

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Duke Energy Ohio, Inc., for an) Case No. 14-0375-GA-RDR
Adjustment to Rider MGP Rates.)

In the Matter of the Application of)
Duke Energy Ohio, Inc., for Tariff) Case No. 14-0376-GA-ATA
Approval.)

DIRECT TESTIMONY OF

KEITH BONE

ON BEHALF OF

DUKE ENERGY OHIO, INC.

March 31, 2014

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I. INTRODUCTION AND PURPOSE

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A. My name is Keith Bone, and my business address is 550 South Tryon Street,
3 Charlotte, North Carolina 28202.

4 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

5 A. I am employed by Duke Energy Business Services LLC as Director of Insurance
6 & Claims for the Duke Energy Corporation (Duke Energy) enterprise. I am
7 responsible for directing and managing the worldwide insurance operations,
8 claims, and captive insurance company operations for Duke Energy and its
9 affiliated companies, including Duke Energy Ohio, Inc., formerly known as The
10 Cincinnati Gas & Electric Company, Inc. (Duke Energy Ohio or Company).

11 **Q. PLEASE BRIEFLY SUMMARIZE YOUR EDUCATIONAL**
12 **BACKGROUND AND PROFESSIONAL EXPERIENCE.**

13 A. I earned a Bachelor of Science degree in Engineering Operations from North
14 Carolina State University in 1979. I joined Duke Power in 1979 as a buyer for
15 Duke Power's hydroelectric facilities and electric transmission department. Since
16 then, I have assumed positions of increasing responsibility. In 1987, I became
17 Manager of Procurement, and in 1995, I was appointed Manager of Acquisitions
18 and Sales in Duke Power's real estate division. In November 2000, I became
19 Director of Claims, and I assumed my current position in July of 2006.

20 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE PUBLIC**
21 **UTILITIES COMMISSION OF OHIO?**

22 A. No.

1 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THESE**
2 **PROCEEDINGS?**

3 A. My testimony will describe the steps that Duke Energy Ohio has taken to comply
4 with the Opinion and Order¹ of the Public Utilities Commission of Ohio
5 (Commission), issued November 13, 2013, to actively pursue collection of all
6 remediation costs available under its insurance policies. In this regard, I will
7 describe the historical insurance policies that are potentially available to provide
8 coverage for Duke Energy Ohio's liability for environmental property damage at
9 and around the former manufactured gas plant (MGP) sites known as the East End
10 and West End MGPs located in Cincinnati, Ohio. I will also discuss the status of
11 Duke Energy Ohio's efforts to locate and analyze the potentially applicable
12 coverage, the efforts that Duke Energy Ohio has taken to obtain insurance
13 coverage, some of the challenges that Duke Energy Ohio must overcome to
14 secure coverage, and the next steps Duke Energy Ohio intends to take in its effort
15 to achieve insurance recovery.

II. BACKGROUND

16 **Q. WHAT IS YOUR BACKGROUND IN INSURANCE?**

17 A. As Director of Insurance & Claims, I have been involved in all aspects of
18 insurance procurement and management of insurable risks for Duke Energy since
19 2006.

¹ *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, *et al.* (November 13, 2013)

1 **Q. IN THE COURSE OF YOUR JOB DUTIES AS DIRECTOR OF**
2 **INSURANCE AND CLAIMS, WHAT TYPES OF INSURANCE POLICIES**
3 **HAVE YOU PROCURED?**

4 A. I have procured numerous types of policies, including comprehensive general
5 liability, umbrella/excess liability policies, all-risk property damage policies, and
6 a myriad of other types of policies typically obtained by utility companies.

7 **Q. WHAT ARE YOUR RESPONSIBILITIES WITH RESPECT TO THE**
8 **FORMER MGP SITES OWNED BY DUKE ENERGY OHIO?**

9 A. I am responsible for supervising efforts to obtain insurance recovery for the
10 liabilities at those sites.

11 **III. COVERAGE AVAILABLE FOR**
12 **ENVIRONMENTAL PROPERTY DAMAGE**

13 **Q. WHAT TYPES OF INSURANCE POLICIES POTENTIALLY AFFORD**
14 **COVERAGE FOR THE COMPANY’S LIABILITIES IN CONNECTION**
15 **WITH THE EAST END AND WEST END MGP SITES?**

16 A. In general, liability policies are intended to cover all sums that the insured
17 becomes obligated to pay because of liability for bodily injury or property damage
18 during the policy period. For environmental property damage, policyholders
19 typically seek coverage principally from comprehensive general liability or
20 umbrella/excess liability policies purchased prior to 1986.

1 **Q. WHAT IS THE SIGNIFICANCE OF 1986 IN RELATION TO**
2 **ENVIRONMENTAL PROPERTY CLAIMS?**

3 A. In 1986, the insurance industry began to include so-called absolute pollution
4 exclusions in their policies. In addition, many policies issued after 1985 were
5 written on a claims-made basis, rather than on an occurrence basis. Claims-made
6 policies cover only claims first made during the policy period (or any extended
7 reporting period) or claims about which a notice of circumstances was first given
8 to the insurer during the policy period (or any extended reporting period). In
9 contrast, occurrence-based policies are intended to afford coverage for liability for
10 property damage during the policy period, regardless of when the claim is first
11 made against the insured. Environmental property damage typically occurs over
12 decades, which can trigger many years of occurrence-based coverage.
13 Accordingly, policies issued prior to 1986 are typically the best source of
14 potential coverage for environmental property damage.

15 **Q. DID THE COMPANY UNDERTAKE A SEARCH FOR INSURANCE**
16 **POLICIES THAT MAY AFFORD COVERAGE FOR THE FORMER MGP**
17 **SITES?**

18 A. Yes, Duke Energy Ohio searched its archives and records for evidence of
19 potentially applicable coverage, including the types of policies described above.
20 It also retained outside coverage counsel, K&L Gates, LLP, to review the
21 Company's insurance files in an attempt to locate any policies that might provide
22 coverage for the East End and West End sites. In addition, Duke Energy Ohio
23 retained an insurance archaeologist to locate additional evidence of coverage.

1 **Q. DID DUKE ENERGY OHIO AND ITS CONSULTANTS FIND**
2 **POTENTIALLY APPLICABLE COVERAGE?**

3 A. Although the existence of these policies does not guarantee coverage, Duke
4 Energy Ohio and its consultants located evidence of general liability policies
5 issued to the Company over the period from 1940 to 1985.

6 **Q. CAN YOU DESCRIBE DUKE ENERGY OHIO'S HISTORICAL**
7 **INSURANCE THAT POTENTIALLY AFFORDS COVERAGE FOR THE**
8 **MGP SITES?**

9 A. These historical liability policies are occurrence-based and provide coverage for
10 liability resulting from bodily injury or property damage taking place during the
11 policy period that was caused by an "occurrence." In these policies, an
12 occurrence is generally defined as "an accident, or an event or continuous or
13 repeated exposure to conditions which results in bodily injury, personal injury, or
14 property damage," and all damages arising out of such exposure to substantially
15 the same general conditions shall be considered as arising out of one occurrence.
16 Thus, subject to, and potentially limited by, the terms, conditions, exclusions, and
17 underlying attachment points, the policies provide coverage for sums that the
18 policyholder incurs for liabilities arising from property damage that occurred
19 during the policy periods, up to the limits of the policies. As is the case with
20 many other gas utilities, Duke Energy Ohio did not purchase primary policies that
21 afford first-dollar coverage. Rather, the policies that Duke Energy Ohio
22 purchased are excess policies that sit above self-insured retentions, which are like
23 deductibles.

1 **Q. HOW MANY GENERAL LIABILITY POLICIES DID DUKE ENERGY**
2 **OHIO PURCHASE COVERING THE PERIOD BETWEEN 1940 AND**
3 **1985?**

4 A. Duke Energy Ohio purchased approximately 100 policies covering this period.
5 However, a number of the insurers that issued policies during this period are now
6 insolvent, and it is unlikely that Duke Energy Ohio will be able to recover under
7 those insolvent policies.

8 **Q. ARE THE POLICIES ISSUED BY THE SOLVENT INSURERS IN THE**
9 **HISTORICAL PROGRAM A SOURCE OF POTENTIAL INSURANCE**
10 **RECOVERY FOR THE MGP SITES?**

11 A. Yes. However, as discussed below, and as they generally do in response to
12 environmental claims, the insurers likely will resist providing coverage.

IV. STEPS UNDERTAKEN TO OBTAIN INSURANCE COVERAGE

13 **Q. CAN YOU DESCRIBE THE STEPS THAT A POLICYHOLDER**
14 **TYPICALLY TAKES TO SEEK INSURANCE COVERAGE FOR AN**
15 **ENVIRONMENTAL CLAIM SUCH AS THE CLAIMS CONCERNING THE**
16 **MGP SITES HERE?**

17 A. Although each situation is different, policyholders generally undertake the following
18 steps to seek coverage for environmental claims such as the claims relating to the
19 MGP sites here:

- 20 • Search for copies of policies or secondary evidence of policies that
21 potentially afford coverage;

- 1 • Analyze the policies and secondary evidence to determine whether
- 2 coverage may be available;
- 3 • Notify the insurers that issued the potentially applicable policies of the
- 4 claim;
- 5 • Respond to the insurers' reservations of rights letters and requests for
- 6 additional information;
- 7 • Attempt to negotiate a resolution of coverage disputes with the insurers
- 8 through settlement; and
- 9 • If adequate settlement with insurers is not reached, the next step would
- 10 include litigation.

11 **Q. HAS DUKE ENERGY OHIO NOTIFIED THE SOLVENT INSURERS IN**
12 **ITS HISTORICAL INSURANCE PROGRAM THAT IT INTENDS TO**
13 **SEEK COVERAGE FROM THEM UNDER THE POLICIES ISSUED TO**
14 **THE COMPANY?**

15 A. Yes.

16 **Q. CAN YOU SUMMARIZE THE STEPS THAT THE COMPANY TOOK**
17 **PRIOR TO DECEMBER 31, 2013, TO ACTIVELY PURSUE THE**
18 **COLLECTION OF ALL REMEDIATION COSTS THROUGH**
19 **POTENTIALLY AVAILABLE INSURANCE COVERAGE FOR THE**
20 **MGP SITES?**

21 A. Prior to December 31, 2013, Duke Energy Ohio undertook a number of actions in
22 its efforts to obtain insurance recovery for the MGP sites, including the following:

- 1 • It has searched for and collected its historical liability policies, both from
- 2 its own files and through an investigation by its insurance archaeologist;
- 3 • It has retained insurance coverage counsel with significant experience in
- 4 representing utilities in obtaining insurance for environmental claims
- 5 arising from MGP sites;
- 6 • Through its outside counsel and its own in-house counsel, it has analyzed
- 7 its historical policies to determine which may potentially provide
- 8 coverage;
- 9 • It has provided notice to its historical insurers whose policies potentially
- 10 provide coverage;
- 11 • It has responded to requests from the insurers for additional information;
- 12 • It has had multiple communications, and has met, with two insurers.

13 **Q. HAS DUKE ENERGY OHIO TAKEN ANY ADDITIONAL STEPS TO**
14 **OBTAIN INSURANCE COVERAGE FOR THESE SITES?**

15 A. Yes. Duke Energy Ohio conducted an informational meeting for its historical
16 insurers on March 18, 2014, in Charlotte, North Carolina as the next step in the
17 process of pursuing settlements with those insurers. Eleven insurers (counting
18 related insurers as one) attended that meeting. Since the meeting, the Company
19 has been responding to those insurers' additional informational requests.

20 **Q. WHAT ARE THE NEXT STEPS IN PURSUING COVERAGE AND WHEN**
21 **DO YOU EXPECT TO TAKE THEM?**

22 A. Duke Energy Ohio will take the following specific steps:

- 1 • Working with its outside consultant, complete the development of a
- 2 projection of future costs for the remediation of the East End and West
- 3 End MGPs;
- 4 • Meet with the insurers again to discuss future cost projections for the sites;
- 5 • Develop individual settlement targets for all the solvent insurers and
- 6 convey settlement demands to each insurer, and
- 7 • Begin settlement negotiations with individual insurers.

8 We expect to undertake each of these tasks in the next three to four months,

9 although settlement negotiations with the individual insurers will most likely

10 extend months beyond this period.

11 **Q. WHY HASN'T DUKE ENERGY OHIO FILED A LAWSUIT**

12 **AGAINST ITS INSURERS TO RECOVER INSURANCE PROCEEDS?**

13 A. Duke Energy would prefer to attempt to reach amicable settlements with its

14 historical insurers if possible. If this result can be achieved, Duke Energy Ohio

15 may be able to avoid the costs of expensive and lengthy lawsuits against the

16 several carriers. The steps that Duke Energy Ohio has taken and intends to take --

17 providing information to the insurers regarding the sites, responding to reasonable

18 questions and entering into settlement negotiations -- are all necessary to

19 achieving this possible goal.

20 **V. ASSESSMENT OF INSURANCE RECOVERY**

21 **Q. WHAT ARE THE CHALLENGES TO OBTAINING COVERAGE FOR**

22 **THESE LIABILITIES?**

1 A. The insurers have reserved rights to deny coverage based on a number of policy
2 terms, conditions, exclusions, and defenses, including (but not limited to) the
3 following:

- 4 • alleged late or insufficient notice;
- 5 • the losses allegedly do not arise from an “Occurrence” or “Accident”;
- 6 • the Company allegedly “expected or intended” the property damage at
7 issue;
- 8 • the losses allegedly arise from a known loss;
- 9 • the amounts incurred to investigate and remediate property damage
10 allegedly are not “damages” within the meaning of the policies;
- 11 • the Company allegedly is not “legally obligated to pay” amounts to
12 address property damage;
- 13 • the Company allegedly incurred costs without the insurers’ consent;
- 14 • the Company allegedly failed to cooperate with the insurers;
- 15 • the losses allegedly are barred by owned property exclusions in the
16 policies; and
- 17 • the losses allegedly are barred by qualified pollution exclusions in certain
18 policies.

19 Duke Energy Ohio has counter-arguments to these defenses. However, we
20 expect that a number of Duke Energy Ohio’s insurers, at least initially, will resist
21 providing coverage, as they typically do when asked to provide coverage for
22 environmental damage at former MGP sites.

VI. CONCLUSION

1 **Q. DOES THIS CONCLUDE YOUR DIRECT PRE-FILED TESTIMONY?**

2 **A. Yes.**

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Summary: Testimony DIRECT TESTIMONY OF KEITH BONE ON BEHALF OF DUKE
ENERGY OHIO, INC.

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