

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

)	Case No. 14-375-GA-RDR
)	Case No. 15-452-GA-RDR
In the Matters of the Applications of Duke Energy)	Case No. 16-542-GA-RDR
Ohio, Inc., for Adjustments to Rider MGP Rates.)	Case No. 17-596-GA-RDR
)	Case No. 18-283-GA-RDR
)	Case No. 19-174-GA-RDR
)	Case No. 14-376-GA-ATA
)	Case No. 15-453-GA-ATA
In the Matters of the Applications of Duke Energy)	Case No. 16-543-GA-ATA
Ohio, Inc. for Tariff Approval.)	Case No. 17-597-GA-ATA
)	Case No. 18-284-GA-ATA
)	Case No. 19-175-GA-ATA
In the Matter of the Application of Duke Energy)	
Ohio, Inc. for Authority to Defer Environmental)	Case No. 19-1085-GA-AAM
Investigation and Remediation Costs.)	
In the Matter of the Application of Duke Energy)	
Ohio, Inc., for Tariff Approval.)	Case No. 19-1086-GA-UNC

COMMENTS

BY

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Since 2013, customers have paid more than \$50 million in subsidies—about \$100 per residential customer—to clean up the dirty toxic mess left behind by Duke’s defunct manufactured gas plants (“MGP”) from the 19th century. Now, Duke wants to charge customers another \$46 million—\$80 per residential customer—for additional cleanup costs that Duke incurred between 2013 and 2018.¹ On top of that, Duke wants to continue deferring costs

¹ See *In re Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Case No. 14-375-GA-RDR *et al.*, Entry ¶¶ 10-11 (Aug. 27, 2019) (\$26.0 million from 2013 to 2017 and \$19.8 million for 2018).

(incurred after 2019) for later collection from customers.² This is so wrong for customers.

Customers never should have been made to pay the first fifty million. They should not be made to pay Duke nearly another fifty million dollars.

Since the PUCO first approved charges to consumers for MGP cleanup costs, it has said that Duke and its shareholders should be held accountable for the damage caused by Duke's plants (even though Duke is charging customers):

- “[W]e find intervenors’ argument that the shareholders should bear some of the responsibility for the remediation costs persuasive.”³
- “[I]t is incumbent upon the utility to commence its investigation and remediation, and request for recovery in a timely manner, so as to minimize the ultimate rate burden on customers.”⁴
- A ten-year period for charges to consumers “is reasonable and necessary in order to protect the public interest and ensure the Company and its shareholders are held accountable.”⁵
- “We also stress that any future request submitted by Duke for an additional extension of deferral authority beyond December 31, 2019, will be heavily scrutinized, in order to ensure that the Commission’s original intent to protect the public interest and hold Duke and its shareholders accountable, in part, for the remediation continues to be realized.”⁶

The time for Duke to be held accountable is now. Customers have already shouldered more than their share of the burden. Consistent with the PUCO’s prior findings, Duke and its shareholders should be responsible for cleaning up the pollution that the manufactured gas plants have caused. Customers should stop being burdened with these costs, which they played no role

² *In re Application of Duke Energy Ohio, Inc.* Case No. 19-1085-GA-AAM, Application (May 10, 2019) (the “2019 Extension Application”). Duke will file a case in 2020, seeking to charge customers for whatever it spends in 2019.

³ *In re Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distrib. Rates*, Case No. 12-1685-GA-AIR (the “Rate Case”), Opinion & Order at 59 (Nov. 13, 2013) (the “Rate Case Order”).

⁴ Rate Case Order at 59.

⁵ Rate Case Order at 72.

⁶ *In re Application of Duke Energy Ohio, Inc. for Authority to Defer Envtl. Investig. & Remediation Costs*, Case No. 16-1106-GA-AAM, Finding & Order at 14 (Dec. 21, 2016) (the “2016 Extension Order”).

in causing. Customers did not make the decision to pollute, and the two plants have been defunct since 1928 and 1963.⁷

The Office of the Ohio Consumers' Counsel ("OCC") respectfully requests that the PUCO hold Duke accountable and protect Duke's customers by (i) denying Duke's request to continue deferring costs beyond the current December 31, 2019 expiration date, (ii) adopting Staff's position that Duke should not be permitted to charge customers for the cost to remediate outside the bounds of the MGP sites (\$23 million out of the \$46 million total, by Staff's calculation⁸), and (iii) denying a substantial portion of the remaining \$23 million in charges as imprudent because Duke's remediation techniques are significantly more expensive than necessary to clean up the sites consistent with environmental laws and regulations.

I. BACKGROUND

Duke or its predecessors previously operated manufactured gas plants at two sites in Cincinnati, referred to as the East End and West End sites. The subsequent availability of natural gas made manufacturing gas unnecessary. As such, the West End plant was shut down in 1928, and the East End plant was shut down in 1963.⁹ It has been a long time since Duke's customers (many of whom are no longer customers) benefited from these manufactured gas plants.

Manufactured gas plants have long been a source of environmental concern. At the time of their operation in the 19th and early 20th centuries, hazardous waste from the plants (tar, sulfur, ammonia, oil) was routinely dumped onsite, contaminating land and water.¹⁰ Since at

⁷ Rate Case Order at 25 (MGP operations ended at the West End plant in 1928 and the East End plant in 1963).

⁸ *In re Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Case No. 14-375-GA-RDR *et al.*, Entry ¶¶ 10-11 (Aug. 27, 2019) (noting that Staff recommended \$11.9 million in reductions for 2013-2017 and an additional \$11.4 million for 2018).

⁹ Rate Case Order at 25.

¹⁰ Rate Case Order at 24.

least 1988, Duke has known about the need to clean the East End and West End sites.¹¹ Duke did not begin investigating and cleaning the sites in 1988, however. Because Duke considered these sites “lower priorities,” investigation at the East End site began in 2007 and at the West End site in 2010.¹²

In 2012, Duke filed its most recent natural gas base rate case (Case No. 12-1685-GA-AIR). In that case, Duke sought to charge customers for the costs it incurred cleaning the MGP sites through December 31, 2012—around \$55 million.¹³ Various parties, including OCC, Kroger, and the PUCO Staff opposed most or all of these charges on the grounds (among others) that (i) the expenses incurred to remediate the facilities were not related to utility plant in-service that was used and useful at the time the expenses were incurred, and (ii) Duke imprudently spent more than necessary to remediate the sites.¹⁴ The PUCO found that Duke could charge customers under R.C. 4909.15(A)(4) even if the expenses incurred were tied to property that was not used and useful, and that Duke’s remediation efforts were prudent.¹⁵

Accordingly, the PUCO allowed Duke to create a rider (“Rider MGP”) to charge customers for \$55 million in costs that Duke incurred from 2008 to 2012.¹⁶ The PUCO also granted Duke authority to defer additional cleanup costs after 2012. For the East End site, Duke was allowed to defer costs from January 1, 2013 through December 31, 2016.¹⁷ For the West

¹¹ Rate Case Order at 25.

¹² Rate Case Order at 26.

¹³ Rate Case Order at 12; Rate Case, Entry on Rehearing at 16 (Jan. 8, 2014) (the “Rate Case Entry on Rehearing”).

¹⁴ *See generally* Rate Case Order.

¹⁵ *See* Rate Case Order at 53-54, 58-60, 63-65.

¹⁶ Rate Case Order at 12.

¹⁷ Rate Case Order at 72.

End site, Duke was allowed to defer costs from January 1, 2013 through December 31, 2019.¹⁸ The PUCO left open the possibility of extending these dates if “exigent circumstances” existed.¹⁹ Duke later asked the PUCO to extend the deferral period for the East End site, and the PUCO granted an extension to December 31, 2019.²⁰ Now Duke wants to further extend the deferral period for both the East End and West End sites indefinitely, claiming that exigent circumstances have delayed cleanup.²¹

In these cases, Duke also asks the PUCO for authority to charge customers about \$46 million for remediation costs that Duke spent from 2013 to 2018.²² With respect to costs for 2013 to 2018, the PUCO has only approved deferrals. It has never engaged in ratemaking, never found that any such costs have been prudently incurred, and never ruled that customers can be charged for such costs.²³

Based on its review of Duke’s proposed charges to customers, the PUCO Staff has recommended significant reductions in Duke’s proposed charges. Out of Duke’s \$46 million in proposed charges, the PUCO Staff found that about \$23 million was improper and should not be charged to customers.²⁴ Staff’s primary reasoning was that much of the costs that Duke has

¹⁸ Rate Case Order at 72.

¹⁹ Rate Case Order at 72.

²⁰ See 2016 Extension Order.

²¹ See 2019 Extension Application.

²² See *In re Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Case No. 14-375-GA-RDR *et al.*, Entry ¶¶ 10-11 (Aug. 27, 2019) (summarizing Duke’s applications for 2013 through 2018, including requests for \$26.0 million from 2013 to 2017 and \$19.8 million for 2018).

²³ See 2016 Extension Order (noting that the deferrals are not ratemaking and that the PUCO has not yet determined “what, if any, of these costs may be appropriate for recovery”) (emphasis added).

²⁴ *In re Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Case No. 14-375-GA-RDR *et al.*, Entry ¶¶ 10-11 (Aug. 27, 2019) (noting that Staff recommended \$11.9 million in reductions for 2013-2017 and an additional \$11.4 million for 2018).

incurred have been to clean up property outside the bounds of the East End and West End sites, thus making those costs ineligible for recovery from customers.²⁵

Duke filed unsolicited comments in these cases disputing the PUCO Staff's conclusions and arguing in favor of both its 2019 Extension Application and its request to charge customers \$46 million for 2013 to 2018 cleanup costs.²⁶ The Attorney Examiner then set a procedural schedule allowing intervening parties to respond to Duke's application in the extension case as well as the Staff's July 12, 2019 report.²⁷ OCC herein makes recommendations on Duke's application and the Staff Report.

II. RECOMMENDATIONS

A. Duke has failed to demonstrate "exigent circumstances," so the PUCO should protect consumers and not allow Duke to continue deferring MGP remediation expenses beyond the current December 31, 2019 expiration date.

1. Consumers are unreasonably at risk unless the PUCO properly finds that Duke has had more than enough time to clean up the MGP sites.

Currently, Duke is authorized to defer cleanup costs through December 31, 2019.²⁸ Duke claims that this is not enough time to finish cleanup and that it should be allowed to continue remediation and defer future remediation costs for later collection from customers.²⁹ But Duke has had more than enough time to complete the remediation.

²⁵ See Case No. 14-375-GA-RDR *et al.*, Staff Report (Sept. 28, 2018), Staff Report (July 12, 2019).

²⁶ Case No. 14-375-GA-RDR *et al.*, Case No. 19-1085-GA-AAM, Comments of Duke Energy Ohio, Inc. (Aug. 12, 2019) (the "Duke Comments").

²⁷ Entry (Aug. 13, 2019).

²⁸ Rate Case Order at 72-73; 2016 Extension Order ¶ 37.

²⁹ 2019 Extension Application.

Duke has known about the need to clean up the East End and West End sites since at least 1988.³⁰ For 20 years thereafter, Duke did nothing because it considered these sites to be “lower priorities.”³¹ It did not begin investigating and remediating the East End site until 2007, and it did not begin investigating and remediating the West End site until 2010.³²

In the Rate Case Order, the PUCO stressed the importance of limiting the amount of time that Duke could charge customers for MGP cleanup:

The Commission believes that the imposition of such a timeframe [10 years] is, in accordance with R.C. Title 49, reasonable and in the public interest and will ensure that the remediation will be carried out in a responsible and expeditious manner, so that recovery through Rider MGP will be finite. ... We believe that, absent exigent circumstances, this 10-year timeframe ... is reasonable and necessary in order to protect the public interest and ensure that the Company and its shareholders are held accountable.³³

Thus, the PUCO ruled that charges to consumers would end December 31, 2016 for remediation of the East End site and December 31, 2019 for the West End site.³⁴

The PUCO subsequently allowed Duke to continue deferring remediation costs at the East End site through December 31, 2019.³⁵ In granting that extension, the PUCO reiterated its belief that charges to consumers should be limited and that Duke’s shareholders should remain accountable:

[W]e will limit the extension of deferral authority for the East End site to three years, or until December 31, 2019. We also stress that any future request submitted by Duke for an additional extension

³⁰ Rate Case Order at 25 (Duke witness Bednarcik testified that Duke’s cleanup obligations at the two sites “have been anticipated by Duke since 1988”).

³¹ Rate Case Order at 25.

³² Rate Case Order at 25-26.

³³ Rate Case Order at 72.

³⁴ Rate Case Order at 72.

³⁵ 2016 Extension Order.

of deferral authority beyond December 31, 2019, will be heavily scrutinized, in order to ensure that the Commission's original intent to protect the public interest and hold Duke and its shareholders accountable, in part, for the remediation continues to be realized.³⁶

Duke has been remediating these sites for over a decade, and it could have started remediating them two decades sooner. Duke should have completed the remediation by now, *i.e.*, within the ten plus years the PUCO has allowed. Customers should not pay for any additional costs after December 31, 2019. Allowing the utility to defer the costs for later collection from customers circumvents the ten-year time period that the PUCO found appropriate for remediation efforts. It is time for the PUCO to make good on its promise to customers and hold Duke and its shareholders responsible for at least some of the remediation cost. In this regard, the PUCO should deny Duke's request to defer remediation costs incurred after December 31, 2019 and later collect those costs from customers.

2. Duke's excuses for why it has not completed remediation at the MGP sites do not show that exigent circumstances exist, and only serve to put customers at risk for additional charges.

In the Base Rate Case, the PUCO ruled that Duke could seek an extension of the ten-year remediation period only in the event of "exigent circumstances."³⁷ On rehearing, it clarified that an exigent circumstance is an "event beyond the control of the Company."³⁸ Duke has cited several reasons explaining why it will not complete remediation of the MGP sites by December 31, 2019. None of these are based on exigent circumstances.

³⁶ 2016 Extension Order at 14.

³⁷ Rate Case Order at 72.

³⁸ Base Rate Case, Entry on Rehearing at 4 (Jan. 8, 2014).

a. The existence of regulations is not an exigent circumstance that justifies a further extension of the time for potentially charging customers.

First, Duke essentially argues that because it is a regulated utility subject to both state and federal laws, exigent circumstances exist.³⁹ For example, Duke cites federal regulations established by the Pipeline and Hazardous Materials Safety Administration, safety standards under Ohio Adm. Code 4901:1-13, and the Ohio pipeline safety code under Ohio Adm. Code 4901:1-16.⁴⁰ According to Duke, the existence of these regulations makes it harder for Duke to remediate the MGP sites, so exigent circumstances are present.

This is not a reasonable interpretation of “exigent circumstances.” Each of the regulations cited by Duke has existed for years—they are not exigent circumstances at all. Duke, as a regulated utility, will always be subject to these and many other regulations. If the mere existence of regulations constituted exigent circumstances, then exigent circumstances would always exist, and Duke would be allowed to continue remediating and charging customers forever. This cannot be what the PUCO intended when it established the exigent circumstances requirement. Indeed, the PUCO ruled in the Base Rate Case that an exigent circumstance must be an “*event* beyond the control of the Company.”⁴¹ The existence of regulations is not an event at all, so it can’t be an event beyond the control of Duke. The fact that Duke remains subject to regulations is not an exigent circumstance.

³⁹ 2019 Extension Application at 15.

⁴⁰ 2019 Extension Application at 14-15.

⁴¹ Base Rate Case, Entry on Rehearing at 4 (Jan. 8, 2014) (emphasis added).

b. The existence of propane facilities at the East End site is not an exigent circumstance because Duke ignored options for planning around this issue.

Next, Duke argues that it needs more time to remediate the East End site because the middle parcel of the East End site houses propane storage facilities that are used as peaking facilities, and remediation cannot be completed until these facilities are retired.⁴² This is not an exigent circumstance for several reasons.

First, Duke has complete control over the scope, planning, sequencing, timing, scheduling, and physical remediation activities at the East End site. It has known since day one that it cannot perform remediation during the winter months near the propane peaking facility. But because these are peaking facilities that are only required during winter peaks, Duke can work around them the rest of the year when temperatures are warmer and there are fewer concerns about using heavy equipment near the facilities. While cold-weather restrictions might lengthen the time it would take to remediate the areas around the propane plant, Duke has had 13 long years to complete the remediation. Rather than focus on this parcel, Duke instead chose to spend millions of dollars remediating the west of the west parcel, which is outside the boundaries of the MGP sites.

Second, Duke has provided no evidence that it considered less extensive (and less costly), but still environmentally acceptable remediation techniques in the vibration-sensitive areas at and near the propane peaking facilities. For example, as an alternative, Duke could have considered shallower digging, paving over contaminated areas, and restricting future access to the middle parcel of the East End site. These alternatives could have allowed Duke to complete

⁴² 2019 Extension Application at 18-25.

the remediation more quickly, even taking into account any limitations on remediating during winter months.

Third, Duke is asking to extend the deferral period for both the East End and West End sites. But there are no propane facilities at the West End. To the contrary, the propane facilities are located on the central and west parcels of the East End. Even if the existence of propane facilities justified further deferral at those parcels on the East End (which it doesn't), it has no bearing on Duke's request to continue deferring costs (for later collection from customers) for the West End, or even for continuing to defer costs (for later collection from customers) on the eastern parcel of the East End or the Purchased Parcel.

c. Duke caused delays in building the Central Corridor Pipeline, so this is not an exigent circumstance.

Duke has not established that it took all reasonable steps to retire the propane peaking facilities in a timely manner. As Duke explained in its application, it plans to retire the propane facilities, and after that, it will be able to complete remediation of the middle parcel of the East End site. According to Duke, it can only retire the facilities after a new pipeline, which Duke refers to as the Central Corridor Pipeline, is complete.⁴³ But Duke asserts that it has not completed the Central Corridor Pipeline due to delays in the Ohio Power Siting Board ("OPSB") case.⁴⁴ Duke claims that the OPSB case was delayed for reasons beyond Duke's control, when in fact, Duke contributed to the delay in the case.⁴⁵ The OPSB case has not resulted in exigent circumstances.

⁴³ 2019 Extension Application at 19.

⁴⁴ *Id.*; OPSB Case No. 16-253-GA-BTX.

⁴⁵ Case No. 16-253-GA-BTX, Motion for Suspension of Procedural Schedule by Duke Energy Ohio, Inc. (Aug. 23, 2017); Case No. 16-253-GA-BTX, Motion by Duke Energy Ohio, Inc. for Reestablishment of Procedural Schedule (Apr. 13, 2018).

Duke filed its application in the OPSB case in September of 2016. This was nine years after it began investigating and remediating the East End site, and just months before the original December 31, 2016 end of the deferral period for the East End site. While *some* of the delay in the OPSB case may have been outside Duke's control, Duke has not explained why it waited so long to file the case to begin with. Duke knew since the very beginning that it would not be able to complete remediation at the East End site without finding an alternative solution to the propane peaking facilities. Yet it waited nine years before beginning the process for the Central Corridor Pipeline. Duke may not have complete control over the timing of the OPSB case, but it had control over when to file the case, and it waited nine years to do so. That inaction was not reasonable, and the cost of Duke's inaction should not be laid on consumers.

Then, on August 23, 2017, less than three weeks before the hearing scheduled for September 11, 2017, Duke filed a motion to indefinitely suspend the procedural schedule in the case, citing the need for "further examination" and "additional investigation."⁴⁶ Duke did not complete its examination and investigation for an additional eight months.⁴⁷ Indeed, it appears that Duke did not complete its investigation in a timely manner. For instance, in its motion to set a new procedural schedule, Duke attached various communications between it and outside parties (like the U.S. Environmental Protection Agency) regarding its investigation, all of which were dated February 2018 or later.⁴⁸ These documents seem to point to little efforts being undertaken by Duke between August 2017 and January 2018.

⁴⁶ Case No. 16-253-GA-BTX, Motion for Suspension of Procedural Schedule by Duke Energy Ohio, Inc. (Aug. 23, 2017).

⁴⁷ See Case No. 16-253-GA-BTX, Motion by Duke Energy Ohio, Inc. for Reestablishment of Procedural Schedule (Apr. 13, 2018).

⁴⁸ *Id.*

Further, following its April 13, 2018 motion to reestablish a procedural schedule, it then took Duke another three months to file its reports regarding environmental compatibility and the public need for the Central Corridor Pipeline.⁴⁹ Duke's suggestion that delays in the OPSB case were completely outside of its control do not appear to be true, as Duke contributed to the delay. Thus, any such delays are not exigent circumstances that would warrant extending the deferral period beyond December 31, 2019.

And as with Duke's argument regarding the propane facilities, the Central Corridor Pipeline is entirely unrelated to the West End, so at a minimum, it does not justify the PUCO authorizing further deferral of remediation expenses there.

d. The need to sequence remediation activities is not an exigent circumstance.

Finally, Duke claims that it cannot complete remediation of the Ohio River until it completes remediation of the upland areas, and thus, exigent circumstances exist.⁵⁰ There is nothing exigent about these circumstances.

None of this information is new to Duke. If it is true today that the upland areas must be cleaned before the Ohio River, then the same was true 13 years ago when Duke started investigating and remediating the East End site. What Duke has ignored entirely is *why* it has not yet completed remediation of the upland area. Again, Duke was aware of the timeframes that the PUCO imposed, and it maintained complete control over the scope, planning, sequencing, timing, scheduling, and physical remediation activities. It could have accelerated remediation of the upland areas at any time in the past 13 years so that it could proceed with sequential remediation of the Ohio River.

⁴⁹ Case No. 16-253-GA-BTX, Duke Energy Ohio Reports (July 26, 2018).

⁵⁰ 2019 Extension Application at 25-28.

Duke must be held accountable for its past decision-making. One way to hold Duke accountable is to deny its request to continue deferring costs and ultimately charging customers for remediation beyond the 13-year period.

The need for sequencing is common in environmental remediation. Duke is the one responsible for determining the priority of remediation, including making sure to remediate areas if completion of those areas is a prerequisite to cleaning other areas. Duke has again failed to demonstrate exigent circumstances that would warrant additional deferrals and charges to customers beyond December 31, 2019.

B. The PUCO Staff correctly concluded that Duke should not be allowed to charge customers for remediation of property outside the bounds of the East End and West End sites.

1. The Rate Case Order prohibits Duke from charging customers for remediation that occurs outside the bounds of the MGP sites from 2013 onward.

The PUCO Staff's proposal in these cases is relatively straightforward: customers should not pay for remediation that occurred outside the bounds of the MGP sites from 2013 to 2018.⁵¹ In its comments, Duke goes to great lengths trying to downplay the importance of the MGP-site geography, arguing that customers should pay for remediation of land, water, and air not only at the MGP sites, but basically anywhere remotely close to the MGP sites. For example, Duke claims that in the Rate Case, "the Commission rejected the proposition that the Company's recovery of remediation expenses was geographically limited to areas that provide service to customers...."⁵² Duke similarly argues that "[r]ecoverability does not depend on historic property

⁵¹ Staff Report (Sept. 28, 2018); Staff Report (July 12, 2019).

⁵² Duke Comments at 5.

ownership or whether an actual piece of equipment once was set upon the MGP-contaminated area.”⁵³ These arguments ignore the plain language of the Rate Case Order.

For 2013 to 2018 (the years relevant to these cases), the PUCO has allowed Duke to defer expense incurred cleaning the MGP sites. Now, Duke wants to turn those deferrals into charges to consumers. Duke can only charge customers for, at a maximum, amounts that were properly deferred. To determine what was properly deferred, a review of the Rate Case Order is required. And the Rate Case Order unambiguously limits the deferred costs that could be collected from customers to the geographic bounds of the East End and West End sites themselves—not the areas surrounding them:

Duke requests authority to continue to defer costs related to the MGP remediation after December 31, 2012. ... [T]he environmental investigation and remediation costs associated with the East and West End MGP sites are business costs incurred by Duke in compliance with Ohio regulations and federal statutes. Therefore, we find Duke’s request for authority to continue to modify its accounting procedures and to defer costs related to the environmental investigation and remediation cost beyond December 31, 2012, is reasonable and should be approved. *Such deferral authority should be limited to the East and West End sites and for a period as set forth below.*⁵⁴

The Rate Case Order says that the deferral is limited to the East and West End sites. It does not say “related to” the East and West End sites. It does not say “land, air, and water near the East and West End sites.” It does not say “all contamination caused by manufactured gas plants.” It does not say “East and West End sites, plus any contaminated portions of the purchased parcel.” It does not say “East and West End sites plus the Ohio River.” If it said any of those things, then perhaps Duke might credibly claim that the deferral of costs (for later collection from customers) includes contamination outside the geographic bounds of the MGP

⁵³ Duke Comments at 7.

⁵⁴ Rate Case Order at 71 (emphasis added).

sites themselves. But as written, the Rate Case Order plainly limits the deferral of costs to the cleanup at the East and West End sites only.

The PUCO's discussion of the Purchased Parcel in the Rate Case Order also confirms that remediation outside the geographic bounds of the East End and West End sites should not be customers' responsibility. The PUCO found that Duke could not charge customers under Rider MGP for the purchased parcel because there was no evidence that it was ever used for manufactured gas:

With regard to the purchased parcel located to the west of the western parcel of the East End site, ... Duke failed to prove, on the record, what, if any, of this purchased parcel was, or ever had been, used for the provision of manufactured gas or utility service for the customers of Duke or its predecessors. Rather, the record indicates that, while the nine-acre purchased parcel may have been impacted by the former MGP operations, only a small portion of the parcel may have been associated with the actual MGP property originally owned by Duke and its predecessors. ... *[W]e are not willing to entertain Duke's unsubstantiated request for recovery of costs related to property [that] has not been shown on the record in these cases to provide, either in the past or in the present, utility services that caused the statutorily mandated environmental remediation.*⁵⁵

The same logic applies here. The purchased parcel, and other property (including the Ohio River) were not part of the original MGP sites that caused the contamination. Thus, any costs to remediate property outside the geographic bounds of the East End and West End sites should not be passed on to customers.

The PUCO must enforce its Rate Case Order.⁵⁶ The Rate Case Order says that the deferral of expenses from 2013 and beyond is limited to the West End and East End sites themselves, not the surrounding areas. The 2013 to 2018 remediation costs may only be passed

⁵⁵ Rate Case Order at 60 (emphasis added).

⁵⁶ See *State ex rel. Tantarelli v. Decapua Enters.*, 2019-Ohio-517 (Feb. 14, 2019) (describing the doctrine of *res judicata*).

on to customers (if at all) if they are costs for cleanup within the geographic bounds of the East End and West End sites. If Duke believes that there should be remediation activities conducted outside the East and West End boundaries, then those costs should be the responsibility of Duke's shareholders, not Duke's customers.

2. Staff's geography-based disallowance is consistent with the Rate Case Order and subsequent Supreme Court decision because the geography argument is not about used and usefulness.

In these cases, the PUCO Staff has stated that customers should not pay for remediation of property outside the bound of the East End and West End MGP sites.⁵⁷ In an effort to refute this argument, Duke mischaracterizes it by claiming that Staff is attempting to reargue the used and usefulness issue that was resolved in the Base Rate Case and subsequent appeal.

It is true that in the Base Rate Case, the PUCO, and later the Supreme Court of Ohio, did not agree with OCC's and Staff's position that cleanup costs were unlawful because they were tied to MGP sites that were no longer "used and useful" under R.C. 4909.15(A)(1). But that is irrelevant here. Staff, OCC, and others are not making a "used and useful" argument in these rider cases.

Staff's argument is based on the locations of the remediation. Duke is cleaning up property that is outside the bounds of the MGP sites—including the purchased parcel and the Ohio River—and trying to charge customers for those cleanup costs. Neither Staff nor OCC has taken any position on whether these properties are "used and useful" under R.C. 4909.15(A)(1) because this is not a base rate case where such an inquiry would be required. To the contrary, the issue is strictly one of geography. And as explained immediately above, the PUCO has already ruled that for remediation costs in 2013 and thereafter, geography is relevant.

⁵⁷ Staff Report (Sept. 28, 2018); Staff Report (July 12, 2019).

Duke is trying to make it look like the PUCO Staff and OCC are trying to relitigate the used and useful issue that was already decided. OCC is not. The issue of charging customers for cleanup outside the bounds of the MGP sites after 2012 is a different issue unrelated to the used and useful argument. And the geography issue was decided in consumers' favor when the PUCO limited deferrals for costs in 2013 and thereafter to the geographic bounds of the East End and West End sites. The PUCO must stand behind its decision and deny Duke's request to charge customers even more remediation costs than allowed under the PUCO's Order.

3. Neither the PUCO nor the Supreme Court of Ohio has ruled that Duke has a legal right to collect from customers every last cent it spends cleaning up the pollution from its defunct gas plant sites.

Throughout its comments, Duke discusses the PUCO's ruling in Duke's most recent natural gas base rate case and the subsequent ruling by the Ohio Supreme Court on appeal. In short, Duke claims that the PUCO's order and Supreme Court ruling guarantee Duke the right to charge customers for 100% of the costs that Duke incurs cleaning up its defunct MGP sites.⁵⁸ Neither the PUCO nor the Supreme Court said this. To the contrary, the PUCO specifically limited Duke's ability to charge customers in several ways.

First, the PUCO did not allow Duke to charge customers for cleanup costs incurred before January 1, 2008 at the East End site and before January 1, 2009 at the West End site.⁵⁹ Second, the PUCO denied Duke's request to charge customers carrying costs, concluding: "we find the intervenors' argument that the shareholders should bear some of the responsibility for the remediation costs persuasive."⁶⁰ Third, the PUCO similarly found that Duke should only be allowed to charge customers for ten years of cleanup costs and that such time limitation "is

⁵⁸ See, e.g., Duke Comments at 4-7.

⁵⁹ Rate Case Order at 72.

⁶⁰ Rate Case Order at 59.

reasonable and necessary in order to protect the public interest and ensure the Company and its shareholders are held accountable.”⁶¹ Fourth, with respect to the Purchased Parcel, the PUCO found that “Duke failed to prove, on the record, what, if any, of this purchased parcel was, or ever had been, used for the provision of manufactured gas or utility service for the customers of Duke or its predecessors.”⁶² Fifth, the PUCO ruled that it was “not willing to entertain Duke’s unsubstantiated request for recovery of costs related to property [that] has not been shown on the record in these cases to provide, either in the past or in the present, utility service that caused the statutorily mandated environmental remediation.”⁶³

Duke paints a rosy picture of the Rate Case Order in its favor—one where the PUCO unambiguously found that Duke should be allowed to charge customers for any and all cleanup costs, no matter how tenuous the connection to the actual sites of Duke’s former MGP operations. This is simply not what the PUCO said or implied in the Rate Case Order; it was not a blank check underwritten by consumers. To the contrary, the Rate Case Order allowed Duke to charge customers tens of millions of dollars for MGP cleanup costs through 2012, but placed material limitations on future charges to customers.

The Supreme Court’s ruling goes no further than this. On appeal, the Court addressed three issues that OCC and others had raised: (i) whether the PUCO erred by failing to apply the used and useful standard under R.C. 4909.15(A)(1), (ii) whether R.C. 4909.15(A)(4) requires expenses to be normal and recurring, and (iii) whether the PUCO failed to find that the remediation costs were related to Duke’s provision of distribution service.⁶⁴ Though the Court

⁶¹ Rate Case Order at 72.

⁶² Rate Case Order at 60.

⁶³ Rate Case Order at 60.

⁶⁴ *In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437 (Feb. 28, 2017).

ruled in Duke's favor on each of these issues, it did not rule that customers are required to pay 100% of Duke's cleanup costs, even if they are related to geographic areas outside the bounds of the MGP sites. Nor did the Court rule that Duke should be allowed an unlimited number of years to complete the cleanup. Those issues simply were not before the Court, so the Court's ruling is not determinative.

C. Duke's remediation activities could harm consumers because Duke imprudently spent more money remediating the East End and West End sites than was necessary.

In its October 30, 2018 reply comments, OCC explained various ways in which Duke spent more than necessary cleaning up the pollution from the MGP sites.⁶⁵ Pursuant to the procedural schedule established in the rider cases,⁶⁶ OCC expects to demonstrate through expert testimony that Duke could have remediated the sites at much lower cost while still complying with all environmental standards, thus proving that Duke acted imprudently. In addition to those costs that Duke incurred to remediate areas outside the MGP sites, the PUCO should also deny a Duke's request to charge customers for any imprudently-incurred costs within the bounds of the MGP sites.

D. The PUCO has already ruled that all insurance money belongs to customers, so it should reject Duke's request to allocate insurance payments among customers and Duke's shareholders.

As the PUCO Staff noted in its most recent report, Duke has collected a "significant amount of insurance proceeds."⁶⁷ In fact, as of nearly a year ago (October 2018), Duke had

⁶⁵ Case No. 14-375-GA-RDR *et al.*, Reply Comments by the Office of the Ohio Consumers' Counsel (Oct. 30, 2018).

⁶⁶ Case Nos. 14-375-GA-RDR, 15-452-GA-RDR, 16-542-GA-RDR, 17-596-GA-RDR, 18-283-GA-RDR, 19-174-GA-RDR.

⁶⁷ Staff Report at 6 (July 12, 2019).

collected at least \$50 million in insurance money.⁶⁸ But none of this money has been passed on to customers or used to offset Rider MGP charges. Duke is delaying passing this money back in part because it believes that “insurance proceeds must be allocated at the conclusion of the remediation process.”⁶⁹ According to Duke, if shareholders are required to bear some of the costs of remediation, then any insurance proceeds should be divided up between shareholders and customers.⁷⁰ Duke’s argument, however, relies on Duke’s misinterpretation of the PUCO’s Rate Case Order.

Duke claims that the Rate Case Order did not decide the insurance issue but that instead, “the need for apportionment [was] recognized and was left to be decided in a future proceeding.”⁷¹ This is false. The Rate Case Order already resolved the allocation of insurance proceeds, and it resolved it in favor of consumers: consumers get all of the insurance proceeds, and only after customers have been reimbursed in full do shareholders get whatever might be left over. The Rate Case Order states this plainly: “We find that *any proceeds* paid by insurers or third parties for MGP investigation and remediation should be used to reimburse the ratepayers.”⁷² It does not say that insurance proceeds will be divided up among shareholders and customers based on their respective responsibilities for remediation costs. It says that all insurance proceeds go to customers. It is only when customers have been reimbursed *in full* that the remaining insurance proceeds, if any, go to shareholders: “to the extent the proceeds

⁶⁸ See Case No. 14-375-GA-RDR *et al.*, Reply Comments by the Office of the Ohio Consumers’ Counsel (Oct. 30, 2018).

⁶⁹ Duke Comments at 18.

⁷⁰ Duke Comments at 18-20.

⁷¹ Duke Comments at 20.

⁷² Rate Case Order at 67 (emphasis added).

collected from insurers and/or third parties *exceed the amount recoverable from ratepayers*, Duke should be permitted to retain such amount.”⁷³

The allocation of insurance proceeds has already been decided. Customers have the first right to all net insurance proceeds until they are reimbursed in full.

E. Duke appears to have completed its pursuit of insurance proceeds, so the net proceeds should be immediately credited to customers through Rider MGP.

In its most recent filing, Duke witness Lynch testified that Duke has reached a settlement with each of the insurers that it had sued.⁷⁴ Mr. Lynch further testified that Duke was continuing to negotiate with a single insurer, Safety National, whose policy required arbitration.⁷⁵ Subsequently, Duke revealed through discovery that it has reached a settlement agreement with Safety National. Accordingly, it appears that Duke has completed its pursuit of all insurance proceeds. This means that the total amount of insurance proceeds and the cost that Duke incurred pursuing them will not change, so the net proceeds (insurance proceeds minus costs) are known and final. There is nothing more to do regarding insurance. All net proceeds should be immediately passed on to customers through Rider MGP.

III. CONCLUSION

The PUCO should deny Duke’s request to charge customers an additional \$46 million for cleaning up the environmental damage from its manufactured gas plants because (i) much of that cost was for property outside the bounds of the MGP sites and (ii) Duke has failed to prove that the costs were prudently incurred. The PUCO should also deny Duke’s request to continue deferring remediation costs after December 31, 2019 because Duke has failed to prove that the

⁷³ Rate Case Order at 67 (emphasis added).

⁷⁴ Case No. 19-174-GA-RDR, Direct Testimony of Michael J. Lynch on Behalf of Duke Energy Ohio, Inc. at 6 (Mar. 29, 2019) (“Duke Energy Ohio was able to reach settlements with all of the Historical Insurers that it sued.”).

⁷⁵ *Id.* at 8.

delay in completing a timely remediation was caused by exigent circumstances. Finally, the PUCO should order Duke to immediately begin returning net insurance proceeds to customers. Only after customers are reimbursed in full what they have paid under Rider MGP should any leftover insurance proceeds be retained by Duke's shareholders.

Customers have paid more than \$50 million to date to clean up long-obsolete MGP sites. They've paid more than their fair share. The PUCO should adhere to its commitment to "protect the public interest and hold Duke and its shareholders accountable."⁷⁶

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⁷⁶ 2016 Extension Order at 14.

CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments were served on the persons stated below via electric transmission this 13th day of September 2019.

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