

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for an Adjustment to)	Case No. 19-174-GA-RDR
Rider MGP Rates.)	
 In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Tariff Approval.)	Case No. 19-175-GA-ATA

**DIRECT TESTIMONY OF
KEITH G. BUTLER
ON BEHALF OF
DUKE ENERGY OHIO, INC.**

_____	Management policies, practices, and organization
_____	Operating income
_____	Rate Base
_____	Allocations
_____	Rate of return
_____	Rates and tariffs
<u> X </u>	Other: Insurance

March 29, 2019

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I. INTRODUCTION AND PURPOSE

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

2 A. My name is Keith G. Butler, 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 (DEBS) as Senior Vice
6 President, Global Risk Management and Insurance and Chief Risk Officer on
7 behalf of Duke Energy Corporation (Duke Energy). DEBS provides various
8 administrative and other services to Duke Energy Ohio, Inc., (Duke Energy Ohio
9 or Company) and other affiliated companies of Duke Energy.

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

12 A. I have a Bachelor of Science degree in Business Administration, with a
13 concentration in accounting, from the University of North Carolina at Chapel Hill.
14 I am a Certified Public Accountant in the state of North Carolina, a member of the
15 American Institute of Certified Public Accountants, a member of the North
16 Carolina Association of Certified Public Accountants, Advisory Board of the
17 Enterprise Risk Management Initiative at NC State's Poole School of
18 Management, a member of the Strategic Risk Council of the Conference Board
19 and a member of the Financial Executive International's Strategic Risk
20 Committee.

21 I joined Duke Energy in January 1984, in the Controller's Department,
22 and have worked in various leadership positions in accounting, finance,

1 independent power development, and energy services. I was appointed to the
2 position of Vice President & Corporate Controller in August 2001 and was
3 responsible for the accounting functions of Duke Energy. In June 2005, I was
4 appointed to the position of Vice President, Corporate Tax. I was appointed
5 Senior Vice President, Tax in January 1, 2007. As Senior Vice President, Tax, I
6 had overall responsibility for corporate tax compliance, tax planning, and tax
7 accounting for Duke Energy. I oversaw Duke Energy's Tax Department, which
8 among other things, prepares and files federal, state, and local income, sales and
9 use, excise, and property tax returns for Duke Energy and its affiliated companies
10 as well as manages audits with the Internal Revenue Service and state and local
11 tax authorities.

12 In February 2016, I was appointed to my current position as Senior Vice
13 President Global Risk Management and Insurance and Chief Risk Officer.

14 **Q. PLEASE SUMMARIZE YOUR RESPONSIBILITIES AS SENIOR VICE**
15 **PRESIDENT GLOBAL RISK MANAGEMENT AND INSURANCE AND**
16 **CHIEF RISK OFFICER.**

17 **A.** As Senior Vice President Global Risk Management and Insurance and Chief Risk
18 Officer, I have responsibility for overall risk management of Duke Energy, with
19 particular focus on the corporation's market, credit, operational and strategic
20 risks. In addition, I manage Duke Energy's insurance programs.

21 With regard to the former manufactured gas plant (MGP) operational sites
22 and areas requiring remediation that are at issue in these proceedings, I am one of

1 the people responsible for overseeing the efforts to obtain insurance recovery for
2 the liabilities associated with those sites.

3 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE PUBLIC**
4 **UTILITIES COMMISSION OF OHIO?**

5 A. Yes. Most recently, I provided testimony in support of Duke Energy Ohio's request
6 for an increase in electric distribution rates, filed under Case No. 08-709-EL-AIR, *et*
7 *al.*

8 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THESE**
9 **PROCEEDINGS?**

10 A. The purpose of my direct testimony is to describe the steps that Duke Energy
11 Ohio took in 2018 to comply with the Opinion and Order¹ issued November 13,
12 2013, to actively pursue insurance coverage for its investigation and remediation
13 costs at the two MGP sites. Keith Bone previously testified about the historical
14 insurance policies that are potentially available to provide coverage for Duke
15 Energy Ohio's liability for environmental property damage at and around the
16 former MGP sites known as the East End and West End MGP sites located in
17 Cincinnati, Ohio. Keith Bone also previously discussed Duke Energy Ohio's
18 efforts to locate and analyze the potentially applicable coverage and some of the
19 challenges that Duke Energy Ohio overcame to secure recoveries from insurers.
20 In that regard, I will discuss the efforts undertaken by Duke Energy Ohio in 2018
21 to obtain recovery under available insurance coverage.

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.*, Opinion and Order, at pg. 67 (November 13, 2013).

1 Finally, I discuss the issues surrounding the appropriate treatment of the
2 insurance proceeds as well as the need for the Commission to fairly balance the
3 allocation of costs of ongoing MGP remediation work with the benefits of the
4 insurance proceeds.

II. DISCUSSION

A. 2018 Efforts to Obtain Insurance Recovery

5 **Q. PLEASE DISCUSS THE EFFORTS UNDERTAKEN BY DUKE ENERGY**
6 **OHIO IN 2018 TO OBTAIN INSURANCE RECOVERY FOR THESE**
7 **SITES.**

8 **A.** Duke Energy Ohio took the following steps during 2018 to obtain insurance
9 recovery for the losses at these sites. From January 2018 through October 2018,
10 Duke Energy Ohio actively litigated against the remaining insurer-defendants in
11 the case. Duke Energy Ohio took and defended numerous fact depositions. It
12 exchanged expert reports with the insurer defendants and took and defended
13 multiple expert depositions. It also filed and won a motion to compel against one
14 of the insurer-defendants, St. Paul/Travelers. In addition to its litigation efforts,
15 Duke Energy Ohio engaged in settlement negotiations both directly and through a
16 mediator with all of the remaining insurer-defendants. These settlement
17 negotiations were ultimately successful, with Duke Energy Ohio reaching written
18 settlement agreements in 2018 with the remaining insurer-defendants in the case,
19 St. Paul/Travelers, Zurich, and Allstate. Duke Energy Ohio executed the last of
20 the settlement agreements with St. Paul/Travelers in late 2018.

1 The only one of its historical insurers with which Duke Energy Ohio has
2 not reached settlement is Safety National Casualty Corporation (Safety National).
3 Safety National had an arbitration provision in its policy and, consequently, Duke
4 Energy Ohio could not pursue this insurer in the litigation. Duke Energy Ohio did
5 have settlement discussions with Safety National in 2018, but the parties have not
6 yet reached an agreement. Settlement discussions with Safety National are
7 ongoing.

8 **Q. PLEASE DISCUSS THE RESULTS OF THE SETTLEMENT WITH ST.**
9 **PAUL/TRAVELERS, ZURICH AND ALLSTATE AND THE**
10 **DISPOSITION OF FUNDS.**

11 A. As the result of settlement with St. Paul/Travelers Zurich, and Allstate, as well as
12 settlements with other insurers, Duke Energy Ohio has received settlement funds
13 associated with the liability and obligation for MGP contaminate remediation. It is
14 the Company's position that these funds should be maintained by the Company
15 until it has: (1) resolved the issues pending in the Company's annual Rider MGP
16 proceedings that have been before the Commission since 2014 without resolution;
17 (2) completed the MGP remediation work; and (3) exhausted all settlement
18 negotiations with insurers. Maintaining these funds until resolution of these three
19 matters is necessary to allow for the appropriate netting of the proceeds against
20 the costs incurred in obtaining the insurance recovery and to ensure the proper
21 allocation of these proceeds in the event the Commission determines a portion of
22 the remediation costs should be allocated to the Company. This approach is

1 consistent with the Commission's Opinion and Order in the proceeding wherein
2 MGP costs were approved for recovery by Duke Energy Ohio.

3 **Q. WHY DID DUKE ENERGY OHIO SETTLE WITH THESE INSURANCE**
4 **CARRIERS?**

5 A. The insurance carriers contended, among other things, that they had no obligation
6 to provide coverage for the investigation and remediation costs at the East End
7 MGP site and the West End MGP site. The insurance carriers based this
8 contention on certain language in their policies and on their proposed
9 interpretation of Ohio insurance coverage law. Through aggressive litigation,
10 service of interrogatories and document requests, depositions of the insurers'
11 respective company representatives, retention of highly qualified experts to
12 dispute the insurers' claims, depositions of the insurers' experts communication to
13 the insurers of Duke Energy Ohio's own interpretation of Ohio insurance
14 coverage law, and diligent direct negotiations and through mediations, the
15 Company achieved settlements while mitigating legal costs and balancing the risk
16 of potential adverse outcomes of a trial. The insurance coverage issues in the case
17 were complex, and the court and/or jury could have reached decisions regarding
18 the key legal and factual disputes that were adverse to Duke Energy Ohio's
19 positions. The achievement of settlements with the insurer-defendants was neither
20 easy nor a foregone conclusion.

21 **Q. DO YOU BELIEVE THE INSURANCE SETTLEMENTS ACHIEVED TO**
22 **DATE ARE REASONABLE AND IN THE BEST INTERESTS OF**
23 **CUSTOMERS AND THE COMPANY?**

1 A. Yes. The Company has rigorously pursued recovery of investigation and
2 remediation costs from its historical insurance policies, with a careful balancing
3 of the relative risks of litigation and managing costs. The results were a fair
4 resolution given the complexity of the issues and parties involved.

5 **Q. ARE THERE ANY REMAINING INSURANCE CARRIERS THAT**
6 **COULD POTENTIALLY PROVIDE SETTLEMENT FUNDS?**

7 A. Yes. The Company is continuing to pursue recovery from an additional insurer,
8 Safety National. Safety National was not part of the litigation because its
9 insurance policies contained an arbitration clause. The Company continues to
10 pursue recovery of funds under the Safety National policies. As a result, even
11 though the litigation piece of the recovery efforts has concluded, the Company
12 continues to pursue potential recovery and is incurring costs in that pursuit.

B. Distribution of Settlement Proceeds

13 **Q. PLEASE EXPLAIN THE COMPANY'S POSITION REGARDING THE**
14 **DISTRIBUTION OF SETTLEMENT PROCEEDS.**

15 A. The Company believes it is not yet appropriate to begin disbursing the insurance
16 proceeds for several reasons.

17 First, as was directed by the Commission in Case No. 12-1685-GA-AIR,
18 the Company has sought timely recovery of its MGP remediation expenses by
19 making annual filings since 2014. The Commission has not ruled on any of these
20 filings, therefore the Company has not been permitted timely recovery of any
21 incurred and incremental remediation costs. While the Commission's order in
22 Case No. 12-1685-GA-AIR did state that the Company was not to accrue carrying

1 costs on its MGP deferral, and the Company did not challenge that decision at the
2 time, it was unforeseeable and indeed incomprehensible that the Commission
3 would not timely issue any decisions in the annual recovery filings and that the
4 Company's applications would remain unresolved for more than five years. The
5 stated rationale for the Commission's decision to exclude carrying costs from the
6 deferral was, in part, to encourage the Company to seek timely recovery of its
7 MGP remediation costs. The Company has, in fact, sought timely recovery of
8 such costs but, inexplicably, the Commission has not provided timely approval to
9 recover those very costs. It is unreasonable for the Commission to direct
10 insurance proceeds to begin to flow back to customers when the Commission has
11 yet to authorize recovery of MGP remediation costs for calendar years 2013,
12 2014, 2015, 2016, 2017, and now 2018. As explained in the direct testimony of
13 Ms. Sarah Lawler, the Commission's delay in ruling on the Company's MGP
14 recovery proceedings, coupled with the inability to accrue carrying costs, has
15 resulted in a significant financial impact to the Company.

16 Moreover, the Staff of the Commission only recently issued its report
17 regarding the remediation expenditures for calendar years 2013 through 2017. It
18 was only after the issuance of that report that the Company was initially made
19 aware of the Commission Staff's opinion regarding only partial recoverability of
20 remediation costs of the former MGP sites. The potential that the Staff of the
21 Commission would recommend non-recovery of remediation costs for anything
22 other than prudence was raised for the first time in the September 28, 2018 Staff
23 Report. The Company explained in its reply comments why it disagrees with the

1 Staff's conclusion (not the least of which being that the basis for the
2 recommendation has already been litigated by the Ohio Supreme Court in favor of
3 the Company) and again, to date, this dispute has not been resolved in these
4 proceedings.

5 As explained by Duke Energy Ohio witness Michael Lynch, the insurance
6 proceeds at issue were to resolve all remediation liabilities relating to the East
7 End MGP Site and the West End MGP Site under the policies that were the
8 subject of the insurance coverage lawsuit that Duke Energy Ohio filed. The
9 insurance policies were not tied to a specific year, a specific boundary of real
10 property, location of contamination, or type of contamination. The settlements
11 were to resolve all claims related to the presence of contaminants at the East End
12 MGP Site and the West End MGP Site, wherever these might be located.

13 In addition, the Company continues to conduct remediation assessments.
14 As was recognized by the Commission's November 13, 2013, Gas Rate Case
15 Opinion and Order, the Company has a legal obligation to remediate MGP
16 contamination at the East End MGP Site and the West End MGP Site, regardless
17 of any geographic border, arbitrary or otherwise. As Duke Energy Ohio witnesses
18 Shawn Fiore, and Todd Bachand explain in their direct testimony, the MGP
19 investigation is an iterative process that takes time to complete. Until the issues
20 regarding scope of remediation and allocation of MGP remediation expense
21 between customers and the Company is resolved, no insurance proceeds should be
22 distributed.

1 Finally, the Company continues to pursue additional insurance proceeds
2 and is incurring costs in that pursuit. The Commission's Order in Case No. 12-
3 1685-GA-AIR, *et al.*, stated that any distribution of insurance proceeds to
4 customers will be net of costs to achieve those proceeds. Because the Company
5 continues to pursue proceeds and is incurring costs, it is not yet appropriate to
6 begin disbursing such funds until the Company has achieved finality in acquiring
7 such funds.

8 **Q. WHY ARE THE SCOPE OF THE SETTLEMENTS AND THE SCOPE OF**
9 **INSURANCE COVERAGE UNDER THE POLICIES RELEVANT TO**
10 **THE ISSUE OF TREATMENT OF THE INSURANCE PROCEEDS?**

11 A. It is my understanding that, as set forth in the testimony of Michael Lynch, the
12 settlements and underlying insurance policies were not directed at any particular
13 parcel, or limited to the presence of contamination at only where the original
14 MGP operations took place. The scope of settlement for all MGP contamination
15 at the East End MGP Site and the West End MGP Site is relevant because the
16 Staff of the Commission seems to believe that only MGP contamination that was
17 on a property where original MGP operations occurred is recoverable under the
18 Company's Rider MGP. Notwithstanding the Staff's interpretation of the Ohio
19 Supreme Court's decision, not to mention its defiance of the Commission's own
20 order approving these expenses, it is irreconcilable to say on one hand that
21 remediation cost recovery is somehow limited and should be apportioned based
22 upon some geographic meets and bounds of real property and to also not allocate
23 the insurance proceeds in a similar manner, or in some other reasonable manner,

1 once remediation is complete, and the final costs can be determined. In other
2 words, to the extent that remediation costs are limited to customers based upon a
3 belief that there is a timing or geographic apportionment of remediation expense
4 between customers and the Company, so too should there be a corresponding
5 apportionment of insurance proceeds. Again, as set forth in Mike Lynch's
6 testimony, the amount and value of insurance settlement proceeds were achieved
7 based upon resolving 100 percent of MGP remediation liability at the East End
8 MGP Site and the West End MGP Site under the policies. Denying full recovery
9 of MGP remediation expense without any allegation of imprudence and based
10 only upon Staff's arbitrary allocation of the legal obligation to incur necessary
11 MGP remediation costs by establishment of an arbitrary property boundary line,
12 especially one that is unrelated to the actual physical presence of contamination,
13 is both unsupportable and unreasonably punitive. Moreover, doing so without also
14 allocating a pro rata share of the insurance proceeds that were acquired to resolve
15 total MGP liability at the East End MGP Site and the West End MGP Site from
16 insurance carriers would effectively double penalize the Company for its efforts
17 to comply with federal law and for incurring costs that were already determined
18 by the Ohio Supreme Court as a necessary expense of providing utility service.

III. CONCLUSION

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

20 **A. Yes.**

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3/29/2019 2:51:05 PM

in

Case No(s). 19-0174-GA-RDR

Summary: Testimony Testimony of Keith G. Butler electronically filed by Mrs. Debbie L Gates on behalf of Duke Energy Ohio Inc. and Watts, Elizabeth H and D'Ascenzo, Rocco O. Mr.