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 OF THE KROGER CO.

The Kroger Co. ("Kroger") is one of the largest grocers in the United States, with over 65 stores, manufacturing plants, and offices, taking gas distribution service from Duke Energy Ohio, Inc. ("Duke") on firm and interruptible transportation schedules. Kroger uses Duke's natural gas service for food storage, lighting, heating, cooling, and distribution. Therefore, Kroger sought and was granted intervention in the above-captioned matters.

The majority of issues were resolved via a Stipulation and Recommendation ("Stipulation") filed on April 2, 2013, with a corrected Stipulation filed on May 10, 2013. The parties to the Stipulation, including Kroger, agreed that there would be a $0 base rate increase, and that Duke may establish a rider for recovery of MGP costs approved by the Commission, if any, and indicated the percentage allocation of any approved MGP costs to the rate classes.[1]

[1] Kroger Ex. 1 at 6 (Townsend Direct); Tr. Vol. III at 762-764 (May 1, 2013); OCC Ex. 1 at 10 (Hixon Direct); Duke Ex. 19C at 2 (Wathen Third Supp.).

Therefore, the issues that remain unresolved by the Stipulation include: the recovery of manufactured gas plant ("MGP") remediation costs and, if any such recovery is allowed, the amount of the recovery, the appropriate design of the recovery mechanism, and the amortization period for such allowed costs. For the reasons discussed herein, the Public Utilities Commission of Ohio ("Commission") should reject Duke's proposal to recover $62.8 million in deferred remediation costs. If, however, the Commission determines that some recovery of remediation costs is necessary, the recovery should be limited to those costs that are just and reasonable and currently used and useful. In addition, if recovery is allowed, any proceeds paid from insurance policies should offset the costs allowed from customers, the costs should be allocated to customers using the allocation factors set forth in the Stipulation, and the remediation costs should be amortized over ten-years.

I. Procedural History

On August 10, 2009, Duke submitted an application to the Commission in Case No. 09-712-GA-AAM for authority to defer potential future recovery of the costs associated with the environmental remediation of the East End and West End MGP sites. The Commission, in its Finding and Order, authorized Duke to defer its MGP remediation costs. However, in its Order and in its Entry on Rehearing, the Commission did not determine the amount of recovery, if any, that would be appropriate.[2]

On June 7, 2012, Duke filed a notice of intent to file an application to increase its gas rates, and on July 9, 2012, filed its application seeking authority to increase its rates, partially in an effort to receive approval for the recovery of the deferred MGP remediation costs.

[2] Kroger Ex. 3 at 3 (*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, Finding and Order (November 12, 2009) (2009 Deferral Case)); Kroger Ex. 4 at 5 (2009 Deferral Case, Entry on Rehearing (January 7, 2010)).

Subsequently, a procedural schedule was established for the above-captioned proceedings. Intervening parties, including Kroger, engaged in numerous settlement discussions with Duke prior to the established hearing date. The parties were ultimately able to settle all issues except for a few related to the recovery of MGP remediation costs. A hearing on the unresolved MGP-related issues commenced on April 29, 2013. The major topic explored at the hearing was Duke's right to recover its MGP remediation costs for the East and West End MGP sites. There was also discussion of the appropriate design of the recovery mechanism and amortization period for any allowed recovery.

II. Argument

a. The Commission should deny Duke's request to recover its remediation costs for the East End and West End MGP sites.

In paragraph 5 of its Application, Duke proposes the following:

> Through this Application, [Duke] ... proposes to recover deferred costs associated with the remediation of former manufactured gas plant (MGP) sites. In Case No. 09-712-GA-AAM, the Commission authorized the deferral of costs incurred to remediate the MGP sites, consistent with applicable environmental laws and regulations. The costs incurred to date approximate $47 million and [Duke] projects to incur an additional $15 million in remediation costs, exclusive of carrying costs, through the remainder of the test year. [Duke] proposes to amortize the total costs of approximately $65 million, including deferrals and carrying charges, over a three-year period.

On May 1, 2013, at the hearing on these matters, Duke Witness Wathen testified that the remediation costs Duke is proposing to recover have been adjusted downward from $65.3 million to $62.8 million to reflect actual remediation costs incurred by Duke through December 31, 2012.[3] These costs were incurred from January 1, 2008 to December 31, 2012 in connection

[3] Tr. Vol. III at 775.

with Duke's remediation of two MGP sites: the East End site and West End site, both located in Cincinnati, Ohio.

The manufactured gas production plants owned by Duke were constructed by Duke's predecessor companies in approximately 1841 and 1882, and ceased operations in 1928 and 1963.[4] Duke asserts that "Duke Energy Ohio is responsible for environmental remediation as a result of its historic and current ownership and operations of this property, including when Duke Energy's predecessor companies owned and operated the [MGPs]."[5] Duke initially stated that Duke[6] determined that it had liability for remediation of its MGP sites in 1988 based on the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[7] According to Duke, in 1988, Duke began to systematically review all of its MGP sites.[8] Duke prioritized the review of its MGP sites "based on a number of criteria, including but not limited to current site use and use of groundwater in the surrounding community."[9] The East End and West End sites were initially prioritized low, but were reprioritized in 2006 and 2009, respectively, due to changes in site conditions.[10] The East End site was reprioritized after a developer approached Duke and indicated that he planned to use adjoining property for residential development,[11] and the West End site was reprioritized due to a proposal to build a new bridge in Cincinnati that would interfere with existing electrical facilities on the site, including a substation, transformer bays, transmission lines, and a transmission tower.[12]

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[4] See Duke Ex. 21 at 5 (Bednarcik Direct), subsequently modified at hearing; Tr. Vol. I at 83 (April 29, 2013).
[5] Duke Ex. 22C at 1-2 (Hebbeler Second Supp.).
[6] For ease in readability, "Duke" also refers to Duke Energy and/or its predecessor companies that owned the MGPs prior to the purchase by Duke Energy Ohio. For a more thorough history of the ownership of the plants, see Duke Ex. 21, Attachment JLB-1 (as modified)(Bednarcik Direct).
[7] Tr. Vol. I at 16, 20; Duke Ex. 21A at 4, 16 (Bednarcik Supp.).
[8] Duke Ex. 21A at 16 (Bednarcik Supp.).
[9] Id.
[10] Id. at 17.
[11] Id. at 17-19.
[12] Id. at 19-20; Tr. Vol. II at 326-35 (April 30, 2013).

Duke claims that, based on these changes in conditions, it was liable under Chapter 3746 of the Ohio Revised Code and the associated rules codified in 3745-300-01 through 3745-300-14 of the Ohio Administrative Code.[13] These rules establish the Voluntary Action Program ("VAP") which is a "set of rules, regulations, guidance, and other directives from the Ohio [Environmental Protection Agency ("EPA")], that establish a process by which contaminated sites may be investigated and remediated to Ohio EPA standards."[14] A company choosing to participate in the VAP will generally hire a VAP Certified Professional (CP), who is paid by Duke, but who is an agent of the state that is responsible for verifying that properties are investigated and cleaned up as required by the VAP rules.[15] If a CP determines that a property meets all applicable VAP standards, "the CP may prepare a [No Further Action] letter."[16] A remediating party may then request that the CP submit the No Further Action ("NFA") letter to the Ohio EPA in an attempt to obtain a Covenant Not to Sue ("CNS") from the State of Ohio.[17]

Duke decided to voluntarily enter into the VAP in 2006 after learning about the potential changed conditions at the East End site. Duke retained VAP CPs to assist Duke in the remediation of the MGP sites.[18] It is the costs incurred in connection with these investigation and remediation efforts that Duke is attempting to recover through the above-captioned proceedings.

Duke conceded that the VAP is not a compulsory program and that Duke does not currently have a mandate or formal order from any State or Federal agency requiring Duke to

[13] Duke Ex. 21 at 6-7 (Bednarcik Direct).
[14] Duke Ex. 26 at 5 (Fiore Direct).
[15] Id. at 6.
[16] Id. at 7.
[17] Id. at 8.
[18] Tr. Vol. II at 542-43, 547-49; Duke Ex. 21A at 18, 20 (Bednarcik Supp).

remediate the MGP sites.[19] Duke's decision to enter into the VAP and remediate in the manner chosen was done on its own accord. Duke Witness Fiore stated that "Duke does not have to follow the [VAP]. It is voluntary. It's not compulsory."[20] He further testified that the only consequence of Duke not complying with the VAP standards is that Duke would not receive an NFA letter.[21] Accordingly, Duke is attempting to recover from current customers the cost of remediation that Duke voluntarily chose to incur (at the time and manner of its choosing), and that were not necessary for the provision of natural gas services. Duke should not be permitted to recover remediation costs from customers under such circumstances. Rather, this is a cost that should be borne by Duke's shareholders.[22]

As explained previously, Duke learned of its potential liability at the East and West End sites in 1988, yet it waited until 2007 and 2010, respectively, to begin remediation of the sites (investigation of the sites began in 2006 and 2009, respectively).[23] Duke witness Jessica Bednarcik admitted that the conditions which required remediation at the East and West End sites were the same in 1980 as they were in 2007 and 2010, when remediation actually began.[24] It is also possible that the conditions were in existence prior to 1980.[25] Therefore, Duke could have voluntarily chosen to remediate the sites back in 1980 when it first learned of the need for remediation at the time CERCLA was enacted or when Duke began affirmatively reviewing all of its MGP sites in 1988.[26] Duke could have requested to pass the costs to remediate onto gas customers at that time, a time when it would have been much more likely for the customers it

[19] Tr. Vol. II at 356, 572; Tr. Vol. III at 629, lns 17-19 ("Duke does not have to follow the voluntary action program. It is voluntary."); Tr. Vol. III at 631; Tr. Vol. I at 139; also see Staff Ex. 1 at 31.
[20] Tr. Vol. III at 629.
[21] Id. at 630.
[22] See Duke Ex. 14 at 6 (Hayes Direct).
[23] Tr. Vol. I at 16, 20.
[24] Tr. Vol. II at 522-28.
[25] Id.
[26] Duke Ex. 21A at 16 (Bednarcik Supp.).

would have been seeking to collect costs from to have received manufactured gas services from those MGPs. Instead, Duke waited almost thirty years to begin remediation on these sites and is now attempting to pass the burden of the remediation costs onto customers that are very unlikely to have received any benefits from Duke's MGPs.

The MGP sites are not, and have not been for at least forty-five years, used and useful in the provision of natural gas services to current Duke customers and, therefore, should not be included in the calculation for plant in-service. The East End site ceased manufacturing gas in 1963 and the West End shut down its gas manufacturing operations in 1928.[27] Therefore, these sites clearly were not "used and useful in rendering natural gas distribution service on March 31, 2012, the date certain in this case."[28] Because neither of the MGP sites remediated by Duke were used and useful on the date certain in this case, they cannot be included in the plant in-service calculation. If the MGP sites are not included in plant in-service, the remediation costs for those sites cannot be recovered from customers. Therefore, the Commission should deny Duke's request to recover $62.8 million in remediation expenses.

Duke argues that the Commission has already determined that it is entitled to some recovery of the remediation expenses because the Commission approved the deferral of the expenses in Case No. 09-0712-GA-AAM.[29] However, the Commission specifically stated in its Order that: "By considering this application the Commission is not determining what, *if any*, of these costs may be appropriate for recovery in Duke's distribution rates."[30] Further, in its Entry on Rehearing, the Commission denied rehearing "because the deferrals do not constitute ratemaking and approval of Duke's application is not a determination of what, *if any*, of these

[27] Duke Ex. 21 at 5 (Bednarcik Direct); Tr. Vol. I at 183.
[28] Staff Ex. 6 at 4 (Adkins Direct); OCC Ex. 14 at 28 (Hayes Direct).
[29] Tr. Vol. III at 767, lns 6-8 ("[T]he Commission authorizing a deferral must be providing some assurance of recovery as we rely on that in creating regulatory assets.").
[30] Kroger Ex. 3 at 3 (emphasis added).

costs are appropriate for recovery in Duke's distribution rates."[31] The Commission made it clear in its entries in the 2009 Deferral Case that there was no guarantee or expectation of recovery. Accordingly, the Commission is not obligated to allow Duke to recover its remediation expenses based on its findings in the 2009 Deferral Case. [32]

It is also important to note that Duke's stated rationale for its need to voluntarily enter into the VAP in 2006 for the East End site was a change in condition; a change in condition that Duke created when it sold a piece of property and provided an easement to a residential developer, who then contacted Duke, indicating that it planned a large residential development on his newly acquired property.[33] Duke then reacquired the property in 2011 at a premium purchase price.[34]

Duke Witness Wathen explained that this piece of purchased property is "recorded on the company's books as a nonutility plant, so customers are not going to be asked to pay for it."[35] In response to a question as to whether Duke customers would receive any benefits from the proceeds of a subsequent sale of that property, Duke responded in the negative, stating that "[i]t is not part of rate base, the customers have no investment on it, shareholders have the exclusive investment on it, so the proceeds in excess or below the value of that money would go to the shareholders."[36] Notwithstanding Duke Witness Wathen's statements that customers would not be asked to pay for the property, Duke did in fact ask customers, through this proceeding, to pay for the remediation of the property that has been recorded as a "nonutility" plant, and asked

[31] Kroger Ex. 4 at 3 (emphasis added).
[32] See OCC Ex. 14 at 22-23 (Hayes Direct).
[33] Duke Ex. 21 at 9-10 (Bednarcik Direct); Duke Ex. 21A at 13, lns 13-15 (Bednarcik Supp.) ("Some land that was part of the original MGP site, to the west of the West Parcel, was sold by the Company in 2006 and reacquired by Duke Energy Ohio in 2011.").
[34] Id. at 14 (Bednarcik Direct); Duke Ex. 21A at 13 (Bednarcik Supp.); Staff Ex. 6 at 18 (Adkins Direct); Staff Ex. 1 at 34 (Staff Report).
[35] Tr. Vol. III at 755.
[36] Id.

customers to pay for operating and maintenance expenses on that property.[37] Specifically, Duke proposed to pass on to ratepayers the cost of the above-market purchase of the property and the cost to remediate the site.[38] As the Staff Report indicates:

> Duke states that as the entity responsible for cleaning up the impacts at what was the developer's property and to minimize its future liability, a decision was made to purchase the land from the developer. The Company further states that it purchased the land for $4,500,000 and that the $2,331,580 included for recovery in its Application represents the amount over and above the fair market value of the land that Duke had to pay in order to acquire the property.[39]

The recovery of costs associated with a premium paid to a developer to purchase a piece of property back from the same developer that Duke had originally sold the property to in order to protect itself from future liability arising from the potential presence of MGP impacts, as well as to protect itself from liabilities associated with the original sale of the same property, are not operating or maintenance expenses related to rendering natural gas service, and cannot be recovered from customers.[40] Therefore, any such costs should be disallowed as recommended by Staff.[41] The purchased property is a nonutility asset, was not used and useful in the provision of natural gas distribution service as of the date certain, and therefore, any costs associated with such purchased property should not be recovered from customers.[42]

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[37] Staff Ex. 6 at 15-16, 18 (Adkins Direct); Staff Ex. 1 at 34 (Staff Report) (referencing Duke Witness Bednarcik's Direct Testimony at 14-15 and interviews with Company personnel (October 18, 2012)).
[38] Tr. Vol. III at 756; Staff Ex. 1 at 34 (Staff Report).
[39] Staff Ex. 1 at 34 (Staff Report)(January 4, 2013).
[40] Staff Ex. 6 at 18 (Adkins Direct).
[41] Staff Ex. 1 at 43 (Staff Report).
[42] Staff Ex. 6 at 16 (Adkins Direct).

b. If the Commission grants Duke's request to recover manufactured gas plant remediation costs, recovery should only be limited to those portions of the former MGP sites that are currently used and useful.

Kroger maintains its position that the MGP sites were not used and useful as of the date certain in these proceedings, and, therefore, the remediation expenses incurred due to the sites' former uses cannot be passed on to Duke's current customers. Further, even if portions of the MGP sites are determined to be currently used and useful, the current use of sites is not what created the need for the remediation. Current customers should not be responsible for the cost to remediate for past uses of the site from which they received no benefit. Additionally, customers should not be responsible for the cost to remediate land that is owned by shareholders and that is not used and useful in the provision of natural gas service to current customers, and which was never used and useful in the provision of natural gas service to Duke's customers.[43]

Nonetheless, and subject to Section c below, if the Commission finds that Duke is entitled to recovery of some costs, the recovery should be limited to a maximum of $6,367,724, as recommended by Staff.[44] Staff's recommendation appropriately limits the recovery to portions of the former MGP sites that are currently used and useful in the provision of gas services.[45]

Additionally, the Commission should limit its approval, if any, to the costs requested in this proceeding, and not authorize subsequent remediation costs that may be incurred in the future.[46] If the Commission authorizes the recovery of some costs that have been deemed to be just and reasonable and currently used and useful in the provision of natural gas services through

[43] Tr. Vol. III at 755-56; OCC Ex. 14 at 35-36 (Hayes Direct).
[44] Staff Ex. 1 at 46 (Staff Report).
[45] Staff Ex. 6 at 4, 9, 16 (Adkins Direct).
[46] See Tr. Vol. III at 775-77; Duke Ex. 19C at 3 (Wathen Third Supp.)(referencing an "initial Rider MGP" and recognizing that "the proposed amount to initially be recovered via Rider MGP is the balance at December 31, 2012.").

this proceeding, the Commission should direct Duke to request through subsequent proceedings any additional costs that may be incurred going forward, requiring Duke to meet its burden of demonstrating that the costs it subsequently incurred were just and reasonable and currently used and useful in the provision of natural gas services.

c. If the Commission grants Duke's request to recover manufactured gas plant remediation costs, recovery should be further limited to those costs that are just and reasonable.

Duke has failed to meet its burden to demonstrate that the MGP costs are just and reasonable pursuant to Section 4909.15, Revised Code. As such, Duke's recovery, if any, should be significantly reduced as those costs were imprudently incurred by Duke. Ohio law provides that costs which are determined to be imprudent may not be recovered from customers.[47] An investigation of the prudency of costs incurred "is an essential part of determining whether Duke's expenditures are reasonable and prudent, and whether the expenditures may be charged to customers."[48] Staff's recommended recovery of $6,367,724 is based solely on the "verification and eligibility of the expenses for recovery," accepting the opinion of Duke's CP, and not taking into account the fact that the costs may have been imprudently incurred.[49] Staff recognized that its position was limited in nature and explained that its position was not intended to preclude other parties from addressing the reasonableness of Duke's remediation expenses or limit the Commission's ability to address such issues.[50] Accordingly, an investigation into the prudency of the costs incurred by Duke is necessary and appropriate to determine the proper recovery of remediation expenses, if any.

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[47] Section 4909.154, Revised Code.
[48] OCC Ex. 15 at 26-27 (Campbell Direct).
[49] Staff Ex. 1 at 40 (Staff Report); Staff Ex. 6 at 25 (Adkins Direct).
[50] Staff Ex. 6 at 25 (Adkins Direct).

The record demonstrates that, "Duke's expenditures were excessive and imprudent for MGP remediation."[51] Duke decided to use a remediation approach that "was far in excess of the more cost effective and reasonable remedial option provided for in Ohio EPA's VAP Rules,"[52] which Duke is not obligated to conduct. OCC Witness Campbell stated that Duke's "decision to exceed reasonable, cost effective and protective VAP requirements, and to spend excessively to conduct remediation that was not necessary..., constitutes imprudence on Duke's part."[53] In accordance with Ohio law, Duke cannot be permitted to recover these imprudently incurred costs. Therefore, Staff's recommended recovery should be reduced by the amount of costs that were imprudently incurred by Duke.

d. If the Commission grants Duke's request to recover manufactured gas plant remediation costs, any such costs should be offset by any insurance policy proceeds received.

The Commission should direct Duke to use its best efforts to collect all remediation costs available under its insurance policies, and offset any amounts authorized to be collected from any proceeds paid by the insurers.[54] Duke should have exhausted all insurance claims – with the potential for Duke to receive funds – prior to attempting to recover the MGP costs from customers.[55] Duke's own witness stated that he has seen companies successfully pursue and recover insurance proceeds for remediation efforts.[56] The Commission should not reward Duke for its failure to exhaust its remedies by allowing it to recover the entire amount of MGP costs

[51] OCC EX. 15 at 5 (Campbell Direct).
[52] Id. at 7.
[53] Id.
[54] Staff Ex. 1 at 47 (Staff Report).
[55] See OCC Ex. 14 at 28-29 (Hayes Direct).
[56] Tr. Vol. I at 143.

from customers. Duke customers paid for the policies as part of their rates, and, therefore, should be entitled to the benefit of any insurance proceeds received by Duke.[57]

Additionally, as recommended by Staff, Duke should "pay customers an interest rate that is linked to customers instead of Duke."[58] This recommendation is commensurate with Staff's recommendation that "any insurance reimbursements that Duke makes to ratepayers should be net of carrying costs that Duke is entitled to retain pursuant to the 09-712 Order."[59] Therefore, the Commission should require Duke to offset the MGP rider, on a dollar for dollar basis, by the amount of any insurance recovery, plus interest.

e. If the Commission grants Duke's request to recover manufactured gas plant remediation costs, any costs should be recovered through a MGP rider and amortized over ten years.

In paragraph 5 of its Application,[60] Duke proposes to amortize the total costs of $62.8 million, including deferrals and carrying charges, over a three-year period. Duke Witness Wathen stated that the proposal for a three-year amortization was made in an effort to avoid any rate shock.[61] However, in considering the rate impact on current customers of a three-year amortization period, Duke failed to take into account that it is attempting to recover costs expended to clean-up MGP sites that ceased operations decades ago.

At the hearing, Duke listed a number of factors that should be considered when determining an appropriate amortization period including the amount of the deferral, age of the deferral, and the proximity of the next set of rate cases.[62] Missing from Duke's list was

[57] OCC Ex. 14 at 29 (Hayes Direct); Tr, Vol. III at 846; Staff Ex. 1 at 47(Staff Report) (Staff concurs that some offset to the rider would be appropriate.).
[58] Staff. Ex. 6 at 23 (Adkins Direct).
[59] Id.
[60] As modified by subsequent testimony.
[61] Duke Ex. 19c at 3 (Wathen Third Supp.); Tr. Vol. III at 747-48.
[62] Tr. Vol. III at 811-812.

consideration of the nature of the costs involved.[63] Kroger Witness Townsend stated that the nature of the remediation costs needs to be considered because the costs incurred were for MGP sites that have not been in operation for approximately fifty years.[64] In addition to the MGP sites ceasing operations decades ago, the environmental problems that Duke is remediating are also decades old.[65]

Additionally, Kroger Witness Townsend explained that there are differing opinions as to what constitutes rate shock or the level of the rate impact on customers.[66] Contrary to Duke's assertion, when the nature of the costs Duke is attempting to recover is considered, it is clear that an amortization period greater than three years is necessary to avoid rate shock. A ten-year amortization period is more appropriate because it allows for mitigation of "rate impacts on customers who did not receive the benefit of the MGPs at issue."[67] As mentioned above, Duke is seeking to recover costs that are related to MGPs that have not been in operation for almost fifty years and it is very unlikely that current customers reaped any benefit from the MGP plants.[68] Kroger Witness Townsend added: "To the extent that current-day customers are required to pay for any of these legacy costs, the impact on today's customers becomes increasingly arbitrary the shorter the time allowed for recovery."[69] OCC witness David Effron agreed, stating: "It is not reasonable to impose the significant costs of remediation of the MGP sites over such a short time period where those plants and the production from those plants have likely never been of benefit

[63] Id. at 812.
[64] Id.
[65] Id.
[66] Id. at 814.
[67] Kroger Ex. 1 at 3 (Townsend Direct); OCC Ex. 22 at 12 (Effron Direct).
[68] Kroger Ex. 1 at 7 (Townsend Direct).
[69] Id.

to current Duke customers and where the environmental liability was realized over many decades."[70]

Further, Duke has known about the need for remediation of these sites since at least 1988, yet failed to take any steps to remediate until beginning to investigate in 2006.[71] If Duke had begun remediation upon notice of the environmental concerns, customers that actually received a benefit from the operation of the MGP sites may have been responsible for the recovery of the remediation costs.

The Commission, if it allows recovery, should extend the amortization period to ten years in order to mitigate the impact on current customers who will be forced to pay for these, one-time nonrecurring, remediation costs that relate to MGPs that have not been in operation for decades and that have provided no benefit to them.[72] Additionally, as explained by Duke Witness Wathen, the Stipulation sets forth the appropriate allocation factors to be used when allocating the revenue requirement between the residential and non-residential classes.[73] To ensure fairness within a rate class, Duke should recover the costs on an equal percentage basis. Given the unusual nature of these costs, there is no sound ratemaking reason for collecting these costs on a per bill basis. Therefore, the Commission should reject Duke's proposal to first allocate the revenue requirement between classes based on the allocation factors agreed to in the Stipulation, and then "divide that by the number of bills" ("straight bill allocation").[74]

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[70] OCC Ex. 22 at 12 (Effron Direct).
[71] Duke Ex. 21A at 16-17 (Bednarcik Supp.).
[72] OCC Ex. 22 at 12 (Effron Direct); Kroger Ex. 1 at 7 (Townsend Direct).
[73] Duke Ex. 19C at 3 (Wathen Third Supp.).
[74] The "per bill" basis was proposed by Duke for the first time in Wathen's Third Supplemental Testimony. Duke Ex. 19C at 3 (Wathen Third Supp.); see also Tr. Vol. III at 777-79.

III. Conclusion

Based upon the foregoing arguments, the Commission should deny Duke's request for recovery of remediation expenses for the East and West End MGP sites inasmuch as the investigation and remediation costs were incurred in areas of former MGP sites that are not currently used and useful for natural gas distribution service, and thus, are not recoverable in natural gas rates. Nonetheless, if the Commission determines that Duke is entitled to some recovery of its MGP remediation costs, the recovery should be limited to those costs that are just and reasonable and currently used and useful. The Commission should also direct Duke to use its best efforts to collect all remediation costs available under its insurance policies, and offset any amounts authorized to be collected from any proceeds paid by the insurers. Furthermore, to the extent that any recovery is granted through the MGP Rider, the Commission should require that any costs be allocated to customers as set forth in the Stipulation and amortized over a ten-year period.

Respectfully Submitted,

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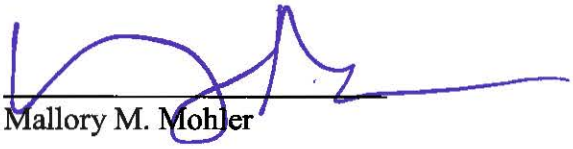
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 6th day of June, 2013 by electronic mail if available or by regular U.S. mail, postage prepaid, upon the persons listed below.



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Summary: Brief Post-Hearing Brief of The Kroger Co. electronically filed by Mrs. Kimberly W. Bojko on behalf of The Kroger Co.