface water failing to meet UPUS beyond the property boundaries, there was no justification for Duke to spend its money (money it wants from customers) to remediate groundwater or soil to protect

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[255] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 19 (February 25, 2013).

[256] OCC Ex. No.15A (Direct Testimony of James R. Campbell, Ph.D.) at 19, *citing* Attachment JRC – 15 (DEO-MGP 002004); Attachment JRC – 16 (DEO-MGP 003641-4); Attachment JRC – 14 (DEO-MGP 002963-6); See Attachment JRC – 11 (DEO-MGP 014092); Attachment JRC – 17 (DEO-MGP 007387-92) (February 25, 2013).

[257] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 19, *citing* Attachment JRC – 14 (DEO-MGP 002963-6); Attachment JRC – 13 (DEO-MGP 003641-4); Attachment JRC – 17 (DEO-MGP 007387-92 (February 25, 2013)).

[258] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 19, *citing* Attachment JRC – 14 (DEO-MGP 002963-6); See Attachment JRC – 13 DEO-MGP 003641-4) (February 25, 2013).

[259] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 19, *citing* Attachment JRC – 17 (DEO-MGP 007387-92) (Confidential Response) (February 25, 2013).

[260] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 19, *citing* Attachment JRC – 14 (DEO-MGP 002967-70); Attachment JRC – 13 (DEO-MGP 003645-8); See also Attachment JRC – 17 (DEO-MGP 007393) (February 25, 2013).

groundwater to meet a point of compliance beyond property boundaries. And, because groundwater at Duke's MGP sites is not and cannot be used for potable purposes and in light of the City Ordinance, additional measures to remediate groundwater for potable use are not necessary. Again, that means that Duke need not have spent money for cleanup to protect groundwater beyond property boundaries.

v. If Groundwater Were Shown To Be Contaminated Beyond The Property Boundaries, Use Restrictions or Urban Setting Designation Would Have Been (or Would Be) A Prudent Means of Remediation That Would Have Saved Money for Duke.

There is no evidence that groundwater is contaminated beyond the property boundaries. But Dr. Campbell did point out that if groundwater were to be found to exceed UPUS beyond property boundaries, then an Urban Setting Designation ("USD") could be applied for under VAP Rules. That could extend the point of compliance to a location up to 0.5 miles from the property boundary.[261]

Ohio EPA has specifically published a technical guidance compendium stating that where there is "no current or future use of ground water by local residents for the purpose of drinking, showering, bathing, or cooking," "ground water that contains chemicals from prior industrial activities poses no potable use risk to the community."[262] In such locations, "an approved USD would lower the cost of cleanup and thereby promote economic redevelopment while still protecting public health and safety."[263] Use restrictions or environmental covenants on adjacent properties could also be used to

[261] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 18 (February 25, 2013).

[262] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 21, *citing* Attachments JRC-19 and JRC-20, VAP Technical Guidance Compendium VA.20010.09.006 (Urban Setting Designation Notification Letter: Purpose of USD and Standards) (February 25, 2013).

[263] Id.

extend the point of groundwater compliance beyond the property boundaries.[264] The bottom line is that Duke need not have spent money to perform remediation to protect groundwater beyond its property boundaries.

vi. There Is No Evidence That Groundwater Beyond Property Boundaries Or Other Point of Compliance Was Contaminated and Required Duke to Spend Money on Remediation.

Measures are necessary to protect the leaching pathway (where applicable) and for protection from exposures to contaminated groundwater. Remediation of 'free product" is another measure required, generally for the protection of groundwater to the extent that groundwater may be affected beyond the property or USD area boundaries. "Free product" is defined by the VAP Rules as "a separate liquid hydrocarbon phase that has a measurable thickness of greater than one one-hundredth of a foot."[265] In other words, these are COCs that, because of their physical characteristics, may migrate and reach groundwater. Dr. Campbell testified that measurements of free product "are collected in groundwater monitoring wells."[266]

Dr. Campbell testified, however, that the VAP Rules only specifically mention "petroleum free product" and do not mention "tar free product."[267] Thus, VAP's free product standard may not necessarily be directly applicable in this proceeding.

Nonetheless, Dr. Campbell addressed the "free product" issue in detail. As he testified, "[t]ar free product (also referred to as DNAPL) was not identified in monitoring

[264] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 13 (February 25, 2013).

[265] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 22, *citing* VAP Rule 3745-300-01 (Definitions) (February 25, 2013).

[266] Id.

[267] Id.

wells at the West End MGP Site. DNAPL was identified in a limited number of monitoring wells (4 of 16) at the west parcel of the East End MGP."[268]

But "free product" standards only apply if groundwater is affected beyond the property or USD area boundary. Even if the standard does apply to tar free product, it may not apply here because no evidence yet exists showing groundwater exceedences at such locations.[269] Thus, under the VAP Rules, "the presence of free product **does not require** the extensive and imprudent soil remediation conducted by Duke."[270] Here again, Duke is spending money that was not needed to spend. Duke's spending of money, lots of money, would not necessarily be of concern were Duke not trying to collect it from customers. But it's a big concern because Duke is seeking to collect $63 million from customers.

Dr. Campbell testified that remediation would, as a practical matter, include excavation of at least "some mobile tar" such as some of the soil in the former tar pit down to a depth of 20 feet bgs.[271] Dr. Campbell included costs for this excavation in his proposed remediation.[272]

And even if there was evidence, which there is not, that free product affected groundwater quality beyond the property or USD boundaries, Dr. Campbell testified that Duke could apply for a variance to limit the scope of remediation. VAP Rules

[268] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 22 & Attachment JRC-17 (DEO-MGP 007349-007499), Attachment JRC-14 (DEO-MGP 002997-002943), and Attachment JRC-13 (DEO-MGP 003604-003704) (February 25, 2013).

[269] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 22 (February 25, 2013).

[270] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 22-23 (February 25, 2013).

[271] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 23 (February 25, 2013).

[272] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 28, 31, 33 (February 25, 2013).

specifically allow for variances from established standards under the following circumstances:

> 1) technical infeasibility or if the cost substantially exceeds the economic benefits; 2) if the proposed remediation method (e.g. institutional controls and engineering controls) of addressing the issue will ensure that public health and safety will be protected; and 3) and if the proposed remediation method is necessary to preserve, promote or enhance employment opportunities or the reuse of the affected property.[273]

Nonetheless, at this point in time, there is no reason to believe that a variance for "free product" would be necessary. As Dr. Campbell testified, even if contamination were to be found in groundwater at a location beyond the property boundaries, given that there is an alternative water supply in the area, use restrictions or a USD should be able to be obtained to extend the point of compliance beyond any area that might be affected by contaminated groundwater.[274] That means Duke did not need to remediate groundwater beyond property boundaries.

d. The Two-Foot BGS Applicable Excavation Standard for Non-Residential Remediation, Together With Institutional and Engineering Controls, Would Have Been Adequate For Most Areas on the MGP Sites and Would Have Saved Duke Money on Remediation Costs.

Some of Duke's documentation suggests that excavation below the 2-foot BGS standard was necessary to prevent potential exposure of workers. That protection seems needed at both indoor and outdoor sites, to COCs through surface soil contact and vapor

[273] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 23, *citing* VAP Rule 3745-300-12 (Variances from Generic Numerical Standards or Property-Specific Risk Assessment Procedures). Notably, Dr. Campbell also pointed to a training module utilized by the Ohio EPA providing a case study for a remedial action plan under the VAP, to include a free product variance for a manufacturing site with measurable levels of free product in monitoring wells (up to several feet thick), including a risk mitigation plan and a USD. OCC Ex. No. 15A, (Direct Testimony of James R. Campbell, Ph.D.) at 24 (February 25, 2013).

[274] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 22 (February 25, 2013).

contact from soil and groundwater.[275] This would include the protection of on-site workers and construction workers at the sites.[276]

As noted above, contact with groundwater, including vapors from groundwater, was unlikely because of the depth of groundwater. Further, as Dr. Campbell testified, these are exposures that are well-controlled through both "Institutional" and "Engineering" Controls. Dr. Campbell testified that the VAP Rules allow such "risk mitigation measures" to be undertaken in lieu of excavation.[277] He explained the use of such measures in the context of Duke's MGP sites as follows:

> One less expensive alternative to the more extensive and expensive approach taken by Duke is to control direct contact exposure to contaminated soils by constructing engineering controls such as soil covers or asphalt paving. Institutional controls can then be established to limit future uses of the site to those that are consistent with the engineering controls and future commercial/industrial use assumptions. Institutional controls can also prohibit excavation of contaminated soil without proper personnel protective equipment ("PPE") and establish soil handling controls to protect workers and the environment. Specification of PPE and soil handling requirements can be accomplished through a soil management plan linked to the institutional control. Soil management plans are commonly accepted exposure control mechanisms used in environmental remediation. Soil management plans are accepted by both industry and regulatory agencies, and would have been a more reasonable remediation measure for Duke at the MGP Sites.[278]

Duke has produced no evidence such Institutional and Engineering Controls, as discussed further below, would not have been adequate to control any human exposure to

[275] *See, for example,* OCC Ex. No. 15A, (Direct Testimony of James R. Campbell, Ph.D.) at Attachment JRC-16, DEO-MGP 001261-001262 (February 25, 2013).

[276] Id.

[277] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 11 (February 25, 2013).

[278] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 11-12 (February 25, 2013).

COCs. That means Duke could have avoided remediation and avoided spending its money (or what it wants to be its customers' money).

i. Institutional Controls, Such As Use Restrictions, Were (and Are) Appropriate Measures to Control Exposure and Avoid Spending Funds on Remediation.

Duke's property, being non-residential, did not have to meet residential standards and only had to meet the 2-foot BGS standard identified above, except where exposure to greater depths is reasonably anticipated. Further, VAP guidance makes clear that Ohio EPA will modify standards, including points of compliance, even in residential settings, where economic or technical feasibility presents challenges to meeting established standards.[279]

Use restrictions are one way in which a point of compliance can be modified.[280] Use restrictions take into consideration the likely use of a property and establish appropriate remedies needed consistent with such risk. Thus, even in a residential area, construction of a high rise building would likely limit digging, and Ohio EPA has concluded that a 2-foot BGS excavation would be sufficient.[281] A use restriction, one form of Institutional Control, could have been put in place to "prohibit excavation" without appropriate equipment.[282]

[279] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 12-13, *citing* Attachments JRC-19 and JRC-20 VAP Technical Guidance Compendium VA 30007.10.001 ("Restricted" (Modified) Residential Properties) (February 25, 2013).

[280] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 13, *citing* Attachments JRC-19 and JRC-20 VAP Technical Guidance Compendium VA 30007.10.001 ("Restricted" (Modified) Residential Properties) (February 25, 2013).

[281] Id.

[282] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 12 (February 25, 2013).

For Duke's MGP sites, Dr. Campbell testified that Institutional Controls "should be applied in the form of an Environmental Covenant restricting future use of the property to commercial/industrial uses, prohibiting use of groundwater, and requiring risk mitigation measures in the form of a Soil Management Plan."[283] The result would be avoided expenditures.

ii. Soil Covers or Asphalt Paving Would Have Constituted an Adequate Engineering Control in Most Locations, and Saved Money for Duke (and Customers that It Wants to Charge).

Engineering Controls, such as fencing, soil covers, and asphalt, are another cost-effective measure that, in many cases, will provide sufficient protection. Ohio EPA's guidance explains how barriers such as these can be sufficiently protective:

> This can be done through construction of a physical barrier that eliminates contact with soil above applicable standards such as hard surface engineering controls or a soil cover cap. An O&M [Operation & Maintenance] plan is necessary to see that these controls are maintained.[284]

Together with Institutional Controls to ensure that Engineering Controls are maintained intact, Engineering Controls are a cost-effective means of protecting human health and the environment. For Duke's MGP sites, Dr. Campbell testified that "[e]ngineering controls in the form of maintaining the existing perimeter fence to limit and control access to the Site and construction of a two foot soil cover for protection of workers from direct contact with contaminated soils" would have been a cost-effective remedy.[285] The result would be spending less money on remediation.

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[283] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 28 (February 25, 2013).

[284] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 13, *citing* Attachments JRC-19 and JRC-20 VAP Technical Guidance Compendium VA 30007.10.001 ("Restricted" (Modified) Residential Properties) (February 25, 2013).

[285] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 28 (February 25, 2013).

iii. A Soil Management Plan Would Have Been A Cost-Effective Measure to Control Exposure to COCs in Concert With Appropriate Engineering and Institutional Controls, to Manage The Sites and Limit Remediation Expenditures.

One form of Institutional Control that would have been a cost-effective measure to control exposure to contaminants at Duke's MGP sites is a soil management plan. Dr. Campbell testified that "[s]oil management plans are commonly accepted exposure control mechanisms used in environmental remediation" and "are accepted by both industry and regulatory agencies."[286]

For Duke's MGP sites, Dr. Campbell explained how a Soil Management Plan would be utilized:

> The Soil Management Plan would provide procedures for any required future excavation in the area of the natural gas pipelines, vaporizer building and sensitive infrastructure. If and when soil in the vicinity of the natural gas pipelines or vaporizer building needed to be excavated (e.g., for repairs or expansion of the natural gas facilities), the work would be conducted in accordance with the procedures outlined by Duke in the Soil Management Plan. Such procedures would protect human health and the environment by specifying how the excavation should be completed, worker protection standards, requirements for management and disposal of contaminated soils, backfilling and replacement of the soil cover.[287]

It is important to recognize that a Soil Management Plan would protect workers and other individuals on site from exposure to COCs, in accordance with applicable standards. Should excavation be required in areas where such excavation was not reasonably anticipated and another remedy was not, therefore, implemented, a Soil Management Plan would provide, as appropriate for the use of personnel protective

[286] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 12 (February 25, 2013).

[287] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 29 (February 25, 2013).

equipment, additional excavation or other measures necessary to protect workers and others on-site from exposure? Such a Plan would avoid more costly remediation.

iv. Institutional and Engineering Controls would have been less expensive approaches to Prevent On-Site Exposure to Contaminated Groundwater and are Reasonable under the VAP Rules.

As noted above, exposure to contaminated groundwater at Duke's MGP sites is unlikely because it is located a substantial depth below ground surface. Nonetheless, Dr. Campbell discussed the used of Institutional and Engineering Controls, such as fences and soil covers that are considered adequate to prevent on-site exposure to contaminated groundwater.[288] That approach would have reduced expenditures and saved money.

e. Duke's Remediation was Excessive in Light of the Availability of Institutional and Engineering Controls, and Variances, under VAP Rules. The result means that Duke paid more than was prudent for ratemaking purposes. And customers should not be tapped to pay the excess cost.

As Dr. Campbell testified, Duke never "explicitly stated" the reasons that it determined to conduct soil excavation below 20 feet bgs and in-situ solidification of shallow (0-20 feet BGS) and deeper (>20 feet BGS) soil.[289] Dr. Campbell surmised that the goal was to "address groundwater.[290] But "such remediation is not required by the VAP Rules to address soil and groundwater at the MGP Sites" and Duke's remediation "far exceeded reasonable VAP requirements."[291] Thus, Duke spent far too much money to excavate. Under the VAP rules, what was required and appropriate for groundwater

[288] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 17-18 (February 25, 2013).

[289] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 25 (February 25, 2013).

[290] Id.

[291] Id.

protection was "remediation of mobile tar and application of use restrictions through institutional controls and engineering controls along with periodic groundwater monitoring."[292] Duke should not expect customers to pay the excess for its overspending.

f. If Free Product Were Found Beyond Property Boundaries, or Other Points of Compliance, A Variance Should Be Requested Before Remediation Is Performed.

Ohio EPA's VAP Rules provide for variances, including for Urban Setting Designations and for free product (DNAPL). The variance for USDs was discussed in more detail above. Dr. Campbell set forth Ohio EPA's general standard for assessment of variances:

> The VAP Rules allow for a variance from established standards, such as groundwater UPUS, based on: 1) technical infeasibility or if the cost substantially exceeds the economic benefits; 2) if the proposed remediation method (e.g., institutional controls and engineering controls) of addressing the issue will ensure that public health and safety will be protected; and 3) and if the proposed remediation method is necessary to preserve, promote, protect or enhance employment opportunities or the reuse of the affected property.[293]

The availability of variances from applicable standards for USDs, free product, and other quantitative and qualitative standards is a key component of the VAP. These variances are given because of the impracticality of a solution where "the cost substantially exceeds the economic benefits." The VAP recognizes that remedies can and should be tailored to specific site characteristics. Duke's failure to use the variance procedure, as appropriate, to implement a more cost-effective remediation is indicative of

[292] Id.

[293] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 23, *citing* VAP Rule 3745-300-12 (Variances from Generic Numerical Standards or Property-Specific Risk Assessment Procedures) (February 25, 2013).

imprudence. Duke's failure to utilize the variance process when it could and should have been utilized means it spent too much money.

8. Duke has over-stated its need to remediate the MGP Sites--and spent much more money than what the PUCO should allow it to collect from its customers--to address the environmental problems it claims for these MGP Sites.

According to Duke, it has spent a lot of its money -- $62.8 million -- to investigate and remediate these two MGP Sites. And it wants the money it spent to become money that its customers will pay. Duke has offered, as justification of these expenditures, that its remediation activities are designed to be "protective of human health and the environment."[294] However, Duke's website shows certain information that is different than Duke's litigation characterizations and that contradicts certain of Duke's evidence, including testimony, in these proceedings.[295]

Some of the responses to certain Frequently Asked Questions ("FAQ") include information that will be helpful to the PUCO's decision-making process. Certain information in the Duke FAQ differs from claims made by Duke in the hearing. (And the information seems to differ generally from what Duke provided to OCC on discovery.) For example, certain FAQ responses state:

> Q. **Does the West End Site present a health risk to the community**?
>
> A. **No.** Investigative studies by environmental specialist and the Ohio Environmental Protection Agency (OEPA) shows that the West End site does not pose a health risk to neighboring properties, businesses or residents. And the OEPA is not requiring Duke Energy to perform any action

[294] Tr. Vol. I at 207 (Bednarcik) (April 29, 2013).

[295] This information is provided subject to a Motion for Administrative Notice ("OCC Motion") that OCC filed on June 6, 2013. (Attached to the Motion are Duke's FAQs regarding the East End and West End former MGPs. The Motion contains the URL links to the applicable web pages on Duke's web site and contains paper copies as well.

at this site. Regardless, Duke Energy will complete the project in compliance with OEPA regulations.

Q. **Does this site pose a risk to neighboring property?**

A. **No.** Neighbors and their property will have no contact with the residual material or contaminates soil.

Q. **Has this site been a threat to the neighborhood all along?**

A. **No**. Environmental studies conducted at the West End site have shown that there is no threat to public health. (Emphasis added.)[296]

This information from Duke's web site is different than certain of the case information that Duke presented to the PUCO as justification for charging $63 million in cleanup costs to customers. For example, Duke's evidence includes testimony about dangers at the site.[297]

Duke can spend whatever it wants to clean-up former plant sites that date back to the 1800s. But Ohio law, such as R.C. 4909.15(A) and 4909.154, limits what Duke can collect from customers. The law requires a utility such as Duke to prove that the costs it seeks to collect from customers are reasonable, prudent and actually used for providing utility service. This web site information further illustrates that the money Duke spent, while it may fit some objectives of Duke, does not fit the Ohio standards for charging to Duke's customers.

Thus the claim that groundwater will cleanse itself over time has not been proven in at least the last 50 years.

[296] OCC Motion at Attachment A. (Emphasis added).

[297] Tr. Vol. II at 477 (Bednarcik) (April 30, 2013); see also Duke Ex. No. 27 (MGP Power Point Presentation).

The Frequently Asked Questions also notes:

> Q. Are these byproducts considered a risk to health and the environment?
> A. Coal tar contains some chemical compounds, such as polycyclic aromatic hydrocarbons (PAHs). These compounds are a common component of asphalt products, including roadway materials, and are only a human health risk if people directly touch, eat or breathe them for a long period. **Asphalt, concrete and topsoil often serve as a protective barrier, limiting human contact with residues in the ground.** (Emphasis added.)

This answer should be of interest to the Commission because it makes reference to a remediation technique that OCC placed in evidence as being less expensive than certain of Duke's alternative remediation approaches. In other words, Duke's statement in the above FAQ is consistent with the testimony of OCC's witness Dr. Campbell. Dr. Campbell testified to a more prudent and common sense approach to the remediation of these MGP Sites. Dr. Campbell recommended, as a part of an appropriate remediation plan, that engineering controls such as asphalt, concrete and topsoil can serve as sufficient barriers to limit direct human contact with residue in the ground, thus protecting human health. That testimony is consistent with Duke's statement in its web Frequently Asked Question.[298] But at hearing Duke's witnesses were dismissive of this remediation alternative,[299] when OCC's expert Dr. Campbell testified that a combination

[298]OCC Ex. No. 15 (Direct Testimony of Dr. Campbell) at 23-25, 28-29 (February 25, 2013).

[299] Duke Ex. No. 26 (Direct Testimony of Shawn Fiore) at 21 (April 22, 2013).

of similar Engineering Controls in association with land use covenants and some limited remediation would have been sufficient to protect human health and the environment—at much less cost to consumers.

The information from Duke's web site is consistent with evidence in OCC's case that the costs expended by Duke were imprudent. Collection of these costs from Duke's customers (if any collection is authorized) should be significantly reduced from the $62.8 million requested. In the section of the Brief that follows, OCC will describe a more prudent remediation approach that would have greatly reduced costs while meeting the environmental standards that are the subject of OCC witness Dr. Campbell's expertise.

9. Dr. Campbell Identified Prudent Remediation for the East End and West End MGP Sites That Would Have Cost Duke Tens of Millions of Dollars Less Than Its Unreasonably Expensive Remediations. The PUCO Should Provide Customers the Ratemaking Protection Not Provided by Their Utility, Duke.

a. East End Site

Dr. Campbell analyzed the prudent and recoverable assessment and remediation costs at both the East End and West End MGP sites.[300] He performed an analysis of the prudent and recoverable costs for the entirety of each site. And he performed that analysis for the portion of the sites that the PUCO Staff determined were currently used and useful in providing natural gas service to customers.[301] Dr. Campbell's analysis reduces assessment and remediation expenses. He accomplishes this result through taking into account VAP provisions for Institutional and Engineering Controls, with much less excavation than performed by Duke. More specifically, Dr. Campbell provisions and prices remedies with the following characteristics:

[300] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 27-38 (February 25, 2013).

[301] Id.

1) Engineering controls in the form of maintaining the existing perimeter fence to limit and control access to the Site and construction of a two foot soil cover for protection of workers from direct contact with contaminated soils.

2) Institutional controls should be applied in the form of an Environmental Covenant restricting future use of the property to commercial/industrial uses, prohibiting use of groundwater, and requiring risk mitigation measures in the form of a Soil Management Plan.

3) Limited soil excavation should be completed in a portion of the former Tar Pit to remove soil containing mobile tar. Based on a review of the soil boring logs, excavation should be limited to the top of the clay layer at a depth of 20 feet. Any excavated soil that is only tar stained should be placed back into the excavation.

4) Groundwater monitoring is not required for the limited portions of the Site "that are used and useful for providing natural gas distribution service" as determined by Staff.[302]

In other words, Dr. Campbell specified a remedy that limits the need for excavation to two feet in most locations (20 feet in a portion of the former tar pit). This limited excavation is made possible, consistent with VAP Rules, by maintaining effective site control, prohibiting groundwater use, and implementing a Soil Management Plan.[303] Asking customers to pay for groundwater monitoring would not be appropriate if the Commission adopts the PUCO Staff's determination regarding the property that is used and useful.[304] If costs are incurred in the future to excavate for purposes of maintenance, such costs would be addressed at the time such costs are incurred.[305]

[302] OCC Ex. No. 15A Direct Testimony of James R. Campbell, Ph.D.) at 28 (February 25, 2013).

[303] Id.

[304] Id.

[305] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 28-29 (February 25, 2013).

i. East and West Parcels (of East End Site)

Dr. Campbell also broke down his analysis of costs that could be recoverable by the utility in relation to the 3 parcels at the East End MGP site, since the PUCO Staff broke down its analysis in this fashion.[306] For the East and West parcels of the East End site, the PUCO Staff identified a limited area that was used and useful "around the natural gas pipelines and vaporizer building, totaling 53,532 square feet." The PUCO Staff found that the appropriate remedy for these areas does not involve excavation.[307]

Consequently, many of the activities conducted by Duke on these parcels, including "security, air and vibration monitoring, excavation, excavation shoring, water management and disposal, of-site disposal of soil and solidification were not necessary" and should not be included in the recoverable amount.[308] The limited area that the PUCO Staff says is used and useful also reduces the investigation and design work, and the time required to perform the work (45 days or less) for which customers would be responsible.

Dr. Campbell specified this remedy even further for the East and West parcels as follows:

> A two foot soil cover over 1.2 acres would require about 4,000 cubic yards of soil. This material could be placed within a few days, meaning the 45-day duration allowed for cost estimating purposes is very generous. The limited duration would minimize all time related costs such as Duke internal costs and construction management.[309]

Dr. Campbell calculated the cost of this remedy for the East and West parcels, limited by the PUCO Staff's used and useful analysis on Attachment JRC-2. He then

[306] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 29-31 (February 25, 2013).

[307] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 29-30 (February 25, 2013).

[308] OCC Ex. No.15A (Direct Testimony of James R. Campbell, Ph.D.) at 30 (February 25, 2013).

[309] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 30 (February 25, 2013).

determined an assessment and remediation cost of $698,724.[310] This compares to the $23.2 million claimed by Duke (excluding costs associated with purchasing adjacent property), and the PUCO Staff recommendation of $6.7 million.

If the Commission were to reject the PUCO Staff's recommendation and not limit payment by customers for the areas of the East End MGP Site that PUCO Staff determined were used and useful, Dr. Campbell recommended that prudent and recoverable investigation and remediation costs would be $4,372,574 as shown in Attachment JRC-5.[311] This would provide for excavation to two feet in most locations and a two-foot soil cover for protection of workers from direct contact with contaminated soils.[312] It would also provide for a clay layer (20 feet) at the location of the former tar pit to remove soil containing mobile tar.[313] It would also include the implementation of effective Institutional Controls, to include prohibiting groundwater use and a Soil Management Plan.[314] In addition, Dr. Campbell recommended groundwater monitoring upon completion of this remedy.[315] Dr. Campbell documented all of the assumptions underlying his cost analysis in Attachment JRC-5.[316] His cost analysis is "based on the actual unit and lump sum prices incurred at the East End MGP as documented by Duke

[310] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 30 & Attachment JRC-2 (February 25, 2013).

[311] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 34 & Attachment JRC-5 (February 25, 2013).

[312] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 33 (February 25, 2013).

[313] Id.

[314] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 33 (February 25, 2013).

[315] OCC Ex No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 33 (February 25, 2013).

[316] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 34-35 & Attachment JRC-5 (February 25, 2013).

and its contractors."[317] Thus, his cost analysis relies on the unit amounts actually charged by Duke's contractors.

ii. Central Parcel

Duke has not yet completed investigation of this parcel, or begun remediation, Dr. Campbell recommended that costs related to the Central Parcel of the East End site be addressed in future proceedings, consistent with the PUCO Staff's recommendations.[318]

iii. East End Sensitive Infrastructure Costs

In addition to the above-identified costs of assessment and remediation, Dr. Campbell identified sensitive infrastructure costs at the East End site for which there will be additional costs since excavation of the Tar Pit will require excavation above the sensitive infrastructure.[319] Dr. Campbell calculated $456,420 in costs for investigation and remediation associated with excavation above the sensitive infrastructure.[320]

b. West End Site

Similar to his analysis for the East End MGP Site, Dr. Campbell calculated the cost of a remedy for the West End MGP Site to include Institutional and Engineering Controls.[321] Engineering Controls would include maintenance of the existing perimeter fence and maintenance of the previously existing engineered cover for the parcel north of Mehring Way. This parcel was completely covered with asphalt and concrete pavement

[317] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 33 (February 25, 2013).

[318] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 30-31, *citing* Staff Report at 47 (February 25, 2013).

[319] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 31 & Attachment JRC-3 (February 25, 2013).

[320] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 37 & Attachment JRC-2 (February 25, 2013).

[321] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 35-37 (February 25, 2013).

before Duke began its site assessment and remediation at the West End.[322] Pending the finalization of plans for the Brent Spence Bridge, and until such plans show an actual need to disturb this property, the existing cover should be maintained and a Soil Management Plan implemented for this parcel.[323]

With respect to the parcel south of Mehring Way, Dr. Campbell concluded that reasonable expense would have been the construction of an upgraded two foot soil cover in areas where needed for protection of workers from direct contact with contaminated soils.[324] Soil excavation for relocation of the electrical substation should follow a Soil Management Plan "once the specific plans are developed."[325] In addition to a Soil Management Plan for this area, Institutional Controls also should be applied through an Environmental Covenant "restricting future use of the property to commercial/industrial uses [and] prohibiting use of groundwater."[326] Dr. Campbell testified that soil excavation, limited to a depth of 20 feet, should be completed in the area where new underground electrical cables will be routed.[327] Furthermore, groundwater monitoring should be conducted going forward.[328] If costs are incurred in the future to excavate for purposes of maintenance, such excavation would be conducted in accordance with the Soil Management Plan and related costs would be addressed at the time such costs are

[322] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 35 (February 25, 2013).

[323] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 35 (February 25, 2013).

[324] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 35 (February 25, 2013).

[325] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 36 (February 25, 2013).

[326] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 36 (February 25, 2013).

[327] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 36 & Attachment JRC-6 (February 25, 2013).

[328] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 36 (February 25, 2013).

incurred.[329] It should be emphasized that this approach would not require the expensive shoring and tie-back walls or vibration monitoring.[330]

The PUCO Staff "eliminated all expenses incurred at the West End site" based on its used and useful analysis. If the PUCO Staff's position is adopted, there should be no recovery of West End MGP site costs.[331] However, if the Commission does determine to allow recovery of West End MGP Site costs, Dr. Campbell calculated the cost of this remedy for the West End MGP Site assuming the Commission were to find the entire site to be used and useful. Under that scenario, Dr. Campbell determined the prudent and recoverable West End MGP assessment and remediation costs would be $3,654,825.[332] Like his assessment of East End MGP site costs, Dr. Campbell's West End MGP site costs are based on "unit and lump sum prices incurred at the West End MGP as documented by Duke and its contractors."[333]

c. Summary of OCC's Recommendations to Limit What Duke Can Collect from Customers.

If the Commission adopts the PUCO Staff's position that only a limited portion of the East End MGP site is used and useful in providing natural gas service, then the Commission should find that a total cost of $1,164,144 is the prudent and recoverable cost for the East End MGP site.[334] This amount compares to (and is lower than) the PUCO Staff's recommendation based solely on the used and useful principle of

[329] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 36-37 (February 25, 2013).

[330] OCC Ex. No.15A (Direct Testimony of James R. Campbell, Ph.D.) at 37 (February 25, 2013).

[331] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 27 (February 25, 2013).

[332] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 30 & Attachment JRC-2 (February 25, 2013).

[333] OCC Ex. No. 15A, (Direct Testimony of James R. Campbell, Ph.D.) at 37 & Attachment JRC-7 (February 25, 2013).

[334] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 38 (February 25, 2013).

$6,367,724.[335] The difference in these numbers reflects the excessive and imprudent expenditures incurred by Duke as related to the PUCO Staff-determined used and useful property.

For the West End MGP site, if the Commission adopts the PUCO Staff's position that no portion of the property is used and useful in providing natural gas service, then the Commission should find that Duke is not entitled to collect any investigation or remediation costs from customers.

If the Commission rejects the PUCO Staff's position and finds that the entirety of the East End and/or West End MGP sites are used and useful, then the Commission should find that Duke nonetheless should be denied recovery of its excessive and imprudent expenditures. These items can be seen on Table 2 in Dr. Campbell's testimony, reproduced below:

TABLE 2[336]
A SUMMARY OF INVESTIGATION AND REMEDIATION COSTS FOR THE TWO MGP SITES IN THEIR ENTIRETY

MGP	Duke	OCC (JRC-5)	OCC (JRC-7)	OCC Total
East End	$23,232,036	$3,765,403	$0	$3,765,403
East End Property Purchase	$2,336,460	$0	$0	$0
West End	$19,717,809	$0	$3,332,414	$3,332,414
Test Year Estimate East and West	$15,000,000	$0	$0	$0
Subtotal	$60,286,305	$3,765,403	$3,332,414	$7,097,817
Carrying Charges	$5,047,112	$607,171	$322,411	$929,582
Total	$65,333,417	$4,372,574	$3,654,825	$8,027,399

Based upon consideration of Duke's excessive investigation and remediation actions, the Commission should find that, at most, only $8,027,399 of Duke's MGP costs

[335] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 38 (February 25, 2013).

[336] OCC Ex. 15A, (Direct Testimony of James R. Campbell, Ph.D.) at 38 (February 25, 2013).

incurred to date have been prudently incurred. Thus, Duke should be denied recovery of at least the remaining $54.8 million in costs incurred to date.[337] Any recovery of costs incurred in the future should be reviewed in future rate case proceedings. Future costs must be subject to a prudence review under R.C. 4909.154, just as previously incurred costs claimed in this proceeding have been reviewed here. It should be noted again that OCC's recommendation, based on R.C. 4909.14(A), is that the law does not allow the PUCO to authorize Duke to charge customers for the remediation, because plant is not used and useful and the expenses are not for providing customers with utility service.

D. Duke's Activities Surrounding the "Purchased Property" Further Demonstrates Duke's Imprudence and That Customers Should Not Be Made To Pay.

Another issue demonstrating the imprudence of the East End site remediation activities is the parcel adjacent to the East End site that the Utility purchased to avoid future environmental liability. The PUCO Staff recommended complete exclusion of the costs associated with this property transaction.[338] The circumstances surrounding the "purchased property" parcel show that Duke cannot demonstrate prudence for these remediation activities.

Duke's arguments in support of its remediation activities arise from an alleged change in use that necessitated Duke's remediation of the East End site.[339] The change of use allegedly occurred in 2006, when Duke was approached by a developer, who had been accumulating property in the vicinity of the East End MGP site, to purchase an

[337] $62.8 million - $8.0 million = $54.8 million.

[338] Staff Ex. No. 1 (Staff Report of Investigation) at 43 (January4, 2013).

[339] Duke Ex. No. 21A (Supplemental Direct Testimony of Jessica Bednarcik) at 17-19 (February 25, 2013); Duke Ex. No. 17 (Supplemental Direct Testimony of Andrew C. Middleton, Ph.D.) at 11-12 (February 25, 2013); Tr. Vol. I at 2 (Margolis) (April 29, 2013).

additional parcel owned by Duke. Despite knowing that the parcel was formerly an MGP site,[340] and knowing the developer intended to acquire the parcel to construct residential condominiums,[341] and without conducting any investigation to ascertain if contaminants related to MGP operations had affected the parcel,[342] Duke nevertheless proceeded with the sale of the parcel to the developer.

Subsequent to the sale, Duke made attempts to enter the parcel to conduct investigations and make findings with regards to the extent of contamination on the parcel that Duke had sold.[343] Duke's attempts to investigate were denied by the developer who refused to allow Duke to enter the property, despite Duke's promises to remediate the site of any contaminants found on the parcel.[344]

The developer then made threats of a lawsuit for the environmental damage to the parcel sold by Duke to the developer.[345] Duke, in an effort to avoid litigation, agreed in a confidential settlement agreement to buy back the parcel, plus buy other parcels acquired by the developer in the vicinity of the East End site. Duke paid the developer a significant premium for the property.[346] Duke's payment to the developer was $4.5 million or $2,336,460[347] in excess of the fair market value of property acquired by the

[340] Tr. Vol. II at 308 (Bednarcik) (April 30, 2013).

[341] Tr. Vol. II at 310 (Bednarcik) (April 30, 2013).

[342] Tr. Vol. II at 361 (Bednarcik) (April 30, 2013).

[343] Tr. Vol. II at 313 (Bednarcik) (April 30, 2013).

[344] Id.

[345] Id.

[346] OCC Ex. No. 9 (Summary Appraisal Report) (October 28, 2011).

[347] Staff Ex. No. 1 (Staff Report of Investigation) at 43, 51 (January 4, 2013).

developer. A commercial real estate appraiser described the sale as "not an arms-length transaction."[348]

To add insult to injury for customers, Duke now is attempting to collect from customers the $2.3 million premium paid to the developer. Duke could have avoided the entire situation by Duke not selling the parcel to the developer in the first place.

The ultimate demonstration of the inequity of Duke's remediation activities has not yet fully played itself out. Since the repurchase of the parcel, Duke has conducted some investigations at the "purchased parcel" site and ascertained that the site is contaminated. Despite the fact that much of the "purchased parcel" was never owned by the Utility and never used in the provision of utility service, Duke intends to remediate this site in the future. And Duke expects its customers to pay these investigation and remediation costs. Duke's expectation is misplaced.

After remediating, and enhancing the value of the purchased property, Duke may again sell that parcel.[349] Duke should not be allowed to collect from its customers the costs associated with the imprudent decisions and activities that have surrounded these East End site "purchased property" real estate transactions. The PUCO Staff got it right for customers when it recommended denying Duke any collection of costs related to the "purchased property."

[348] OCC Ex. No. 9 (Summary Appraisal Report) (October 28, 2011).

[349] Tr. Vol. III at 755 (Wathen) (May 1, 2013).

IX. UTILITY SHAREHOLDERS SHOULD BEAR 50% OF ANY MANUFACTURED GAS PLANT CLEANUP COSTS THAT THE PUCO DETERMINES ARE RECOVERABLE FROM CUSTOMERS.

A. Shareholders Benefitted from the MGPs; Therefore, They Should Contribute to the Cost of the MGPs Cleanup.

If the PUCO were to find that any MGP-related costs are recoverable from customers, the burden of the costs should be borne equally between the Utility and its customers, net of any amounts recovered from insurance and third-party liability claims. OCC witness Hayes testified that since shareholders benefited from the existence of the MGP as customers did in the past when the MGPs actually produced gas, shareholders should share at least equally in the liability.[350] Without the MGP, there would have been no gas or there would have been less gas to sell; thus the benefit to shareholders came from having the commodity to sell to past customers from the 1840s to the 1960s.[351] In addition to the benefit from the sale of any gas produced by the MGP, shareholders also benefited from the sale of other by-products from the production of gas such as coke, tar and ammonia.[352] There has been absolutely no demonstration by Duke that any of the financial benefits from the sale of these additional products was shared with customers. Thus, shareholders may have realized greater benefits from operation of the MGPs than customers.

B. Sharing Of Responsibility Between Shareholders and Customers Is Important, But Customers Should Be Additionally Protected.

There should be additional exclusions from amounts customers are made to pay, if they are made to pay anything for remediation. First, the records show that Duke has

[350] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 29 (February 25, 2013).

[351] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 29 (February 25, 2013).

[352] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 29 (February 25, 2013).

not been the sole owner of the manufactured gas plant property during the chain of ownership dating back to the 1800's. For example, Columbia Gas owned Duke's gas operations from about 1909 to about 1946.[353] A ratio of Duke's non-ownership to the total MGP operational period should be applied to the amount Duke seeks to request, for purposes of reducing Duke's request by product of that ratio.

This approach would also apply to the so-named "purchased property" that are part of Duke's request. There were certain parcels of the "purchased property" Duke never owned during the period of contamination. Duke bought the properties after contamination, apparently to avoid legal action. The ratio for this property would result in consumers owing nothing to Duke for remediation. Interestingly, had Duke *not* agreed to buy the properties and been sued, Duke likely could have not collected anything from Ohio customers for damages, if any, it would have had to pay as a result of a court case.

Additionally, there should be a ratio developed to exclude costs related to time periods of MGP operation that predated PUCO regulation (prior to 1911). There seems to be some premise that the MGP cleanup costs are part of utility service. They're not and therefore are not recoverable from utility consumers. But MGP operations (and the contamination at issue) were occurring before there was a PUCO and before the type of regulation that occurred after the PUCO's regulation (with adoption of the used and useful standard) in 1911. For example, if half of the time period during which the MGP operated preceded PUCO regulation, then half of the costs Duke seeks to collect from customers should be excluded.

[353] OCC Ex. No. 7 (OCC INT No. 15-577).

X. PRIOR TO COLLECTION OF MGP-RELATED INVESTIGATION AND REMEDIATION COSTS FROM CUSTOMERS, DUKE SHOULD FIRST BE REQUIRED TO EXHAUST EFFORTS TO COLLECT PROCEEDS FROM INSURANCE CLAIMS AND THIRD PARTY LIABILITY.

Duke has focused its MGP cost recovery efforts on collection of the MGP-related investigation and remediation costs from its customers. But Duke could focus first on recovering significant sums for its MGP liabilities from third parties and insurance carriers. Consequently Duke should be required to exhaust these potential sources of cost recovery before turning to customers to pay any of these costs.

Once the remaining eligible MGP-related costs have been split between the Utility and customers, then any insurance policy proceeds should be applied against the MGP-related costs.[354] Customers paid the costs of insurance policies as part of rates in the past, so customers should benefit from proceeds received from those policies.[355]

The PUCO Staff notes, in its Staff Report, that Duke pointed to complicating factors including changes in ownership of insurance policy-holders and imprecise language in very old insurance policies.[356] Another complication, claimed by Duke, is that, given the age of the policies, it is difficult to determine in some cases if some policy holders are still in business.[357] Despite the difficulties Duke may encounter in collecting MGP investigation and remediation costs from insurers, the PUCO Staff recommended that the Commission issue a directive that **Duke should use its utmost efforts to collect all remediation costs available under its insurance policies**.[358] Especially given the

[354] OCC Ex. No. 14 (Direct Testimony of Bruce M. Hayes) at 6 (February 25, 2013).

[355] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 29 (February 25, 2013).

[356] PUCO Staff Ex. No. 1 (Staff Report of Investigation) at 47 (January 3, 2013).

[357] Id.

[358] Id.

magnitude of the costs involved just to date, $63 million, Duke should be s protecting customers' rates by seeking compensation from insurance and third parties.

Further, the PUCO Staff recommended that the Commission direct that any proceeds paid by insurers for MGP investigation and remediation costs should be split between shareholders and customers. This split should be commensurate with the proportion of MGP costs paid by the customers compared to shareholders.[359]

OCC and OPAE agree with the PUCO Staff recommendation that Duke should take all reasonable measures to obtain reimbursement of MGP costs through insurance proceeds and third party liability claims. To the extent recoveries are realized through insurance proceeds, these amounts should be netted against any amount that the Commission finds is recoverable from customers. To the extent that sums are collected that exceed the amount recoverable from customers (including any costs incurred in realizing such insurance proceeds), Duke should be permitted to retain such amount to offset its share of site assessment and remediation costs.

There is also the matter of non-insurance third parties that should be addressed for compensation to reduce what customers are asked to pay. For example, Duke responded to OCC discovery that it is investigating whether Columbia Gas of Ohio, Inc. is liable for MGP-related investigation and remediation expenses on the property at issue.[360] Columbia owned Duke's gas operations from 1909 to 1946.[361] Duke should be required by the PUCO to use and document reasonable measures to collect site assessment and

[359] Id.

[360] OCC Ex. No. 7 (Duke Response to OCC Interrogatory No. 15-576).

[361] OCC Ex. No. 7 (OCC INT No. 15-577).

remediation costs for which any third party (including Columbia) is liable and for which any insurance carrier is responsible under the law.[362]

XI. IF ANY MANUFACTURED GAS PLANT REMEDIATION COSTS ARE ALLOWED FOR COLLECTION FROM DUKE'S CUSTOMERS, THEN SUCH COSTS SHOULD BE AMORTIZED FOR COLLECTION TO OCCUR OVER TEN YEARS.[363]

If Duke is allowed to collect any MGP-related investigation and remediation costs from customers, then Duke's recommendation for a three-year amortization period for approved MGP-related remediation costs is unreasonably short.[364] If any recovery over time is allowed, the PUCO Staff also recommends that rather than recovering the eligible MGP costs through base rates, Duke should apply to recover the authorized MGP costs through a Rider.[365]

Regarding the three-year amortization period, PUCO Staff relies upon Duke's rationale that three years represents the anticipated time between rate cases; however, unlike a possible rate case, there is no reasonable expectation that the MGP costs will recur every three years, or ever. Moreover, there is absolutely no connection between the length of time between rate cases and the length of recovery time for an expense that was caused over 70 years ago.[366] In fact, the PUCO Staff notes that "Except for certain ongoing environmental monitoring costs, the MGP costs are one-time nonrecurring

[362] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 38 (February 25, 2013).

[363] OCC Hearing Ex. No. 18 (OCC Objection to the Staff Report No. 27) (February 4, 2013).

[364] PUCO Staff Ex. No. 1 (Staff Report of Investigation) at 52 (January 4, 2013).

[365] Id.

[366] OCC Ex. No. 13 (Additional Direct Testimony of Kathy Hagans), See also OCC Ex. No. 22 (Direct Testimony of David Effron) at 11, (February 25, 2013).

expenses"[367] Given, the "one-time nonrecurring" nature of these costs, and their magnitude, collecting these costs over just three years is not appropriate.

The MGPs ceased operation many decades ago. It is not reasonable to impose the collection of the costs of remediating the sites -- where those plants had operated many decades ago -- on present customers over a period of only three years. The whole approach lacks generational inequity between current customers and customers that may have actually bought manufactured gas decades or a century ago. Therefore, in the event the Commission allows certain MGP-related costs to be collected from customers, the PUCO should determine that a three-year amortization period is too short for customers in light of the age of the MGP contamination and the length of time that has passed since the MGP facilities have been operated and then retired the PUCO should impose a longer and more reasonable amortization period (e.g. ten-year amortization period, or longer) as recommended by OCC witness Hagans.[368]

XII. IF DUKE IS AUTHORIZED TO COLLECT ANY MGP-RELATED COSTS FROM ITS CUSTOMERS, USE OF THE MGP RIDER SHOULD BE LIMITED TO COLLECTING ONLY SUCH AUTHORIZED COSTS AS WERE DEFERRED AS OF DECEMBER 31, 2012.

Duke witness Wathen, in his April 22, 2013 supplemental testimony, contends that if a Rider is implemented for the purpose of collecting MGP-related investigation and remediation costs ("Rider MGP") from Duke's customers, it should be implemented

[367] OCC Ex. No. 13 (Additional Direct Testimony of Kathy Hagans) (April 30, 2013), See also Id. at 47.

[368] OCC Ex. No. 13 (Additional Direct Testimony of Kathy Hagans adopting certain portions of the Direct Testimony of David Effron) at 10-14 (April 30, 2013).

for those deferrals booked as of December 31, 2012, and for any new costs deferred thereafter.[369]

Duke's proposal for continuing the deferral of MGP costs and inclusion of such amounts in the MGP Rider in the future is contrary to the Staff Report and the Partial Stipulation in this matter. OCC and OPAE submit, for reasons discussed further below, that Duke should be limited to collecting through Rider MGP only those authorized MGP-related investigation and remediation costs, from its customers, that have been deferred on or before December 31, 2012.

Duke's Application, in these cases, proposed collection of MGP-related amortization expenses from customers through approved base rates.[370] The discussion of a Rider MGP for collection of authorized MGP-related amortization expenses originated in the Staff Report. The Staff Report states:

> The Staff also does not agree with Duke that the MGP investigation and remediation expenses should be recovered in base rates. Except for certain ongoing environmental monitoring costs, the MGP costs are one-time nonrecurring expenses that would continue to be recovered in base rates until the Company's next rate case even after the actual expenses incurred (including carrying costs) are fully recovered. The Staff recommends that instead of collecting the Staff-recommended remediation expenses in base rates, the Company should file a rider application in the docket for recovery of the authorized MGP expenses. The Staff recommends that the rider should recover the eligible MGP expenses over a three-year period (including carrying costs set at the long-term debt rate approved by the Commission in this case) and be allocated to customers pursuant to the customer rate allocation ultimately adopted in this case. **The Staff recommends that the ongoing environmental monitoring costs should continue to be deferred under authority granted by the Commission in Case No. 09-712-GA-AAM with future**

[369] Tr. Vol. III at 749-750 (Wathen) (May 1, 2013).

[370] Duke Ex. No. 2 (Application Vol. I) at 5-6 (July 9, 2013).

> **recovery of the expenses determined in a future rate proceeding**.[371]

The Staff Report recommendation with regards to Rider MGP also recommended: (1) the ongoing deferral of Duke's environmental monitoring costs, but not any other investigation or remediation costs, and (2) the future recovery (if any recovery is allowed) of such deferrals to be determined in a future rate proceeding.

Despite disagreeing with these recommendations in the Staff Report, Duke did not include either issue within its Objections to the Staff Report.[372] Duke did not object to Staff's recommendation to limit future deferrals, under the authority granted by the Commission in Case No. 09-712-GA-AAM to ongoing environmental monitoring costs. Therefore, Duke must now file a new application in order to receive Commission authority to defer MGP-related future investigation (e.g. non-ongoing monitoring) costs, as well as, future remediation costs. And Rider MGP cannot be used by Duke to collect from customers costs which Duke does not currently have authority to defer.

The Stipulation does not rescue Duke's proposal either. The Stipulation states:

> The Parties agree that the Company may establish a rider, subject to the terms of this Stipulation and subject to Commission authorization after hearing from Parties in litigation, for recovery of any Commission approved costs associated with the Companies environmental remediation of manufactured gas plants (MGP). The Parties agree to litigate their positions at the evidentiary hearing in the above captioned proceedings, for resolution by the Commission in its Order in these cases. The Staff agrees to litigate its positions as stated in the Staff Report of investigation on the MGP issues, subject to the usual caveat to allow for correction of errors (if any) or updated information.[373]

[371] Staff Hearing Ex. No. 1, Staff Report at 47 (January 4, 2013) (Emphasis added).

[372] See Duke Hearing Ex. No. 30, (Objections to the Staff Report) (February 4, 2013).

[373] Joint Ex. No. 1 (Stipulation and Recommendation) at 8 (April 2, 2013).

There is nothing in the Stipulation that envisions implementation of a Rider that would allow Duke to collect from its customers ongoing MGP-related investigation and remediation costs that have been deferred on or after January 1, 2013.

Furthermore, the Stipulation states:

> **Staff Report Resolves Other Issues**.
>
> The Parties agree that the Staff Report resolves the remaining issues not addressed in this Stipulation and Recommendation with one exception as follows:
>
> > The Company will not submit a facilities based cost of service study in its next gas distribution rate case. [374]

Therefore, the Staff Report and the Stipulation resolve this issue, and Duke's attempt to expand the intent of the Stipulating Parties with regards to the applicability of Rider MGP to costs deferred after December 31, 2012 should be denied by the Commission.

As the Staff Report recommended, a future rate proceeding is where Duke may seek collection from customers of any future deferrals. Rider MGP should not be considered an appropriate mechanism for the collection of any authorized MGP-related costs deferred after December 31, 2012 unless such authorization for collection comes from a future rate proceeding. Duke's witness William Don Wathen testified that Duke anticipates the next rate case filing in the 2015-2016 timeframe.[375]

[374] Joint Ex. No. 1 (Stipulation and Recommendation at 14 (April 2, 2013).

[375] Tr. Vol. III at 747 (Wathen) (May 1, 2013).

XIII. THE ATTORNEY EXAMINER'S DECISION TO ALLOW DUKE TO FILE ADDITIONAL TESTIMONY ONE WEEK BEFORE THE HEARING AND DENY OCC'S MOTION TO STRIKE SHOULD BE REVIEWED BY THE FULL COMMISSION.

Ohio Adm. Code 4901-1-14 (F) allows parties to make an interlocutory appeal of an Examiner ruling at the time it occurs to make the appeal on brief. OCC makes this appeal to the full Commission, on brief.

A. The Commission's Rules Do Not Provide For The Late Filed Testimony That Was Filed In These Proceedings.

On April 4, 2013, a procedural Entry was filed in these proceedings that established the date for the evidentiary hearing. In addition, the Entry stated: "Staff and all parties shall file any additional expert testimony by April 22, 2013."[376] It was presumably in response to the Attorney Examiner's Entry that Duke filed additional Testimony on April 22, 2013. On April 24, 2013, a Joint Motion to Strike the Additional testimony was filed by OCC and OPAE. On April 26, 2013, Duke filed a memorandum contra. The Attorney Examiner denied OCC and OPAE's Motion to Strike on the first day of the evidentiary hearing.[377] OCC and OPAE hereby seek Commission review of the Attorney Examiner's ruling to deny the Motion to Strike under Ohio Adm. Code 4901-1-14(F). Ohio Adm. Code 4901-1-14 (F) states:

> Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing

[376] Entry at (April 4, 2013).

[377] Tr. Vol. I at 15 (Stenman) (April 29, 2013).

> prior to the issuance of the commission's opinion and order or finding and order in the case.

OCC and OPAE believe the additional testimony filed by Duke on April 22, 2013, should have been stricken for the following reasons:

> For a Fair Process, the PUCO's Rules Require Public Utilities to File Their Testimony in Rates Cases on a Specific Schedule -- Not Adhered to by Duke's New Testimony -- to Allow for Intervenors to Prepare for Hearing and to File Their Own Testimony with Knowledge of the Utilities' Direct Testimony. Duke's New Testimony Should Have Been Stricken.

The PUCO's Rules include standard filing requirements for Utility Applications that involve an increase in rates, as was filed by Duke in these proceedings. Ohio Adm. Code 4901-7-01 states:

> All applications for an increase in rates filed under section 4909.18 of the Revised Code, all complaints filed under section 4909.34 of the Revised Code, and all petitions filed by a public utility under section 4909.35 of the Revised Code shall conform to the standard filing requirements, set forth in appendix A to this rule. The commission may, upon timely motion, waive specific provisions of the standard filing requirements, but such waivers must be obtained prior to the time that application, complaint, or petition is filed with the commission. In the absence of such a waiver, the commission may reject any filing which fails to comply with the requirements of this rule.

Ohio Adm. Code 4901-7-01 includes Appendix A which provides details of the specific filing requirements that a utility applicant must comply with. Appendix A, *inter alia*, includes requirements that pertain to the filing of expert testimony. These filing deadlines permit all parties, including the PUCO Staff and the OCC, an ample opportunity to prepare their cases, including the conduct of discovery. The following specific provision applies in a rate case, for filing the direct and supplemental testimony that Duke filed one week before hearing:

(6) Submission of written testimony **(a) Utilities shall file the prepared direct testimony of utility personnel or other expert witnesses in support of the utility's proposal within fourteen days of the filing of the application for increase in rates.** Prepared direct testimony should be in question and answer format and should, in all other particulars, conform to the requirements of rule 4901-1-29 of the Administrative Code. **Prepared direct testimony shall fully and completely address and support all schedules and significant issues identified by the utility as well as all adjustments made to rate base and operating income items. Any new schedules or adjustments or revisions to previously filed schedules or adjustments proposed by the utility shall be accompanied by prepared direct testimony which fully supports the utility's proposal**.[378]

The testimony as described in paragraph (A)(6)(a) of Chapter II of this appendix shall be the utility's case in chief. Any utility that files a rate increase shall be prepared to go forward at hearing time on the data and prepared direct testimony filed in support of the application, the two-month update, and any revisions or new schedules to sustain the burden of proof that the rate increase is just and reasonable. Supplemental testimony filed with objections to the staff report and testimony filed with the two-month update and any revisions shall be limited to matters which the applicant could not reasonably expect to be raised in the case, such as:

(i) Matters raised for the first time in the staff report.

(ii) Matters caused by changes in the law and/or in financial conditions.

(iii) Matters resulting from unforeseen changes in the utility's operations.

(iv) Matters raised by the staff during its investigation or by intervenors during discovery.[379]

Pursuant to the rules, the Utility's direct testimony in compliance with paragraph (A)(6)(e) was filed on July 20, 2012. Portions of the Duke Testimony filed on July 20, 2012, support Duke's litigation position with regards to the MGP-related issues that are

[378] Ohio Adm. Code 4901-1-07 Appendix A Page 12 – 13. (Emphasis added).

[379] Ohio Adm. Code 4901--07-01 Appendix A Page 13. (Emphasis added).

the subject of the evidentiary hearing, specifically William Don Wathen (Direct), Jessica Bednarcik (Direct) and Andrew Middleton (Direct).[380]

Furthermore, the other extenuating circumstances provided in the Standard Filing Requirements for filing supplemental testimony do not apply in this case to Duke's Testimony that was filed on April 22, 2013. For example, (ii) Matters caused by changes in the law and/or in financial conditions; (iii) Matters resulting from unforeseen changes in the utility's operations; or (iv) Matters raised by the staff during its investigation or by intervenors during discovery are not argued by Duke and are not reasons discussed in the testimony filed on April 22, 2013. Therefore, the testimony filed on April 22, 2013 was not contemplated under the Commission's Rules and should have been stricken.

The PUCO's Rules also address the appropriate time line for parties to file expert testimony in a general rate proceeding. . Under the rule, Duke's last filing opportunity was on February 25, 2013. Ohio Adm. Code 4901-1-29 states:

> (A) Except as otherwise provided in this rule, all expert testimony to be offered in commission proceedings, except testimony to be offered by the commission staff, shall be reduced to writing, filed with the commission, and served upon all parties prior to the time such testimony is to be offered. The commission, the legal director, the deputy legal director, or an attorney examiner may establish a schedule in any proceeding for the filing of testimony to be presented by staff.
>
> (1) Unless otherwise ordered by the commission, the legal director, the deputy legal director, or an attorney examiner:
>
> (a) All direct expert testimony to be offered by the applicant, complainant, or petitioner in a general rate proceeding shall be filed and served no later than: ten days prior to the commencement of the hearing or the deadline for filing objections to the staff report of investigation, whichever occurs earlier.

[380] Duke's Statement as to Relevant Objections and Witnesses (April 22, 2013).

> (b) All direct expert testimony to be offered by any other party in a general rate proceeding shall be filed and served no later than the deadline for filing objections to the staff report of investigation.

The PUCO's Rules may be waived for good cause. Accordingly, on January 14, 2013, the OCC, OPAE, the City of Cincinnati, and Kroger filed a Joint Motion for an Extension of Time to File Testimony and Request for Expedited Ruling. Ironically, Duke opposed the Joint Motion on January 16, 2013, stating that Ohio Adm. Code 4901-1-29 (1)(b) required that all direct expert testimony to be offered by any other party in a general rate proceeding shall be filed and served no later than the deadline for filing objections to the staff report of investigation. Duke further argued under a strict constructionist view of the Commission's Rules that "[t]hese are not new rules. Parties have been complying with these rules for many years, and thus, the need to prepare and file testimony and objections at the same time should have been anticipated since the filing of the Company's initial notice in June 2012."[381]

On January 18, 2013, the Attorney Examiner granted the intervenors' Joint Motion. The Entry stated:

> February 25, 2013 – Deadline for the filing of testimony on behalf of Duke and intervenors in the gas rate case, in accordance with Rule 4901-1-29, O.A.C.[382]

Accordingly, on February 25, 2013, Duke and other intervenors -- including OCC, filed testimony in support of their objections to the Staff Report. Duke filed the testimony of William Don Wathen (Supplemental), Jessica Bednarcik (Supplemental), Andrew Middleton (Supplemental) and Kevin Margolis (Direct).[383] Portions of the Duke

[381] Duke Memorandum Contra to Joint Motion for Extension of Time at 2-3 (January 16, 2013).

[382] Entry at 6 (January 18, 2013).

[383] Duke's Statement as to Relevant Objections and Witnesses (April 22, 2013).

Testimony filed on February 25, 2013, supported Duke's litigation position with regards to the MGP-related issues that are the subject of the evidentiary hearing.

The Utility filed its Direct Testimony in support of its case in chief on July 20, 2012, and Supplemental Testimony on February 25, 2013 in support of its objections to the Staff Report. The Commission's Rules and Standard Filing requirements do not provide any other opportunity to file additional direct testimony in a rate proceeding. Therefore Duke's new Testimony filed on April 22, should have been stricken.

B. Duke's Testimony Filed on April 22, 2013 was Highly Prejudicial to OCC, OPAE and Other Interested Parties

Duke's Testimony was filed on April 22, 2013, without any notice prior to its filing, and without an adequate opportunity for OCC and other interested parties to conduct discovery[384] or depose the witnesses in a timely manner.[385] Absent the opportunity to conduct discovery pertaining to the testimony filed on April 22, 2013, OCC, OPAE, and other interested parties could not adequately investigate the claims of the witnesses; OCC, OPAE and other interested parties cannot ascertain the credentials of the expert witnesses; and OCC, OPAE and other interested parties could not adequately prepare for cross-examination of these witnesses.

Ohio law provides that parties in a case before the PUCO should be granted ample discovery rights. R.C 4903.082 states:

> All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the

[384] Ohio Adm. Code 4901-1-16 Discovery Cut-off: 15 days after the issuance of the Staff Report of Investigation – in these cases January 19, 2013.

[385] Entry at 4 (March 8, 2013) granting Duke's Motion to Compel and established a discovery deadline of March 11, 2013 for issuing Notices of Deposition.

> commission's discretion the Rules of Civil Procedure should be used wherever practicable.

The late filing of three pieces of significant testimony by Duke, that could have or should have been filed earlier in these proceedings, as previously argued, or which in fact constitutes rebuttal testimony, is highly prejudicial to OCC, OPAE and other interested parties because ample discovery rights do not exist in this limited time before the evidentiary hearing.[386]

The new Testimony filed by Duke on April 22, 2013 was inconsistent with the PUCO's Rules, including the PUCO's Standard Filing Requirements, addressing the filing of expert testimony. And much of the new testimony constituted the improper submission of rebuttal testimony during the direct phase of these proceedings. In addition, the Commission's April 4, 2013 Entry was not intended to open the door for the filing of such testimony, and, having been issued in response to a stipulation, was only intended to allow additional testimony regarding the Stipulation. Such additional testimony is common practice in PUCO cases after stipulations are filed but only concerns testimony on the stipulation. Finally, Duke's new Testimony was highly prejudicial and denied OCC, OPAE and other interested parties ample discovery rights and denies a fair process. For all these reasons, the Attorney Examiner should have granted OCC's and OPAE's Motion to Strike.

[386] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶ 83. ("The text of Ohio Adm. Code 4901-1-16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 635 N.E.2d 331 ("The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding.")

XIV. CONCLUSION

The OCC and OPAE support the Stipulation signed with Duke and others. And we recommend the PUCO adopt the Stipulation without modification. The Parties agreed to disagree on Duke's request to charge customers for MGP Plant cleanup costs, and that issue was litigated.

Duke has spent a lot of money on environmental remediation of two former MGP Sites. Duke's expenditures have become an issue in this case. Duke is seeking to collect $63 million in environmental investigation and remediation costs, from its utility customers. Duke must prove that its spending is consistent with the statutory limitations of R.C 4909.15(A) and R.C. 4909.154. Those laws require that utility property -- and associated expenses -- must be used and useful in providing service to customers as of the date certain in order to be recoverable from customers, that expenses must be for current utility service, and that costs must be prudently incurred, if customers are to pay. Duke has failed to meet these tests.

The East end and West End MGP site facilities that gave rise to the environmental contamination that is the subject of the investigation and remediation costs began service in 1843 and 1884 and were shuttered in 1928 and 1963, respectively. They were not used and useful in providing natural gas service to current customers as of the date certain in this case, or as of the time such costs were deferred in accordance with a Commission deferral order. And they predated the PUCO's regulation of utilities that began in 1911. For these reasons the PUCO Staff Report rejected $57 million of Duke's requested charges, recommending that just $6.4 million qualified for charging customers under Ohio law.

In addition to not being used and useful in providing natural gas service to current customers as of the date certain or the authorized deferral period, Duke also failed to demonstrate that its remediation efforts were reasonable and prudent. OCC witness Dr. Campbell detailed the much less costly options that were available to Duke to remediate the MGP sites. Duke claims to have considered alternatives but instead elected to spend over $63 million to date with the bill yet to grow in the future. Despite its claims, Duke **was unable to produce any documentation that demonstrates that the Utility considered any less costly options that may have been available to remediate the MGP sites.** Duke has not met its burden of proof and has not shown that its remediation efforts were prudent. Duke's request for remediation cost recovery should be denied. In contrast, OCC has demonstrated that site assessment and remediation could have been conducted at a far lower cost. OCC is recommending that, at most, $8 million qualify for collection from customers and that, in reality, none of Duke's proposed charges qualify for charging customers.

In the event that the Commission determines that Duke should be permitted to recover some MGP investigation and remediation costs, then the PUCO should first require Duke to take all reasonable steps to collect from insurance policies and other potentially liable third parties. Only after those efforts have been exhausted should Duke be permitted to recover any prudently-incurred investigation and remediation costs from customers.

Once such actions have occurred, then OCC and OPAE recommend that any prudently incurred MGP-related investigation and remediation costs should be allocated evenly between customers and shareholders inasmuch as shareholders benefited from the

operation of the MGP facilities and from the sale of MGP byproducts. Any recovery from other potentially liable third parties should be applied to the total allowable MGP costs before they are allocated between customers and shareholders. Any recoveries from insurance policies should be applied to any remediation costs associated with those insurance policies.[387] Finally, any MGP-related investigation and remediation costs allocated to customers should be amortized over a period of at least 10 years to moderate the impact on customer bills and more closely align the recovery period with the period over which this liability was incurred.

Furthermore, customers should be additionally protected from collection of remediation costs during periods of time that the either Duke did not own the MGP Site (such as the 37years (1909 – 1946[388]) that Columbia Gas owned Duke's gas operations), or during periods of time that predate the PUCO's regulation of natural gas utilities (prior to 1911).

The implementation of the MGP Rider should be used only for the collection of the permitted level of MGP-related investigation and remediation costs that were deferred through December 31, 2012. Any costs incurred in the future should be subject to review, including prudence review, in future rate case proceedings.

[387] OCC Ex. No. 14 (Direct Testimony of Bruce M. Hayes) at 6 (February 25, 2013).

[388] OCC Ex. No. 7 (OCC INT No. 15-577).

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The undersigned hereby certifies that a true and correct copy of the foregoing *Post-Hearing Brief* has been served upon the below-named counsel via electronic mail this 6th day of June 2013.

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