BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution 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

DUKE ENERGY OHIO, INC.'S
MEMORANDUM CONTRA APPLICATION FOR REHEARING OF JOINT CONSUMER ADVOCATES

I. INTRODUCTION

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) submits this Memorandum Contra the Application for Rehearing of The Office of the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), Ohio Manufacturers' Association and the Kroger Company, (collectively hereinafter the Intervenors). The Intervenors oppose the decision of the Public Utilities Commission of Ohio (Commission) and disagree that Duke Energy Ohio is legally permitted to recover costs incurred for the investigation and remediation of manufactured gas plants (MGPs). The Company fundamentally disagrees. The position taken by the Intervenors is inconsistent with Ohio law and represents an unwillingness to recognize Commission authority and to support good public policy and corporate environmental

responsibility. The introduction to the Intervenors' argument recounts the history of the MGP plants and the fact that the plants have not been operational in recent years. In so arguing, the Intervenors willfully and persistently refuse to recognize that the expenses incurred by the Company to investigate and remediate the MGP sites were incurred as the direct result of compliance with current federal and state law and regulation. For the reasons set forth in greater detail below, the Application for Rehearing of the Intervenors must be denied.

I. ARGUMENT

A. The Commission Has Acted Well Within Its Authority and Consistent With Precedent By Allowing Recovery of Prudently Incurred Remediation Expenses.

The Intervenors build a foundation for their first argument upon the claim that the Commission disregarded Ohio law in violation of R.C. 4909.15(A)(1). In so arguing, the Intervenors raise the same arguments they previously made, which the Commission rejected. As explained by the Commission, the relevant law supporting its decision in these proceedings is R.C. 4909.15(A)(4). Simply stated, the question before the Commission relates to an *ordinary and necessary business expense* and not the recovery of, or on, capital investment. The Company has not sought to include any capital investment associated with MGP facilities in its rate base.

The Intervenors steadfastly refuse to recognize this solid statutory authority under R.C. 4909.15(A)(4) and instead misconstrue well-settled regulatory law. Intervenors' citations to Ohio Supreme Court decisions that explain that the Commission is a creature of statute are unnecessary and can only be intended to obfuscate the issues as the Commission's decision in this case is, in fact, in compliance with the statutes that provide the necessary authority.

Likewise, the Intervenors' argument that R.C. 4904.15(A)(1) does not provide an exception to the applicability of the used and useful standard is of no assistance here as that provision is not relevant to the Commission's decision. As the Commission very concisely explained, the

environmental cleanup expenses are a normal and necessary cost of doing business. These costs are necessary in order for the Company to stay in business and comply with current environmental laws and regulations; thus they are part of providing current service and are properly recoverable.[1] R.C. 4904.15(A)(1) is inapplicable and Intervenors' arguments based upon the wrong statutory provision fail.

Notwithstanding the Commission's Opinion and Order, the Intervenors continue to assert that the Commission must only consider expenses associated with property that is presently used and useful. Intervenors' misapplication of the law and misguided understanding of the Commission's authority under the statute has no foundation in the law or in Commission precedent. Indeed, costs that do not relate directly to used and useful capital investment but are instead related to the Company's business viability are frequently allowed and included in rate proceedings. Following Intervenors' logic that only costs directly associated with used and useful investment would preclude utilities from recovering such costs as gross receipts taxes, outside consultants, outside legal fees, and many other types of costs that are incurred by the utility in the provision of service but may not be associated with any particular used and useful property.

The General Assembly understandably recognized that there are costs to provide utility service that are not necessarily directly related to used and useful property. That understanding is evident since R.C.4909.15(A)(4) specifically provides for recovery of such costs and does not make recovery contingent on being associated with the valuation of rate base. The MGP remediation costs at issue in this case are no different - they constitute normal and necessary business expense similar to any other cost of remaining in compliance with Ohio and federal environmental laws. Accordingly, the Intervenors' argument continues to fall woefully short.

[1] Opinion and Order at pg. 54.

No party in these proceedings provided any evidence to establish that the Company is not legally responsible for the MGP sites or for the remediation of the sites. Curiously, the Intervenors argue that the Company has no statutory mandate to remediate the MGP sites and there is no order by any environmental agency has requiring or directing Company to remediate the MGP sites. This argument is both irrelevant and factually unsupported. Witnesses for Duke Energy Ohio provided abundant expert testimony to explain the Company's evaluation of its liability under state and federal law for the environmental contamination present at the properties, and the wisdom and prudence of proceeding to proactively address that liability under the voluntary action program (VAP). The testimony, which is likewise recounted in the Commission's Opinion and Order at length, provides a foundation of understanding with respect to the history, causes, experiences, regulations, and management of MGP sites and the expertise of the Company's management team in complying with state and federal law in a prudent and cost effective manner. There is nothing in the record that in any way casts doubt as to the need to remediate these sites. The OCC was the only party in these proceedings to provide a witness who had any experience with environmental remediation. Although the OCC witness, Dr. James R. Campbell, testified as to his opinion of the scope and necessity of the remediation undertaken, his view was that the Company has not interpreted and applied the VAP rules in a cost effective manner and that the expenditures were otherwise imprudent.[2] At no time in these proceedings has any party claimed that the Company was not legally required to remediate these sites.[3]

The Intervenors next argue that the Commission has exceeded its authority by disregarding the used and useful standard. Continuing to assert that the used and useful standard must apply, the Intervenors provide a series of cases that claim to support this argument. However, in each

[2] Direct Testimony of James R. Campbell at pg. 8.
[3] Opinion and Order at pg. 47.

instance, the cases cited are designed to buttress the notion that the Commission must look to R.C. 4909.15 (A)(1) and not 4909.15(A)(4). Thus, the authorities cited are inapplicable, where, as here, the Commission's statutory authority under R.C. 4909.15(A)(4) is clear. For example, at issue in the *Montgomery County*[4] case were questions related to the Commission's emergency powers and what might be permitted in a fuel cost rider. No such question arises in the context of these proceedings. Likewise, the *Cleveland Electric Illuminating Co.*[5] case cited by the Intervenors is of no avail since it dealt with a question as to whether the Commission had improperly extended its authority by considering matters not put in issue by the application for a rate increase. In these proceedings however, the Company included recovery of costs associated with MGP remediation in its application. Thus the *Cleveland Electric Illuminating* case is also inapposite.

Continuing to argue the used and useful requirement notwithstanding its improper application in relation to an allowable business expense, the Intervenors claim that the test year expense in question must be matched to or related to facilities utilized in rendering public utility service during the test period. In responding to the Commission's explicit rejection of two *Ohio Edison* cases, the Intervenors continue to claim that the cases are pertinent because expenses in those cases were disallowed and could not be matched with utility plant.[6] However, the Intervenors themselves note that these cases dealt with expenses of an entirely different nature.[7] Although Duke Energy Ohio has already addressed these cases in post-hearing briefs, and the Commission has already concluded that they are not relevant, the Company again points out that in both of the *Ohio Edison* cases, it is possible, that the costs did not meet the necessary, prudent and reasonable standard that is applied to

[4] *Montgomery County Bd. Of Comm'rs v. Pub. Util. Comm.* (1986), 28 Ohio St.3d 171;503 N.E. 2d 167.
[5] *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 330 N.E. 2d 1.
[6] Opinion and Order at pg.53 referring to: *In the Matter of the Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR, (August 16, 1990), and, *In the Matter of the Application of The Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Increase Rates for Distribution Service*, Case No. 07-551-EL-AIR, *et al.*, Opinion and Order (January 21, 2009).
[7] Intervenors' Application for Rehearing at pg.13.

recovery of costs relevant to R.C. 4904.15(A)(4). Importantly, in neither case were the costs authorized in prior requests for deferral or recognized as normal and necessary business expense.

B. The Revised Code Supports the Commission's Authority

The Intervenors give only a passing nod to R.C. 4949.15(A)(4), setting forth the relevant portion of that statute and arguing again that the underlying property that gave rise to the costs must somehow be inexorably used and useful in providing service to customers on the date certain. Once again the Intervenors conflate R.C. 4909.15(A)(1) with (A)(4) to support the position that only expenses associated with used and useful property are recoverable from customers. However, nothing in R.C. 4909.15(A)(4) mentions the used and useful requirement. The statutory provision refers instead to costs to the utility of rending the public utility service for the test period. As the Commission has already recognized, such costs necessarily include the costs of complying with applicable law. Thus, although the Intervenors adamantly refuse to acknowledge that a utility company may incur allowable expenses that are not directly tied to a particular piece of property, the expenses incurred for investigation and remediation of former MGP sites are indeed "costs to the utility of rendering the public utility service for the test period."[8] There is no possibility that the Commission was confused or misinformed about the meaning and intent of the applicable Revised Code as the Opinion and Order addressed these points exhaustively.

C. Investigation and Remediation Costs are Normal and Recurring Business Expenses.

The Intervenors assert that the Commission failed to comply with statute because, they claim, the Commission is obligated to take into account "normal recurring expenses." However, despite Intervenors' attempts to add new words to R.C. 4909.15(A)(4). This provision does not contain the term" normal" or "recurring" in the context used by the Intervenors. Thus, there is no

[8] Opinion and Order at pg.54.

legal requirement that the expense be normal or recurring in order to be recoverable from customers.

The Commission did in fact recognize that the expense was a recurring one when it stated that "such environmental cleanup expenses are a normal and necessary cost of doing business. These costs are necessary in order for Duke to stay in business and comply with current environmental laws and regulations; thus, they are part of providing current service and are properly recoverable."[9] And prior to making this determination, the Commission acknowledged repeatedly that this was the question that the parties to these proceedings wanted to address.[10] Thus contrary to the Intervenors' assertions, the Commission acknowledged the issue and properly addressed it in its Opinion and Order. There is nothing in the Commission's Opinion and Order to support the Intervenors' claim that the Commission "disregarded" arguments related to these costs. As much as the Intervenors may wish to assert that the Commission must recognize explicitly the "recurring" elements of the expense as a necessary finding in these proceedings, there is no legal support for such a claim. The costs at question here are, undeniably, recurring for a period of time; however, whether the costs are recurring is irrelevant.[11]

Additionally, the Intervenors assert that investigation and remediation costs do not provide a direct and primary benefit to Duke Energy Ohio's current utility customers.[12] However, the Company provided evidence to support the legal and regulatory requirements related to the need to investigate and remediate the sites in question in order to be compliant with state and federal law and to protect human health and the environment. Likewise, as the properties in question still

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[9] Id.
[10] Opinion and Order at pp.48, 52, 54, 57.
[11] The Intervenors cite to their own initial brief for this argument. Thus the argument is based upon earlier argument and no legal authority.
[12] Application for Rehearing at pg.18.

contain ongoing regulated gas operations, the Company established the need to ensure that its own employees were protected. These sites are used to provide affordable, reliable and safe utility service to Duke Energy Ohio's present customers. The remediation serves to allow this ongoing service to continue at the sites and to protect current employees as well as future employees and customers. The Commission's Opinion and Order demonstrates the Commission's understanding and reliance upon the evidence.[13] The Commission found as follows:

> There is no disagreement on the record that the sites for which Duke seeks cost recovery must be cleaned up and remediated in accordance with the directives of CERCLA.[14] There is also no dispute that Duke had MGP operations, and still has utility operations, on the East and West End sites, including, but not limited to: underground gas mains and pipelines; a gas operations center; storage, staging and employee facilities; sensitive utility infrastructure; and propane facilities.[15]

Thus the Commission did in fact recognize that the underlying property that gave rise to the costs was currently used and useful in providing service to customers and therefore constitute costs to the utility of rendering the public utility service as required by R.C.4909.15(A)(4).

D. The Commission Properly Recognized a Normal and Necessary Business Expense.

The Intervenors argue that since these proceedings result from the application for an increase of distribution base rates, the only issue appropriate for such a case, is the examination of what property is used and useful in rendering public utility service. The Intervenors then go on to argue that after the used and useful determination is made, the Commission must then find a nexus between the MGP-related costs and the provision of natural gas service. Intervenors cite to R.C.4909.15 to support this argument, but this argument is contrary to the plain words of the

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[13] Opinion and Order at pp. 24, 36 (Ease End sites was sequenced so that gas activities could continue), pg.38 (the eastern parcel has continued to be used and useful during the entire operating history), pg.40 (the western parcel includes new vaporizers for the propane facility), pg. 41 (the central parcel is comprised of natural gas operations that occupy the entire parcel), pg. 54("There is no disagreement on the record that the sites for which Duke seeks cost recovery must be cleaned up and remediated in accordance with the directives of CERCLA.

[14] *The Comprehensive Environmental Response, Compensation and Liability Act of 1980.*

[15] Opinion and Order at pg. 54.

statute. R.C. 4909.15(A)(1) does indeed direct the Commission to determine the valuation as of the date certain of the property of the public utility used and useful in rendering public utility service. And, in fact, the sites upon which the MGPs are located are used and useful in rendering public utility service. However, it is not necessary to demonstrate any "nexus" as argued by Intervenors in order for the Commission to find that the investigation and remediation expenses are a normal and necessary business expense.

The Intervenors repeat here an argument that was made in a Motion to Stay - that the existence of dissenting opinions expressed in the Commission's Opinion and Order provides support for their contention that the Commission improperly ignored R.C.4909.15(A)(1). However, it is undeniable that a majority of the Public Utilities Commissioners constitutes a quorum for the transaction of any business or performance of any duty or the exercise of any power. The act of the majority is the act of the Commission.[16] Further, a majority of the Commissioners reached the conclusion that it did, allowing recovery of prudently incurred costs for environmental investigation and remediation. The existence of a minority position is irrelevant to the legality and sustainability of the Commission's decision.

E. The Record Supports the Commission's Decision

The Intervenors argue that the Commission's Opinion and Order does not properly support its decision with respect to the used and useful standard. To support this argument, Intervenors assert that the Company has no liability to remediate the MGP sites. In so arguing, the Intervenors advance two illogical and unsupportable arguments.

First, the record clearly and unequivocally supports the prudent decision made by the Company, under applicable Ohio and federal law, to investigate and remediate the MGP sites.

[16] R.C. 4901.08

Duke Energy Ohio provided the testimony through its expert witness Kevin D. Margolis to explain the legal and regulatory requirements related to liability under and compliance with federal and Ohio environmental regulatory law.[17] Mr. Margolis is a practicing attorney with experience representing public and private companies in environmental legal matters, including regulatory compliance, enforcement, remediation (voluntary and involuntary), litigation, insurance and risk.[18] Mr. Margolis provided information related to the legal liability of Duke Energy Ohio and the Company's compliance with the Ohio Environmental Protection Agency's (Ohio EPA) VAP. Mr. Margolis further explained the application of the CERCLA, noting that it establishes strict liability for sites that contain hazardous substances and that such strict liability applies to current owners and operators of real property where such contamination exists.[19] Mr. Margolis explained that pursuing remediation under the VAP provided Duke Energy Ohio with many advantages for managing the investigation and remediation of the West End and East End MGP sites and addressing its liability under state and federal law. Further Mr. Margolis explained that the Company was at risk for third party lawsuits.[20]

No other party at hearing presented any evidence to the contrary. The witness presented by OCC questioned the scope of the remediation, but never questioned the legal mandate to remediate. Indeed, the Company provided evidence demonstrating that its response in remediating under the VAP ultimately saved customers money and at the same time complied with the Ohio EPA's mandates.[21] Thus, the legal requirement to remediate was explained at length in the record and no party refuted this testimony. Moreover, the Commission referred to this information in its Opinion

[17] Opinion and Order at pg. 30.
[18] Direct Testimony of Kevin Margolis a pg.1.
[19] Id. at pg. 6.
[20] Id. at pg.10.
[21] Id. at pg.6, 7-9.

and Order wherein it set forth a review of much of the testimony at hearing and summarized it by noting that there was no disagreement on the record that the sites must be cleaned up.[22] The Commission also affirmed its understanding that the Company was under statutory mandate to remediate the two sites.[23] The Intervenors argument that the decision is unsupported by evidence is contrary to the record as detailed extensively in the Commission's Opinion and Order. Intervenors may disagree with the Commission's Opinion and Order, but there is no lack of support in the Opinion and Order for the Commission's decision. Moreover, it is clear that the Commission has authority to reach decisions based upon the facts presented.[24]

Second, the Intervenors assume based upon an incorrect reading of the Commission's Opinion and Order that the Commission's statutory reliance is necessarily tied to the legal and regulatory environmental requirements. To the contrary, the Commission has correctly recognized the legal mandates imposed upon the Company in order to allow the Company to be compliant with state and federal law. However, in summarizing the circumstances related to compliance with law and regulation, the Commission found that the costs of investigation and remediation could be recovered as normal and necessary business expense. In following the Intervenors' argument to its logical conclusion, even if the Company had been under some more formal legal mandate, such as an active enforcement order, the nature of the costs would still be the same. Remediation costs would still constitute normal and necessary business expenses and would not be subject to a determination with regard to the used and useful standard.

The Intervenors' argument is illogical as it inappropriately suggests that the Commission has determined that there is a nexus between the nature of the environmental liability and the regulatory

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[22] Opinion and Order at pg.54.
[23] Id.
[24] *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, (1999), 86 Ohio St.3d 53 at 58; See also, *FirstEnergy Corp. v. Pub. Util. Comm.*, (2002), 96 Ohio St. 3d 371.

recovery pertaining thereto and that an exception was made.[25] It is not necessary or the Commission to make any exception in permitting recovery under a statute that already clearly allows for such recovery.

The Intervenors stretch this same argument a little further by arguing the same point in a slightly different context. Specifically, the Intervenors assert that the existence of a legal or societal obligation to remediate does not necessarily translate into a "current cost of doing business."[26] However, the Intervenors misconstrue the Commission's Opinion and Order in this context. First, it is undisputable that the sites in question did serve utility customers by providing manufactured gas. Additionally, the sites in question presently serve utility customers as noted above. The Commission's Opinion and Order recognized, with ample support, that the remediation costs were a necessary cost of doing business as a public utility and are indeed properly costs borne by current utility customers.

The Intervenors further attempt to confuse the issues by arguing that CERCLA liability does not apply to the utility's customers.[27] The Company does not contend that CERCLA imposes liability direction onto its customers. However, the Company and its predecessor are liable for the contaminated sites as owners or operators, and thus are required to remediate the contamination in order to comply with federal and state environmental laws and regulations. These expenses are normal and necessary business costs and recoverable under R.C. 4909.15(A)(4).

The Intervenors acknowledge that CERCLA is applicable and that it establishes strict liability. However, the Intervenors again imply that because the Company is "voluntarily" complying with the law, and "has not faced an enforcement action from the U.S. EPA or the Ohio EPA," that the

[25] Intervenors' Application for Rehearing at pg.21.
[26] Id. at pg. 23.
[27] Intervenors' Application for Rehearing at pg.23.

Company's customers should not be required to pay for the remediation.[28] This argument fails again because the record establishes that the remediation of these MGP sites is not voluntary. It is incorrect to argue that compliance with the law and protection of human health and the environment, on a prudent, proactive, and cost-effective basis, is voluntary. The VAP is only voluntary as to *how* the standards are achieved. The liability for these sites was not voluntarily assumed and the need to investigate and remediate the sites was caused by changing circumstances at each site.[29] Mr. Margolis established the Company's liability under CERCLA and Ohio EPA regulations.

As explained in Duke Energy Ohio's Post-Hearing Brief, the Intervenors' argument is akin to arguing that because the Company (rather than its customers) has the obligation to pay taxes, that tax expense should be excluded from rates, or that because the Company has the contractual obligation to pay employees, or vendors, and customers do not, those expenses should be excluded from rates. Such an argument is illogical and contrary to regulatory law and precedent.

In an effort to shore up its argument that the responsibility to clean up the MGP sites lies with the Company and not its customers, the Intervenors cherry-pick language from the 1980 Congressional House debates to attempt to construct an analogy between taxpayers and ratepayers. This argument suffers not just from flawed reasoning, but is undercut by the very same legislative history cited in its Application.[30] While members of Congress were concerned about taxpayers shouldering the burden of hazardous waste site cleanup and funding the Superfund, they were well aware that some of these costs would be borne by consumers. In fact, the legislative history

[28] Intervenors' Application for Rehearing at pg. 20.
[29] Direct Testimony of Kevin Margolis at pp. 9-11.
[30] 96 Cong. House Debates 1980; CERCLA Leg. Hist. (Statement of Mr. Brown). "[T]here is no equitable reason why the cost of the cleanup of hazardous waste sites should be the burden of the taxpayers. Industry points out correctly that the cost will be passed on to the consumer; this simply means that the true cost of a product in its broad sense will include the hidden costs which were previously omitted. This seems to me to be the only reasonable solution to a problem brought by past improper waste disposal practices."

indicates that CERCLA contemplates that companies will incorporate some of the costs of cleanup into the cost of their products and services.[31] Moreover, ratepayers are not the same as taxpayers and the obligation to pay these costs flows from Ohio law, not from CERCLA.

F. Anti-dumping Law is not Applicable to The MGP sites.

The Intervenors essentially cut and paste language from their Reply Brief to make the argument that Ohio's anti-dumping statute from the 1800s obligated Duke to cleanup these MGP sites prior to the promulgation of CERCLA. [32] This argument is both fundamentally flawed and irrelevant. While CERCLA imposes strict liability on owners and operators to clean up contaminated properties, former Section 6925 was a nuisance statute that prohibited *intentional* acts of throwing or depositing "coal dirt, coal slack, coal screenings, or coal refuse" from gas works upon or into any rivers, lakes, ponds or streams or into any place which the same will wash into any such river, lake, pond or stream.[33] There is no evidence in the record that any coal refuse had intentionally been deposited into rivers, lakes, ponds or streams, or that it washed into any rivers, lakes, ponds or streams from any intentional acts. Moreover, the remedy for actions pursued under Section 6925 was limited to fines and damages, not an injunction to remediate the property or to even cease the activity causing the nuisance.[34] Thus, even if there was evidence that Duke Energy Ohio's predecessor violated Section 6925, which there is not, such violations would not have led to an obligation to remediate the site, as claimed by the Intervenors. The Intervenors failed to present

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[31] Id.

[32] Application for Rehearing, at p. 26, citing Ohio General and Local Acts Sec. 6925 (January 6, 1896).

[33] *Compare* 42 U.S.C. 9607(a)(1) *with* Ohio General and Local Acts Sec. 6925 (January 6, 1896) (legislation that preceded R.C. 3767.14).

[34] Ohio General and Local Acts Sec. 6925 (January 6, 1896); *see also Straight v. Hover*, 79 Ohio St. 263, 87 N.E. 174 (1909) (holding that an injunction will not be allowed to prevent the development of the resources of the upstream owner); *Salem Iron Co. v. Hyland*, 75 Ohio St. 160, 77 N.E. 751 (1906) (denying request to enjoin operation of upstream oil wells because plaintiff may obtain water elsewhere)

any evidence that Duke Energy Ohio would have any liability under Section 6925 or that Section 6925 would have obligated the Company to remediate the MGP sites.

G. The Commission Correctly Determined That Duke Energy Ohio Was Required To Incur Approximately $55.5 Million To Remediate The Two MGP Sites To Meet Applicable Standards And To Protect Human Health And The Environment.

In its Application, the Intervenors ask the Commission to reweigh the evidence seven different times. As the Commission noted in its 80-page Opinion and Order, it considered thousands of pages of testimony and transcripts and conducted a detailed review of the evidence in this case.[35] After its extensive due diligence into these issues, the Commission concluded, based on the extensive factual record before it, that Duke Energy Ohio's activities were prudent and reasonable. Specifically, the Commission stated:

> Duke made reasonable and prudent decisions by: acknowledging its liability under state and federal law for the environmental conditions at the MGP sites; pursuing recovery of remediation costs by other potentially responsible third parties and insurers; acknowledging the changes in the use of the properties and adjacent properties in a timely manner; utilizing the Ohio EPA's VAP in a proactive manner; employing a VAP CP, as well as environmental and engineering consultants; and presenting MGP experts, including the Ohio EPA's VAP CP that is working on one of the sites, at the hearing to explain and support Duke's claims. In addition, the record reflects that Duke considered remediation alternatives and, in fact, has incorporated various engineering and institutional control measures mentioned by the intervenors in its remediation plans. Moreover, in selecting contractors, Duke has obtained competitive bids for the major phases of the work at both the East and West End sites and has an appropriate process in place to solicit experienced qualified contractors, and manage the cost of changes to the initial scope of work due to discoveries in the field.[36]

The record, when considered as a whole, overwhelmingly supports the Commission's determination that the investigation and remediation expenses were prudently incurred. Duke Energy Ohio engaged in a comprehensive assessment of its legal liability and duty to clean up the two sites, and exercised in-depth, prudent, and reasonable management of the investigation

[35] Opinion and Order at pg. 64.
[36] Id.

and remediation of the sites. For example, the Duke Energy employee with overall responsibility for these projects, Jessica S. Bednarcik, is an expert in the investigation and clean-up of MGP sites. In addition, as explained by Ms. Bednarcik in her testimony, the record is clear that the Company conducted appropriate risk assessments, developed remedial action plans (with the assistance of experienced consultants), engaged a VAP certified profession (CP), obtained required environmental permits, and engaged in educational community outreach. At each step of the process, the record reflects that tests and samples were taken, and that the Company consulted with environmental firms and its VAP CP in order to ensure that it would be compliant with Ohio environmental law and policy.

In contrast to the vast record supporting the prudence and reasonableness of Duke Energy Ohio's actions, the Intervenors challenge the Commission's findings as unreasonable and unlawful and against the manifest weight of the evidence by continuing to advance the same unsupported arguments raised in its post-hearing briefings. The Commission's Opinion and Order explains in great detail its analysis of the facts and arguments presented in this case. The Intervenors' arguments with respect to the Commission's finding that Duke Energy Ohio met the burden of proof boils down to a disagreement over the weight the Commission accorded to the evidence that it considered. However, when presented with a manifest-weight argument, an appellate court will not overturn a judgment that is supported by some competent, credible evidence going to all essential elements of the case.[37] As is shown below, each of the Intervenors' arguments is meritless and ignores the testimony and evidence presented in this case and considered by the Commission.

[37] *C.E. Morris Co. v. Foley Constr. Co.* (1978), 65 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578.

1. The Record Reflects That Duke Energy Ohio Gave Significant Consideration To All Feasible Alternative Remedial Options, Including Associated Costs.

The Intervenors' complaints about the absence of a specific written report summarizing the Company's consideration and evaluation of alternative remedies considered by the Company is a red herring and is based on the false premise that a written document is required for the Company to meet its evidentiary burden. Not only have the Intervenors been unable to identify a single statute, regulation, or other authority requiring such a document, but their argument is at odds with the Commission's role as the fact finder to consider the totality of all of the evidence, not just documentary evidence. Further, the record indicates that the Company engaged in a process that considered remedial options that first and foremost met the threshold requirements of complying with Ohio environmental law and policy under the applicable VAP standards and protecting human health and the environment.[38] The record also reflects that the Company also considered factors such as best practices, feasibility, constructability, safety, prior experience, and long-term and short-term impacts to the community and the Company's operations, as well as costs.[39] Based upon all of these reasonable considerations, the Company chose remedial actions that would be cost-effective and feasible over the long term, while also meeting all applicable standards. Ms. Bednarcik emphasized that the paramount concern was compliance with the VAP and protecting human health and the environment.

In fact, Duke Energy Ohio presented evidence of specific remedial alternatives that were considered. As indicated by Mr. Shawn S. Fiore, under the Ohio VAP, the oil-like material and tar-like material identified in substantial amounts at both the East End MGP and the West End MGP properties required removal, containment, or treatment. In order to meet the criteria of

[38] Opinion and Order at p. 32; Direct Testimony of Jessica L. Bednarcik, at pp. 20-21; Tr. I. at 211-212 (Bednarcik).
[39] Id.

compliance with applicable VAP standards and achieve the other factors, only a couple of remedial alternatives were actually available – excavation, in situ solidification and containment – and due to the depth of bedrock and the expense, the containment option was deemed not feasible or cost effective.

The record is replete with competent and credible evidence that the Company's process and evaluation was both comprehensive and reasonable and that its decisionmaking was conducted through investigation, assessments, and numerous discussions with experienced environmental consultants, a VAP CP, and experienced Company personnel. In addition, the Company displayed its decision-making for scrutiny by the Commission and the parties to this case through testimony, discovery, and hearings. The Commission's Opinion and Order accurately reflects the record, and the Commission's conclusion that "Duke's witnesses provided ample information on the process to support a conclusion on prudency in these cases"[40] is wholly supported by the evidence.

2. There Can Be No Question, Based On The Evidence, That Duke Energy Ohio's Environmental Remediation Plan Is Reasonable And Prudent.

The Intervenors continue to disagree with the remediation plans put forth by the Company. The OCC's expert, Dr. Campbell, who has no experience with and who has not performed any work under the Ohio VAP, suggested other approaches that he speculated would be appropriate. But the overwhelming evidence in the record indicates these other approaches would not meet applicable VAP standards.

The Commission properly noted in its Order that "the witnesses presented by the intervenors did not have expertise with regard to the Ohio EPA's VAP and the associated rules

[40] Id.

and regulations, and, unlike Duke's experts, the intervenors' witnesses did not have the in-depth, firsthand knowledge of the MGP sites at issue."[41]

In contrast, the Company offered testimony by witnesses who are both familiar with the MGP sites and have expertise with regard to the Ohio VAP. For example, the Company's witnesses included: Shawn Fiore a Certified Professional under Ohio's VAP for over 17 years; Dr. Andrew Middleton, who has been involved in MGP sites for over 30 years; Kevin Margolis, an experienced environmental attorney who has advised many clients on the VAP and clean-up of contaminated sites in Ohio; and Jessica Bednarcik, Duke Energy's Manager of Remediation and Decommissioning, who has substantial experience with the Company and the industry generally with regard to the investigation and remediation of MGP sites. All of these experts testified to and supported the prudency of the Company's approach to addressing the two MGP sites. As Mr. Fiore explained, engineering and institutional control do not in and of themselves meet applicable VAP standards.[42] Moreover, Mr. Fiore emphasized that the approach advocated by OCC Witness Campbell – sometimes referred to as "pave and wave" or "pave and pray" – would not meet applicable VAP standards at these sites.[43]

3. Duke Energy Ohio's Use Of Ohio's Voluntary Action Program Is Evidence Of Prudence.

The Intervenors make the curious argument that the Commission erred in finding that Duke Energy Ohio's use of the Ohio VAP is evidence of reasonableness and prudence. Their rationale appears to be that, because the VAP does not specify or prescribe remedial options, it cannot be a sufficient basis for a finding of prudence.

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[41] Id.
[42] Tr. Vol. III. at 644-645.
[43] Id.

The Intervenors' arguments are specious. The VAP reflects the environmental policy of the State, an intentional decision by the state of Ohio to encourage cost effective remediation through flexible processes. The fact that it is performance-based rather than prescriptive in no way impugns the reasonableness or prudence of the program. In fact, many Company witnesses testified as to the benefits of proceeding under the VAP.

As explained in the Company's direct testimony and during the hearing, the VAP contains many regulations on the standards applicable to the investigation and cleanup of contaminated sites. While the VAP does not mandate how those applicable standards are met, achieving those applicable standards while following the requirements of the VAP is evidence of prudence. It is disingenuous to suggest, as the Intervenors do, that a performance-based compliance plan established by a state regulatory agency is somehow suspect. As mentioned previously, the evidence in this case demonstrates that, within the VAP's performance-based framework, Duke Energy Ohio considered all feasible alternatives that would meet applicable VAP standards, and chose remediation options that would cost-effective meet such standards and protect human health and the environment over the longer term.

4. Company Witness Fiore Is A Certified VAP Professional And An Expert Who Was Highly Competent To Testify To The Reasonableness And Prudence Of Duke Energy Ohio's Remedial Plans In The Context Of The Ohio VAP Framework.

Intervenors misstate the Company's evidence and the Commission's Opinion and Order, by asserting that the Commission relied "almost entirely" on the testimony of Mr. Fiore to conclude that the Company's remediation plans were reasonable. The Company presented substantial testimony from other witnesses, notably Ms. Bednarcik, to establish the reasonableness and prudence of the Company's identification and assessment of remedial options

and alternatives.[44] Mr. Fiore's testimony was offered to demonstrate that the remedial options chosen by the Company were consistent with other MGP cleanups, reasonable within the framework of the Ohio VAP, and that the options chosen by the Company would in fact meet the Ohio VAP requirements and protect human health and the environment. Mr. Fiore's testimony also provided another crucial piece of the record – that the remediation options put forth by the OCC would not meet the Ohio VAP standards.[45]

5. The Commission's Conclusion That The Company Considered Alternative Remedial Options Was Based on Sufficient Evidence.

Again, the Intervenors base their argument under the misguided notion that only documentary evidence can satisfy Duke Energy Ohio's burden of proof. As explained above and noted by the Commission "the lack of documents does not, alone, render the totality of the record evidence indecisive on the prudency of the process."[46] The Intervenors have not been able to identify any statute, regulation, or other authority requiring the Company to document its consideration of MGP remedial alternatives. The Commission's inquiry in its role as a finder of fact is not limited to just documentary evidence, but encompasses all admissible evidence, including expert testimony.

The Intervenors fail to articulate how the testimony of the Company's witnesses "did not stand up to cross-examination," and merely express an opinion that the cross-examination responses were "poor."[47] The Commission's conclusion that "Duke's witnesses provided ample information on the process to support a conclusion of prudency in these cases," was supported by substantial evidence in the record. Ms. Bednarcik testified with respect to the factors considered

[44] Tr. Vol. I at 211-214 (Bednarcik).
[45] Tr. Vol. III at 644-646 (Fiore).
[46] Opinion and Order at p. 64.
[47] Application for Rehearing at p. 35.

by the Company. The Company first considered whether the remedy met applicable VAP standards and was protective of human health and the environment, then considered other factors, including: best practices, feasibility, constructability, safety, prior experience, and long-term and short-term impacts to the community and the Company's operations, as well as costs.[48] Mr. Fiore testified with respect to the remedies applicable to MGP sites, which included excavation, in situ solidification and containment.[49] The Commission's observation that the Company's witnesses were "subject to discovery, as well as extensive, and at times, pointed cross-examination" indicates that the Commission found the testimony presented by these witnesses to be credible and sufficient to support its conclusion that Duke Energy Ohio acted prudently. The Commission's conclusion is not inconsistent with its decision in the case cited by the Intervenors.[50] The Intervenors' argument is misleading because it appears to imply that the Commission found that a party cannot meet its burden of proof without documentary evidence. This is simply not true. In the cited case, the utilities' own employee testified that she performed the same tasks that were performed by a third party. In the cited case, as in this case, the Commission weighed all of the evidence in the record in its determination of whether the burden of proof was met.

6. The OCC's Proposed MGP Remediation Alternative Was In No Way Uncontradicted.

The Intervenors have the audacity to argue that the OCC's testimony concerning a $7.1 million MGP remediation alternative was "uncontradicted." There was no reason to assess or

[48] Opinion and Order at p. 32; Tr. Vol. I at 211-214 (Bednarcik).
[49] Tr. Vol. III at 642 (Fiore).
[50] *In the Matter of the Regulation of the Purchased Gas Adjustment clauses Contained Within the Rate Schedules of Northeast Natural Gas Corporation and Orwell Natural Gas Company*, Case Nos. 12-209-GA-GCR and 12-212-GA-GCR, Opinion and Order (November 13, 2013).

challenge the estimated costs of the alternative suggested by the OCC because it clearly did not meet the threshold requirement that the remedy meet applicable VAP standards in this situation.[51] In fact, several Company witnesses, most notably Mr. Fiore, unequivocally testified that OCC witness Campbell's proffered remediation option would *not* meet Ohio VAP standards or protect human health and the environment over the long term.[52] Moreover, the evidence in the record indicates (and the Commission found) that the OCC's witness, Dr. Campbell, did not possess the level of expertise, especially vis-à-vis the VAP, as did the Company witnesses.[53] There was simply no reason to assess the estimated costs of OCC's alternative which clearly would not meet the VAP applicable standards and other appropriate factors.

7. Dr. Campbell's Testimony Was Taken Into Consideration

Intervenors' baldly contend that the Commission disregarded evidence that excavating to two feet and applying a surface cap would have met applicable standards and protected human health and the environment. The Commission's Opinion and Order goes into great detail with respect to the evidence considered and acknowledges that the Intervenors "question the level of remediation employed by Duke Energy Ohio and record evidence presented by Duke Energy Ohio to support its proposal by presenting their own experts in the field of environmental remediation, in an effort to illustrate potentially less costly remediation alternatives."[54] Contrary to the Intervenors' assertion that the Commission disregarded Dr. Campbell's suggested alternatives, the Opinion and Order clearly indicates that the Commission considered these suggestions. However, the Commission found that "the record in these cases reflects that the witnesses presented by the intervenors did not have expertise with regard to the Ohio EPA's

[51] Tr. Vol. III at 644-645 (Fiore).
[52] Id.
[53] Application for Rehearing at p. 64.
[54] Opinion and Order, at p. 64

VAP and associated rules and regulations, and unlike Duke Energy Ohio's experts, the Intervenors' witnesses did not have the in-depth, firsthand knowledge of the MGP sites at issue."[55] While the Intervenors may disagree with the weight the Commission accorded Dr. Campbell's testimony, they cannot claim that the Commission failed to consider his testimony.

H. The Testimony Offered by the OCC Witness Was Unpersuasive.

The Intervenors argue that the Company did not meet its burden of proof with respect to the prudence of its the actions taken to investigate and remediate the MGP sites. The Intervenors further maintain that the OCC witness in these proceedings was persuasive and that the Commission should have relied more upon his testimony and the evidence he provided. Thus, the Intervenors cry foul. However, the Commission found the record evidence provided by the Company more compelling and did not find the OCC witness to be authoritative in many respects. However, the ample record belies this argument. The Company met its burden of proof with an abundance of compelling evidence that the actions it took to remediate the site were properly and prudently chosen and the Commission correctly relied upon much of this evidence in its Opinion and Order, notwithstanding the Intervenors contorted view of the proceedings.

There are two aspects to this argument; first, that the Company did not meet its burden of proof; and, two, that the Commission should have relied on more of the evidence presented by OCC witness James R. Campbell.

As explained in detail in the Commission's Opinion and Order, and further as supported by the record in these proceedings, Duke Energy Ohio provided lengthy and detailed evidence to support the choice to remediate, the method selected to remediate, and the prudence of the costs incurred in remediating. Although the sole OCC witness, Dr. Campbell may have had an opposing

[55] Id.

view of some of these matters, Dr. Campbell did not have the experience and credentials of Duke's witnesses and his testimony was simply not compelling.

Duke Energy Ohio provided its witness, Dr. Middleton, to provide an exhaustive history of the MGPs that exist on the Company's utility property. Dr. Middleton, with a PhD. in Environmental Engineering, is an eminent expert in the history of MGPs and in the many of the more current information and details related to these sites and treatment of these sites. Dr. Middleton has worked on over 300 MGP sites, including visits to at least 145 sites.[56] Dr. Middleton's testimony was replete with documentary support attached thereto so that the Commission would have sufficient fundamental understanding of the history of these sites and the ways in which industries address these sites. No other party provided any such testimony or attempted to rebut any of this history.[57]

Next, the Company provided the testimony of Kevin Margolis to explain the nature of the Company's liability and the prudence of its efforts to address its legal liability in a cost-effective and efficient manner. Mr. Margolis' expertise has already been recounted here and will not be repeated. However, as noted by the Commission in its Opinion and Order, no party disagrees that there is liability attached to the remediation of the MGP sites at issue in these cases.[58] And again, there were no witnesses presented by any of the parties to testify that the Company was not legally responsible.

Next, the Company presented the testimony of Shawn S. Fiore in order to support the methodology used by the Company to remediate the sites and actions required to comply with applicable standards, under the VAP. Mr. Fiore is a licensed Professional Geologist and a VAP

[56] Direct Testimony of Andrew C. Middleton at pg. 3.
[57] Id. (attachments ACM-1 through ACM-20).
[58] Opinion and Order at pg.47.

Certified Professional (CP) in Ohio.[59] Mr. Fiore explained the VAP and the responsibilities of a VAP CP participating in the VAP Ohio EPA program. In so testifying, Mr. Fiore explained the depth of knowledge, the experience, the integrity and the dedication needed to participate in such a program.[60] Mr. Fiore has extensive experience as a VAP CP, and his work primarily focuses on MGP projects. Mr. Fiore further explained the advantages to companies that participate in the VAP program and the ability of a company to limit its liability in doing so. Further, Mr. Fiore explained the iterative process applied to evaluate and remediate a property and his role in that process.[61] All of this testimony was provided to give the Commission a solid background on Ohio EPA requirements and how the VAP process was applied in connection with the MGP sites.

Finally, the Company provided the testimony of Jessica L. Bednarcik, with experience and qualifications that establish that she is an industry leader in MGP remediation.[62] Ms. Bednarcik provided Direct Testimony and Supplemental Testimony to provide record support for the internal decision-making employed by the Company in overseeing and managing the site remediation. In addition to the pre-filed testimony provided by Ms. Bednarcik, testified at hearing to the scope of her work and the internal decision-making within the Company as well as the details of the sites themselves.[63] None of the parties provided any witnesses to rebut the testimony offered by Ms. Bednarcik.

In spite of all this record support, the Intervenors submit that the Commission improperly relied on the Company's witnesses and should instead have relied more on the OCC witness Dr. Campbell. Dr. Campbell's testified that in his opinion there were less expensive ways to remediate

[59] Supplemental Direct Testimony of Shawn S. Fiore at pg. 1.
[60] Id at pp.7-9.
[61] Id at pg.20.
[62] Direct Testimony of Jessica L. Bednarcik at pg. 1-3.
[63] Id. *passim*

the sites under the VAP. However, Dr. Campbell does not have experience with the VAP, other than that he read the regulations and looked at the Ohio EPA website.[64] Dr. Campbell has never been involved in cleaning up a manufactured gas plant under the VAP and, in fact, has never worked on a project under the VAP.[65] Indeed, this case represented the first time that Dr. Campbell had analyzed the VAP requirements and whether properties meet the applicable standards such than a No Further Action letter can be issued.[66]

The Intervenors excerpt a portion of the Direct Testimony of Dr. Campbell to support the claim that he has experience with the VAP program in Ohio based upon referencing it in other projects. However, on cross examination, Dr. Campbell agreed that he was not a VAP CP and has not applied to be licensed as a VAP CP.[67] None of his employees are VAP CPs.[68] Dr. Campbell has never attended any training offered by the Ohio EPA on the VAP.[69] He did not consult with a VAP CP in the preparation of his testimony; he did not speak with anyone at the Ohio EPA, he did not compare the East End and West End sites with any other MGP sites in Ohio, he has never prepared a No Further Action letter, he has no environmental certifications in Ohio, and indeed, with respect to whether or not the Company was prudent to address the remediation at the East End and West End sites, Dr. Campbell replied: "I hadn't really thought about that."[70] While Dr. Campbell may be a reputable and reliable consultant in certain matters, without question, he was not adequately qualified to offer an opinion with respect to the Ohio VAP program, the remediation of MGP sites, or the Company's decisions.

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[64] Tr. Vol. IV at pg. 948.
[65] Id. at pg. 949.
[66] Id. at pp. 946-949.
[67] Transcript Vol. IV at pg. 946.
[68] Id.
[69] Id. at pg. 948.
[70] Id. at pp. 948-952.

After listening to all the evidence presented, detailing the positions set forth by the parties, including the testimony provided by Dr. Campbell, the Commission determined that Dr. Campbell simply did not have the requisite expertise, or in-depth, first-hand knowledge.[71] Such a conclusion is supported by the record, and well within the Commission's authority. While the Intervenors claim that the Commission's findings with respect to the witnesses' qualifications and experience are "all wrong," the record abundantly supports the Commission's Opinion and Order.

I. Duke Energy Ohio's Need to Investigate and Remediate the East End MGP Site Was Not Triggered by the Company's Decision to Sell a Portion of the Site.

The Company's decision to undertake remediation of the East End site was necessitated by a change in use at and adjacent to the property. Contrary to the Intervenors' suggestion that the sale of the strip of land on the west side of the East End site triggered such change in use, the record reflects that residential development was already planned, and in some cases occurring on properties adjacent to the East End site. Specifically, residential development was occurring adjacent to the east of the East End site and also to the west of the East End site, in the form of site preparation. The strip of property that was sold was simply a small piece in the overall larger-planned residential development on the western side of the East End site. Accordingly, the sale of this small piece of land was not the trigger of the change in use. Moreover, the Intervenors ignore the fact that Duke Energy Ohio's liability follows the MGP waste materials, and is not tied solely to ownership and operation of the property. In other words, the sale of this small piece of land did not change either the Company's liability or the scope of work that was required to address the MGP contamination that exists at the East End site. The Intervenors' claim that the sale of this small piece of land triggered or changed Duke Energy Ohio's liability or remediation obligations is simply without any basis in law or the record.

[71] Opinion and Order at pg.64.

J. The Company Supported Its Request For Recovery of Remediation Expenses.

As discussed above and in the Company's Post-Hearing Brief and Reply Brief, Duke Energy Ohio provided witnesses who were knowledgeable and competent to provide the evidence necessary for the Commission to reach a decision about the allowance of costs for remediation of the MGP sites. The Intervenors' claim that R.C. 4909.19 requires that the Staff offer an opinion about every aspect of the Company's Application. However, such a requirement is not to be found in the Revised Code. R.C. 4909.19 requires that the Commission investigate the facts set forth in the company's application and exhibits thereto. But the statute does not provide any further requirements in respect of how the investigation is to be conducted. That is, the General Assembly has deferred to the Commission's discretion and judgment in terms of ratemaking. Here, the Staff explained in its Report that it had audited the Company's accounting records, reviewed site drawings and aerial photographs, and conducted on-site visits. Staff stated, *inter alia*, that the purpose of its investigation was to ascertain the reasonableness of the proposed expenses, verify invoices and payments for remediation activities and ensure that the Company's books and accounts are a reliable source of data.[72] This report enabled "meaningful contest of the...application" and further allowed Intervenors to make "an informed challenge." Indeed, Intervenors asserted such a challenge via their objections to the staff report and, thereafter, through the protracted discovery process and the presentation and cross examination of witnesses.

Based upon the evidence, which reflected opposing positions, the Commission invoked its judgment and expertise in concluding that the remediation costs were a necessary expense

[72] Staff Report of Investigation, January 4, 2012, at p.40.

associated with the provision of utility service and, but for limited exception, were prudently and reasonably incurred by the Company. In so doing, the Commission rejected the findings of Staff, which it is at liberty to do.[73]

The cases relied upon by Intervenors are factually inapposite. In *Ohio Edison Company v. Public Utilities Commission of Ohio*, (1992),[74] the utility/applicant attempted to supplement its rate request via evidence that was disclosed for the first time during the rebuttal phase of the hearing. The Commission rejected the utility's proposed adjustments, finding that the utility had failed to include the relevant information in its application or to otherwise make it available for timely investigation. Here, however, the Company included information related to its environmental remediation costs in its application and responded, in a timely manner, to Staff during the course of its investigation. Nothing about the Company's actions prevented the Commission of discharging its obligation under R.C. 4909.19, as was the circumstance in *Ohio Edison Company*.

In *Office of Consumers' Counsel v. Public Utilities Commission of Ohio*,[75] the Court rejected an intervenor's challenge to the adequacy of a staff report. Although the matter at issue was addressed in an investigation conducted subsequent to the issuance of the staff report, the Court found that the intervenor had ample opportunity to review the staff's findings and, importantly, to prepare evidence to rebut or support those findings.

Again, Duke Energy Ohio provided information in its application and attachments thereto. Staff thereafter investigated the facts and rendered related opinions in its report. Unlike the circumstance in *Office of Consumers' Counsel*, there can be no legitimate claim here that the

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[73] *Duff v. Public Utilities Commission of Ohio*, (1978), 56 Ohio St.2d 367, 380.
[74] *Ohio Edison Company v. Public Utilities Commission of Ohio*, (1992), 63 Ohio St.3d 555 at 556-557.
[75] *Office of Consumers' Counsel v. Public Utilities Commission of Ohio*, (1981), 67 Ohio St.2d 153 at 160-161.

Staff fell short of its charge. But the decision is informative in that the Court rejected an intervenor's challenge where it had ample opportunity to due process and to prepare its case for hearing. The same is true here – Intervenors were not denied information and, as the record confirms, were able to make an informed challenge as to Staff's conclusions.

K. Contrary to the Intervenors' Contention, the Record Demonstrates that Duke Energy Ohio has Taken Reasonable Actions to Pursue Recovery of MGP Remediation Costs from Other Potentially Responsible Third Parties and Insurers.

As Ms. Bednarcik testified, Duke Energy Ohio is pursuing other means of funding the costs of the MGP remediation.[76] Specifically, the Company is pursuing recovery under its historic insurance policies, and is also investigating the viability of other potentially responsible parties.[77] The Company accepts the Commission's expectation that it pursue these possible sources of funding, and the Company has made clear it has every intention of pursuing these options.[78] However, the record also reflects that pursuit of these other sources of funding is expected to be a lengthy process, which should not delay the recovery of the Company incurred investigation and remediation costs in the meantime.[79] The record also reflects the reality that significant funding from third party sources is not likely to occur.[80]

Although the Commission can ascertain in a future proceeding whether Duke Energy Ohio is fulfilling its commitment to seek third party funding for the cleanup, there is no basis for delaying the Company's recovery of costs that have already been and will continue to be incurred at the present.

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[76] Supplemental Direct Testimony of Jessica L. Bednarcik at pg. 32; see also Transcript, Vol. IV at pp. 380-402.
[77] Id. See also Transcript, Vol. IV, pp. 302-04, 404-06.
[78] Id.
[79] Direct Testimony of Kevin Margolis at pg. 15.
[80] Id.

L. The Commission's Decision to Authorize Duke Energy Ohio to Collect the Deferred MGP Remediation Cost from Customers Over a Five-Year Period is Reasonable.

The Commission's decision to allow amortization of the Company's deferred MGP remediation costs over a five-year period was reasonably balanced and the Intervenors did not offer a substantial basis for any period longer than that.

Duke Energy Ohio had requested that recovery of its deferred MGP remediation expenses be amortized and collected over a three-year period.[81] Other parties recommended a longer time period for such recovery. Notably, however, at the hearing, OCC witnesses agreed that, if three years was the actual expected period between rate cases, then three years was a reasonable timeframe for recovery.[82] Similarly, OCC witness Kathy L. Hagans agreed that, in determining an appropriate amortization period, it is reasonable to consider the amount of the deferral, the age of the deferral, the anticipation of additional deferrals being approved, and the proximity of the next rate cases.[83] Further, despite basing their arguments for a longer amortization period on the concept of "rate shock," the record reflects that Intervenors' witnesses did not do any analysis or research into the rate impacts that would result from differing proposed amortizations periods.[84]

The Company also requested that it be authorized to accrue carrying charges on its MGP remediation expenses on a going forward basis, but the Commission denied that request. The Commission's decision to disallow accrual of further carrying costs also mitigates against a longer amortization period. The Opinion and Order clearly states that the Commission extended the recovery period to five years without carrying costs, in part, as a way to share the burden.

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[81] Direct Testimony of Peggy A. Laub at pg. 13.
[82] Direct Testimony of David J. Effron, at pg. 11.
[83] Transcript Vol. III, at pg. 825.
[84] Transcript Vol. III, at pp. 814-15, 827.

Thus, the Company is sharing the costs inasmuch as it is incurring the loss of time value of money. Intervenors' attempt to extend the period even further is an inappropriate attempt to modify the balance the Commission sought to achieve in extending the recovery period to five years from three and denying carrying costs. Moving to a ten-year amortization without carrying costs unfairly shifts more of the burden to the utility. Taking all of the above into account, there is simply no basis to argue that the Commission's decision to implement a five-year amortization and recovery period was unreasonable.

M. The Commission's Decision To Grant Duke Energy Ohio Authority To Defer And Collect MGP Remediation Costs Incurred After December 31, 2012, Via A Rider, Was Reasonable In Light Of The Evidence Of Record.

Noting its statutory accounting jurisdiction, as well as the request by the Company for continued deferral authority and the Commission's conclusion that MGP cleanup costs are legitimate costs of doing business, the Commission granted Duke Energy Ohio authority to continue to defer costs related to its MGP remediation activities after December 31, 2012, exclusive of carrying charges.[85]

This grant of deferred accounting authority is reasonable and well within the broad authority granted to the Commission under R.C.4905.13. The record reflects that completion of remediation at the two sites is not entirely within the control of Duke Energy Ohio. The Commission, in its Order, determined that the Company's cost recovery via rider should terminate ten years after remediation activities began at each site. Because completion of remediation will be, at least in part, outside of the Company's control, the Company has asked the Commission to revisit this decision. Butthe position taken by the opposing parties, which would terminate rate recovery via rider for the MGP remediation expenses well before such

[85] Opinion and Order at pg. 71.

activities are completed is unreasonable. There is simply no evidence in the record to suggest that Duke Energy Ohio would, could or should be finished with its remediation activities at either site by the end of 2012. As mentioned previously, the Commission rightfully determined that MGP remediation costs are prudent and reasonable costs of providing utility service and should be recovered. Imposition of an arbitrary -- and extremely short -- deadline for rate recovery of such costs would be unreasonable and confiscatory.

H. CONCLUSION

Intervenor's Application for Rehearing merely reiterates all of the arguments that were rejected by the Commission in its Opinion and Order. Intervenor's arguments simply fail for lack of legal and factual support. For the reasons stated herein, Duke Energy Ohio respectfully requests that the Intervenor's Application for Rehearing be denied.

Respectfully submitted,
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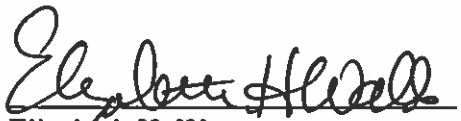
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 23rd day of December 2013, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.



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Case No(s). 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, 12-1688-GA-AAM

Summary: Memorandum Duke Energy Ohio's Memorandum Contra Application for Rehearing of Joint Consumer Advocates. electronically filed by Ms. Elizabeth H Watts on behalf of Duke Energy Ohio, Inc.