BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 14-375-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 14-376-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 15-452-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No.15-453-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 16-542-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 16-543-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No.17-596-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No.17-597-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No.18-283-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No.18-284-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 19-174-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 19-175-GA-ATA

POST HEARING BRIEF OF DUKE ENERGY OHIO, INC.

January 17, 2020

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I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission) previously held, as a matter of law and policy, that prudently incurred expenses for environmental remediation of impacts of Duke Energy Ohio, Inc.'s (Duke Energy Ohio or the Company) former manufactured gas plant (MGP) operations are recoverable through utility rate proceedings. The Commission explained that the Company could recover such costs under R.C. 4909.15(A)(4), as costs "incurred . . . for rendering utility service."[1] The Commission did not reach this conclusion because the process of investigating and remediating environmental contamination somehow generates, distributes, or transmits gas or energy to the homes and businesses of Ohio customers. But, rather, because such remediation costs are "a necessary cost of doing business as a public utility in response to a federal law, CERCLA [the Comprehensive Environmental Response, Compensation, and Liability Act], that imposes liability . . . for the remediation of the MGP sites."[2]

The Commission found that "recovery in this context is permissible" precisely because of the Company's legal and societal obligation to investigate and remediate:

> Not only is Duke legally obligated to remediate these sites as the owner and operator of these sites, but it is undisputed on the record that Duke has the societal obligation to clean up these sites for the safety and prosperity of the communities in those areas and in order to maintain the usefulness of the properties; therefore, these costs are a current cost of doing business.[3]

And the Commission emphasized that "such obligations are clearly not voluntary on Duke's part."[4] Thus, the Commission granted the Company continued authority to defer such costs, albeit within certain time limitations.

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[1] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No.12-1865-GA-AIR, *et al.*, Opinion and Order (November 13, 2013), p. 58 (Gas Rate Case).
[2] *Id.*, pp. 58-59.
[3] *Id.*, p. 59.
[4] Gas Rate Case, Entry on Rehearing, ¶ 25 (January 8, 2014).

In its conclusion granting continued deferral authority, the Commission laid out very clearly what costs would be recoverable: "the 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."[5] After considering extensive evidence, including evidence showing that the contaminants associated with the sites were mobile and could migrate,[6] the Commission rejected the geographically-limiting "used and useful" standard propounded by its Staff and chose to authorize recovery on the basis that remediation was a current cost of service.[7] And, on appeal, the Ohio Supreme Court affirmed the Commission.[8]

Pursuant to the Commission's Opinion and Order in the Gas Rate Case, as affirmed, Duke Energy Ohio has, each year from 2013 through 2018, submitted applications for recovery of its prudently incurred costs of remediating the impacts of the former MGP operations addressed in the Gas Rate Case. Staff has not accused the Company of any sort of excessive spending, either due to over-remediation (in relation to the Company's statutory obligations), over-staffing, or over-payment of contractors. The only "expert" to testify that the Company overspent and/or over-remediated is unqualified to opine and the Commission previously rejected his nearly-identical testimony in the Gas Rate Case. And yet Staff has recommended to disallow recovery of nearly half of the expenses incurred by the Company on the basis of arbitrary alleged property boundaries and even more arbitrary allocation formulas. Staff's recommendation is simply incompatible with the Commission's and the Ohio Supreme Court's resolutions of the Gas Rate Case.

Duke Energy Ohio has liability under state and federal law for MGP contaminants no matter where the material has physically migrated. All remediation of the MGP contamination

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[5] Gas Rate Case, Opinion and Order, p. 71 (emphasis added).
[6] *Id.*, pp. 33-34 (describing the relevant expert testimony).
[7] *Id.*, pp. 53, 58-60.
[8] *In re Application of Duke Energy Ohio, Inc., for an Increase in Its Natural Gas Distrib. Rates*, 150 Ohio St. 3d 437, 2017-Ohio-5536, 82 N.E.3d 1148, ¶ 2 (Gas Rate Case Supreme Court Opinion).

required under environmental laws and regulations is thus a cost of providing utility service and should be recoverable, as the Commission and the Ohio Supreme Court have already determined. Staff and Intervenors' positions are based on fundamental misunderstandings of the facts and conclusions of law established and accepted by the Commission in the underlying rate proceedings where the Commission first approved recovery of MGP remediation costs.

Even if the geographic boundaries propounded by Staff and Intervenors were remotely plausible limitations on cost recovery—and they are not—Staff's allocation methodology has no basis and grossly overestimates the investigation and remediation costs that were incurred outside of the Staff's proposed boundaries. Additionally, Staff misclassifies certain investigation and remediation costs as capital costs. Because Staff errs in both interpreting this Commission's precedent and the evidence, the Commission should reject Staff's recommendations and approve the recovery of all of the prudently incurred costs submitted in the Company's applications for the years 2013 through 2018.

As for the insurance proceeds that the Company has obtained under various environmental policies to cover its costs of investigating and remediating MGP contamination, the Company can only reimburse customers for customers' proportional share of total MGP costs incurred. Under the Commission's decision in the Gas Rate Case, the Company is entitled to recover all of the prudently incurred costs associated with the legal obligation to investigate and remediate potential contamination associated with the former MGP sites, wherever such contamination occurs. If the Commission follows that precedent in these consolidated proceedings, then there will be no need to allocate insurance proceeds—all net proceeds will be refundable to customers. However, if the Commission limits the Company's recovery by imposing the geographic limits advocated by Staff, the share of net insurance proceeds to be refunded to customers should only be allocated after MGP investigation and remediation is complete, and the Company's total expenses and total cost

recoveries are known. Because the insurance policies are generic and the proceeds resolve the Company's claims related to ***all*** MGP contamination regardless of location, any exclusion of certain geographic areas from cost recovery must also require a corresponding exclusion of the insurance proceeds allocated (by some reasonable methodology) to those areas. It will only be when the MGP investigation and remediation work is complete, and the Commission has finally determined all recoverable costs, that the Company will be able to calculate the equitable amount to reimburse to customers: the percentage of the insurance proceeds that corresponds to the percentage of such costs recovered by the Company via Rider MGP.

II. FACTUAL BACKGROUND

A. Descriptions and depictions of the MGP sites at issue in this case.

In this consolidated proceeding, Duke Energy Ohio seeks recovery of the prudently incurred costs of investigation and remediation of the environmental impacts of MGP operations at the East End site and West End site by Duke Energy Ohio's predecessor companies. Requirements for investigating and remediating contamination and environmental ***impacts*** from the MGP operations are not limited by the former or current property boundaries or the location of former MGP operations or equipment.[9] The nature of environmental remediation imposes a legal obligation to investigate and remediate environmental impacts from former MGP operations, regardless of whether they have migrated or extended beyond any property boundaries or footprints of areas that once housed the MGP operations decades ago.[10] Consistent with this obligation and with the Commission's decision in a prior rate case acknowledging the need to investigate and remediate MGP contamination in impacted areas, the Company seeks recovery of

[9] *See infra* Sections IV-A, IV-B.
[10] *Id.*

all of the MGP investigation and remediation costs that it has prudently incurred in 2013 through 2018.

Two of the major points of contention in this case revolve around location. First, while Staff[11] does not dispute the existence of the Company's legal obligation to investigate and remediate MGP impacts, Staff argues that the Commission's Opinion and Order in the Gas Rate Case does not allow the Company to recover costs incurred for work performed partly or entirely in certain locations (Disputed Areas). Second, Staff adopted a methodology—which does not appear to have any reasonable basis and has varied year-to-year throughout the years at issue—for attributing all or part of certain investigation and remediation costs to these Disputed Areas. If the Commission somehow concludes that the location where legally mandated investigation and remediation costs are incurred is relevant to the costs' recoverability (which it is ***not***), an accurate understanding of the geography of the areas involved will be crucial to this case.

1. The East End Site.

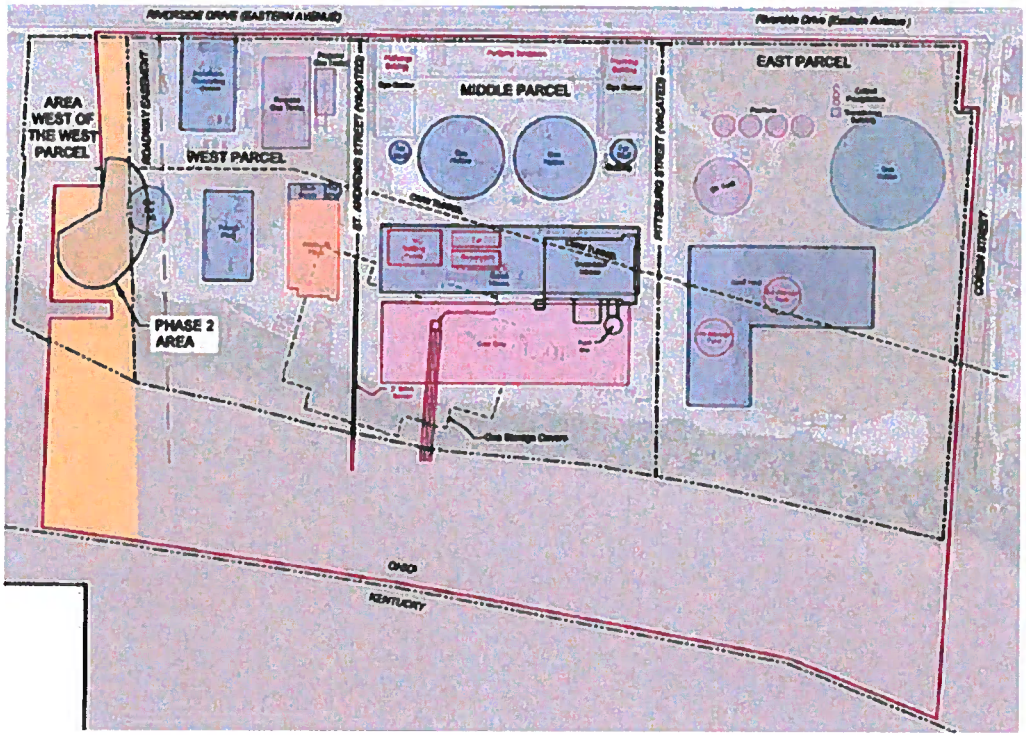
MGP operations were conducted at the East End site from 1884-1909 and 1925-1963.[12] The entire area within the magenta outline in **Map 1** below, as was depicted, and admitted into evidence as Duke Energy Ohio Exhibit 13, Attachment TLB-1, was owned by the Company's predecessors during some or all of these periods of MGP operation.[13]

[11] Certain intervenors agree with Staff on both of these geography-related points. For ease of reading and because these Intervenors do not contribute anything substantively different on this point, arguments regarding the relevance and/or accuracy of the proposed geographic distinctions will sometimes be attributed to Staff alone throughout this brief.

[12] Gas Rate Case, Opinion and Order, p. 25.

[13] Duke Energy Ohio Exhibit 13, Direct Testimony of Todd Bachand (19-174-GA-RDR), Attachment TLB-1, p. 1. The image herein is a partial excerpt from the exhibit, rotated ninety degrees and shrunk, but otherwise unaltered. The legend labels the magenta line as "CG&E/DUKE PROPERTY LIMIT (1963)." *Id.*

Map 1:



Decades later, for purposes of remediation under the Ohio Voluntary Action Program (VAP), the designations of "East Parcel," "Middle Parcel," and "West Parcel" were initially given to the three areas depicted above.[14] The Area West of the West Parcel, which is depicted at the far left (or far West) of Map 1 above, was designated as such after the acquisition of the Purchased Parcel and initial investigation.[15]

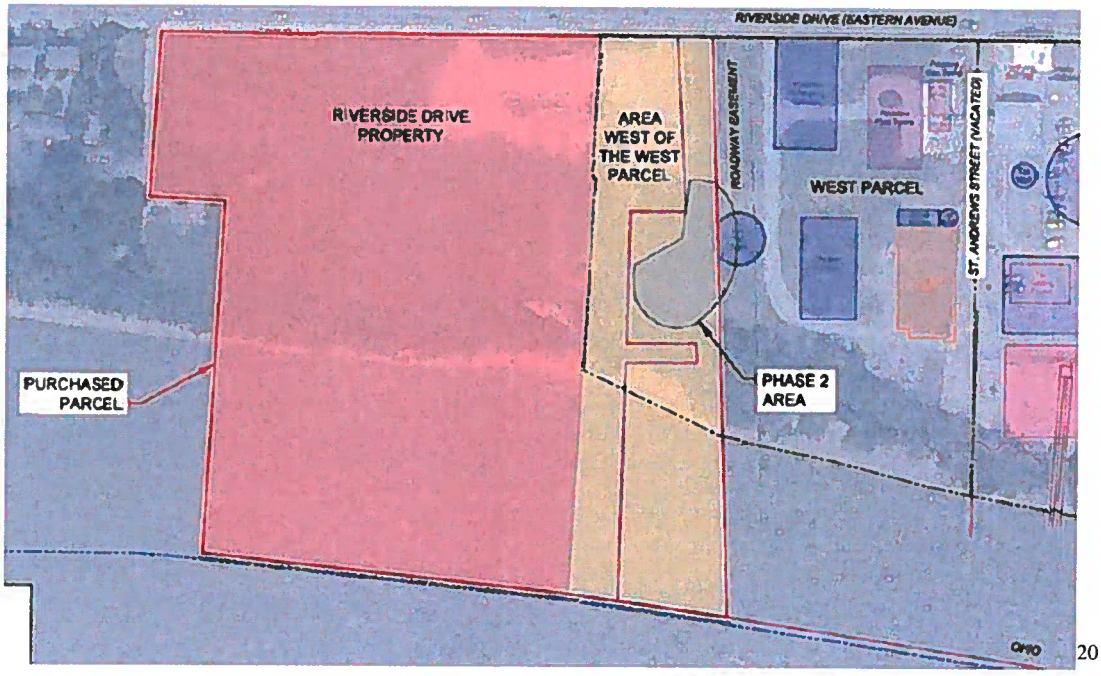
The Area West of the West Parcel (also referred to by Staff and the Ohio Consumers' Counsel (OCC) as "WOW") is one of the Disputed Areas. A portion of the Area West of the West Parcel, shaded yellow above, was "part of the original MGP site on the East End site,"[16] and the remainder (not yellow) was not part of the property. Not only was the yellow portion a part of the

[14] Duke Energy Ohio Exhibit 12, Direct Testimony of Todd Bachand (18-283-GA-RDR), p. 9.
[15] Duke Energy Ohio Exhibit 13, Direct Testimony of Todd Bachand (19-174-GA-RDR), p. 14 and Attachment TLB-1; Hearing Tr., p. 70.
[16] Gas Rate Case, Opinion and Order, p. 41.

site property and impacted by the MGP operations, but MGP equipment was discovered in this area during remediation activities, specifically the foundations of a former iron tar tank.[17]

In 2006, prior to beginning the investigation and remediation of the former East End MGP, Duke Energy Ohio sold the yellow portion of the Area West of the West Parcel.[18] In 2011, the Company purchased approximately nine acres of property, which included the property that had been sold in 2006, which was only a small portion of the much larger piece of contiguous property suspected of being impacted by the past MGP operations.[19] This entire approximately nine-acre area is what has been previously described as the "Purchased Parcel," as depicted below in Map 2, that was admitted into the record as Attachment JLB-1 to Duke Energy Ohio Exhibit 8:

Map 2:



[20]

[17] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 15 and TLB-3 (describing and depicting the remnants of a tar tank found in the Area West of the West Parcel).
[18] Gas Rate Case, Opinion and Order, pp. 41.
[19] *Id.*, pp. 41-42.
[20] Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica Bednarcik, Attachment JLB-1. The image herein is a partial excerpt from the exhibit, rotated ninety degrees and shrunk, but otherwise unaltered.

The Purchased Parcel is outlined in red on **Map 2** above; it is comprised of the pink and yellow shaded areas in **Map 2**, and includes the entirety of the Area West of the West Parcel. It also includes an area referred to as the Riverside Drive Property, which was acquired from a developer in 2011.[21] As testified by Company witness, Jessica Bednarcik, the Area West of the West Parcel was designated once the Company's initial investigation determined that the western portion of the Purchased Parcel was not affected by MGP impacts and that the eastern portion of the Purchased Parcel (the Area West of the West Parcel) had MGP impacts that needed to be further investigated and remediated.[22]

Although Staff did not question the inclusion of investigation and/or remediation costs incurred in the Area West of the West Parcel previously (including in the Gas Rate Case), Staff now maintains that the investigation and remediation of the entire Area West of the West Parcel, including the portion that was part of the original MGP site property (yellow in **Map 1**), is categorically ineligible for cost recovery.[23]

Yet another Disputed Area is the Ohio River. Under both CERCLA and the Ohio VAP, the Company is required to investigate and, if necessary, remediate, all impacts from the former MGP sites, regardless of their location.[24] Thus, the Company is required to investigate and/or remediate any impacts to the Ohio River.[25] However, Staff believes that the Company's costs of investigating the Ohio River are not recoverable as Staff argues that the Ohio River is "offsite" or "outside the East End boundaries."[26] Staff's position is not only inconsistent with federal and state

[21] *Id.*, pp. 8-9.
[22] *Id.*, p. 7.
[23] Staff Report, pp. 3-4 (September 28, 2018) (2018 Staff Report); Staff Report, pp. 5-6 (July 12, 2019) (2019 Staff Report).
[24] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 11.
[25] *Id.*, p. 13.
[26] *See* 2018 Staff Report, p. 4; 2019 Staff Report, p. 6.

environmental laws, but is also inconsistent with Staff's contention that the "East End site" and "West End site" are the areas that are located within the "footprints" of the "original sites."

Historically, and during the time of MGP operations, the Ohio River's low-water mark was at the Ohio-Kentucky border, which is depicted in **Map 1**, above. The current riverbank is as much as 200 feet north of that former waterline due to the construction of the Markland Dam in 1964, which significantly increased the normal pool elevation of the Ohio River, placing portions of the former MGP operations under the water of the current Ohio River.[27] Under federal and state environmental laws, the Company must investigate whether MGP contaminants have migrated, and could continue to migrate into the banks and sediments of the Ohio River, and if necessary, remediate such impacts.[28] Notwithstanding the Company's legal obligation to responsibly investigate and, if needed, remediate all MGP impacts, irrespective of geography, Staff believes that all investigation and remediation work performed in the Ohio River—whether associated with the East End site or West End site—must be categorically excluded from cost recovery. This argument is inconsistent with Ohio and federal environmental law and inconsistent with the prior Ohio Supreme Court ruling, as well as the Commission's Opinion and Order in the Gas Rate Case.

2. The West End Site.

The Company's predecessors conducted MGP operations at the West End site during 1843-1909 and 1918-1928.[29] Apart from challenging the costs the Company incurred in (or Staff attributed to) the Ohio River, it does not appear that Staff or Intervenors attempt to disqualify costs submitted by the Company for the West End site on the basis of property boundaries.[30] Staff did

[27] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 16-17.
[28] Duke Energy Ohio Exhibit 13, Direct Testimony of Todd Bachand (19-174-GA-RDR), p. 6.
[29] Gas Rate Case, Opinion and Order, p. 25.
[30] Staff witness Nicci Crocker testified that Staff excluded some costs for "off-site remediation activities" and that "[i]n most cases, the work appears to all be in the Ohio River." Staff Exhibit 8, Prefiled Testimony of Nicci Crocker, p. 7. The 2019 Staff Report specifies that by "offsite costs" in the West End, Staff means "specifically, costs that were associated with . . . the Ohio River." 2019 Staff Report, p. 6.

recommend that certain West End site costs be excluded, but for an altogether different reason: due to a mistaken perception that they were capital costs or costs of "re-remediating" certain areas, and not proper environmental remediation costs.[31]

B. The full environmental impact of the Company's MGP sites did not become apparent until decades after MGP operations had ceased.

In addition to understanding the sites' geography, it is important to consider the context in which these sites were placed into operation and retired, as well as the context in which remediation efforts commenced. Between approximately 1850 and 1950, MGPs were a commonplace source of power.[32] MGPs burned coal, oil, and other fossil fuels to produce gas for heating, lighting, and other uses. This burning process created numerous residual byproducts, including coal tar, sulfur, and ammonia.[33] During this period, prior to enactment of present-day environmental protection statutes and regulations, it was accepted practice to bury such byproducts at MGP operational sites.[34] Disposing of MGP waste products in this manner caused a number of environmental problems, including soil and groundwater contamination.[35]

The East End and West End sites at issue in this case (MGP Sites)[36] operated collectively between 1884 and 1963, and, as a result, now "contain waste products and contaminants that federal law defines as hazardous substances."[37] Even after the Company retired its MGP operations, "several belowground structures and related residuals remained, including: remnants of gas holders, oil tanks, tar wells or ponds, purifiers, retorts, coal storage bins, and generator houses, as well as associated residuals such as coal tar, scrubber waste, and other chemicals."[38]

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[31] Section IV-D-3 *infra* describes these costs and explains why Staff is mistaken on these points.
[32] Gas Rate Case Supreme Court Opinion, ¶ 3.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] These are the same sites identified as East End and West End sites in the Gas Rate Case.
[37] Gas Rate Case Supreme Court Opinion, ¶ 4; *see* Gas Rate Case, Opinion and Order, p. 23.
[38] Gas Rate Case, Opinion and Order, p. 25.

As awareness of environmental risks grew, the law evolved accordingly. A major development was the enactment of CERCLA, which federal courts have interpreted as subjecting current owners or operators of hazardous sites to strict liability for site remediation.[39] The Company began investigation and remediation of the sites in 2007,[40] to address its liability under both federal and Ohio environmental laws and regulations. In Ohio, the VAP establishes a process for remediating contaminated sites to Ohio Environmental Protection Agency (Ohio EPA) standards.[41] The process involves hiring a VAP Certified Professional (CP) to act as an agent of the state and take "responsib[ility] for verifying that properties are investigated and cleaned up to the levels required by the VAP rules."[42] Once the required remediation is complete and the site meets all applicable standards, the CP issues a No Further Action (NFA) letter. If the remediator chooses, it can submit the NFA letter to Ohio EPA and obtain a Covenant Not to Sue (CNS) from the State of Ohio, which is a formal release of liability for the conditions at the Site that were addressed by the remediator.[43]

Thus, the Company began investigation and remediation efforts under the guidance of an Ohio VAP CP.[44] As noted by the Commission in the Gas Rate Case, "[t]here is no dispute that CERCLA imposes retroactive and strict liability for remediating MGP sites on past and present owners. In addition, no party disagrees that the Ohio EPA's VAP is an appropriate program for responsible entities to use when remediating contaminated sites in Ohio."[45]

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[39] Gas Rate Case Supreme Court Opinion, ¶ 4.
[40] Gas Rate Case, Opinion and Order, p. 26.
[41] *Id.*, p. 30.
[42] *Id.*
[43] Gas Rate Case, Opinion and Order, p. 30.
[44] *Id.*, p. 31.
[45] *Id.*, p. 47.

C. The Company's investigation and remediation obligations are not bound by property or other geographic boundaries.

Because of the mobility of MGP contaminants, their impacts can extend beyond the boundaries of the area on which they originated. In particular, the East End site and West End site contain significant "free product," in the form of oil-like material (OLM) and tar-like material (TLM), which contain a number of chemicals such as benzene and polyaromatic hydrocarbons.[46] And these MGP residuals have migrated, gradually contaminating both geographic areas that contained historic MGP operations and those that did not.[47] All areas that were or could potentially have been impacted by MGP residuals are thus part of the MGP sites that must be investigated and remediated in accordance with CERCLA and the Ohio VAP.[48] MGP residuals and impacts have been found in the Area West of the West Parcel, and there is a significant potential that MGP residuals have migrated into the Ohio River bank, sediments, and surface water.[49]

As testified by multiple Company witnesses and the OCC's expert witness, in the environmental context, the remediation "site" is not defined based upon ownership of property or real estate/geographic boundaries, but is based upon the extent of the contamination.[50] The Commission has already determined that CERCLA undisputedly requires investigation and remediation of all such potential contamination.[51] Moreover, a VAP CP could not possibly issue an NFA letter without investigating and remediating, if needed, the residuals, wherever they might be, including the Ohio River.[52]

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[46] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, pp. 12-13
[47] *Id.*, p. 13; *see* Hearing Tr., p. 416-17.
[48] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 3, 13.
[49] *Id.*, pp. 13, 16-17.
[50] Hearing Tr., pp. 154, 898-99; Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 11-12; Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, p. 16.
[51] Gas Rate Case, Opinion and Order, pp. 47, 59.
[52] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, p. 13-14.

D. The Company has diligently pursued, and continues to pursue, prudent investigation and remediation efforts.

The Company has already completed extensive investigation and remediation work, and continues to work diligently towards an NFA determination for both the East End site and West End site.[53] Investigation and remediation under the VAP is an iterative process, often requiring several rounds of investigation and remediation.[54]

Since 2007, when it began investigation and remediation efforts at the East End site, the Company has made considerable progress. A complete description of the work performed was given by Company witness Bachand in Attachment TLB-1 to his filed testimony.[55] Such work includes, but is not limited to:

- VAP Phase I and Phase II Property Assessments on the East Parcel, West Parcel, Purchased Parcel, and the accessible areas of the Middle Parcel;
- Investigation and monitoring activities including test pits, NAPL (nonaqueous phase liquid) fingerprinting, geophysical surveying, soil sampling, groundwater sampling, installation of wells, forensic analysis, indoor air sampling;
- Sediment, river bank, and surface water investigation in the Ohio River portion of the site, which is ongoing; and
- Active remedial activities, in particular, excavation and *in-situ* stabilization of MGP impacts and site restoration in the remediated areas. Ambient air monitoring and vibration monitoring, among other things, were performed during active remediation.[56]

There remains a significant amount of remediation to complete at the East End site because of co-located propane peaking infrastructure and facilities in the Middle Parcel, which prevents Duke Energy from accessing these areas while those facilities remain in operation.[57]

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[53] *See* Duke Energy Ohio Exhibit 7, Direct Testimony of Jessica Bednarcik, pp. 7-10; Duke Energy Ohio Exhibit 9, Direct Testimony of Todd Bachand, pp. 8-11; Duke Energy Ohio Exhibit 10, Direct Testimony of Todd Bachand, pp. 8-10; Duke Energy Ohio Exhibit 11, Direct Testimony of Todd Bachand, pp. 9-11; Duke Energy Ohio Exhibit 12, Direct Testimony of Todd Bachand, pp. 9-11; Duke Energy Ohio Exhibit 13, Direct Testimony of Todd Bachand, pp. 10-13; *see also* Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 12, Attachment TLB-1.
[54] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, p. 14.
[55] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 12, Attachment TLB-1, pp. 1-3.
[56] *Id.*
[57] Hearing Tr. p. 210, 416, 752.

Significant amounts of MGP residuals in the Middle Parcel cannot be accessed and remediated due to the subsurface propane storage cavern, propane peaking infrastructure, and other facilities located there currently.[58] Performing excavation or *in-situ* stabilization to remediate in this area, before retiring the propane facilities, would pose an unacceptably high level of risk to the safety of the Company's employees, contractors, and the local community, as well as the operational integrity of the Company's natural gas delivery infrastructure and ability to serve customers during the winter heating season.[59] On November 21, 2019, the Ohio Power Siting Board approved the Company's application to construct its Central Corridor Pipeline,[60] which in significant part is intended to allow the retirement of this aging propane infrastructure at the East End site.[61] Given the current status of remediation, the Company has a request pending (in a separate proceeding) to extend the deferral deadline currently in effect for the East End site.[62]

Active remediation at the West End site, on the other hand, was completed in 2019, except for the Ohio River bank and sediment areas, where investigation is currently ongoing.[63] At the West End site, the investigation and remediation efforts to date include, but are not limited to:

- VAP Phase I and II Property Assessments;
- Investigation and monitoring of soil and groundwater, including installation of wells;

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[58] *See* Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, p. 19 (explaining that "[m]obile free product remains in certain portions of the Middle Parcel . . . which are currently inaccessible due to essential utility services" and that the Company will be able to address these areas only "once the sensitive underground infrastructure and propane peaking facilities can be taken out of service and decommissioned").

[59] Hearing Tr. p. 210, 334, 752; *see In the Matter of the Application of Duke Energy Ohio, Inc. for a Certificate of Environmental Compatibility and Public Need for the C314V Central Corridor Pipeline Extension Project*, Case No. 16-253-GA-BTX, Opinion, Order, and Certificate, ¶ 36 (November 21, 2019).

[60] *In the Matter of the Application of Duke Energy Ohio, Inc. for a Certificate of Environmental Compatibility and Public Need for the C314V Central Corridor Pipeline Extension Project*, Case No. 16-253-GA-BTX, Opinion, Order, and Certificate, ¶ 1 (November 21, 2019).

[61] *Id.*, ¶ 36.

[62] *See In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 19-1085-GA-AAM, *et al.*, Application (May 10, 2019). The current deadline is December 31, 2019, after an extension was granted by the Commission. *See In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 16-1106-GA-AAM, *et al.*, Finding and Order, ¶ 43 (December 21, 2016).

[63] Duke Energy Ohio Exhibit 13, Direct Testimony of Todd Bachand, p. 12-13; Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, Attachment TLB-1, pp. 4-5.

- Excavation, in-situ stabilization, and off-site disposal of MGP-impacted materials; and
- Sediment and surface water investigation in the Ohio River, which is ongoing.[64]

A more complete description of all of the remediation work performed at the West End site was provided by Company witness Bachand, in Attachment TLB-1 to his written testimony.[65]

E. Simultaneously with its remediation efforts, the Company has pursued and obtained over $50 million (net of legal costs) in insurance proceeds to cover the MGP investigation and remediation costs incurred.

As contemplated in the Gas Rate Case, the Company "use[d] every effort" to recover remediation costs under available insurance policies.[66] The Company searched its archives and records for potentially applicable insurance policies and retained both an insurance archaeologist and outside counsel, K&L Gates LLP, to assist in the effort.[67] As a result, the Company located approximately 100 historical general liability policies that potentially covered remediation of MGP impacts.[68]

Locating the insurance policies did not immediately or automatically lead to recoveries; some of the insurers were no longer solvent, and those who were, resisted providing coverage, citing various policy terms, conditions, exclusions, and defenses.[69] After attempting and failing to reach voluntary settlements with the insurers, the Company filed suit to obtain recoveries.[70] The Company litigated vigorously, producing over one million documents and participating in numerous fact and expert witness depositions.[71] Ultimately, seeking to maximize the net amount recovered after legal costs, the Company reached settlements with all of the historical insurers,

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[64] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 12, Attachment TLB-1, pp. 3-5.
[65] *Id.*
[66] Gas Rate Case, Opinion and Order, p. 67
[67] Duke Energy Ohio Exhibit 18, Direct Testimony of Keith Bone (15-452-GA-RDR), p. 4.
[68] *Id.*, p. 5-6.
[69] *Id.*, p. 6-7.
[70] Duke Energy Ohio Exhibit 21, Direct Testimony of Keith Bone (18-283-GA-RDR), p. 3.
[71] Duke Energy Ohio Exhibit 24, Direct Testimony of Mike Lynch, p. 6.

with settlements totaling approximately $56 million (not adjusted for legal costs).[72] No party has alleged that the Company's efforts to achieve such settlements were insufficient, unreasonable, or otherwise fell short of the Commission's directives in the Gas Rate Case.

As is standard in these types of settlements and consistent with the extent of the Company's environmental liability, the terms of the various agreements provided comprehensive settlement of claims for ***all*** costs that Duke Energy Ohio had incurred and would incur to investigate and remediate environmental impacts of its predecessors' MGP operations, without any geographic limitations.[73] The policies had covered environmental liabilities arising from the former MGP operations, including the costs of investigating and remediating environmental damage to the soils of neighboring landowners, Ohio River sediments, and groundwater under or beyond the Company's property boundaries.[74] Likewise, the settlements covered all past and future investigation and remediation costs.[75]

III. HISTORY OF COST DEFERRAL AUTHORIZATION AND COST RECOVERY PROCEEDINGS

A. In 2009, the Commission authorized the Company to defer MGP investigation and remediation costs, as "business costs incurred . . . in compliance with Ohio regulations and federal statutes."

In 2009, Duke Energy Ohio first requested authorization to defer "all environmental investigation and remediation costs incurred . . . after January 1, 2008, in compliance with state and federal regulations,"[76] with the expectation that the majority of such costs would stem from investigation and remediation of the MGP sites.[77] In support of its application, Duke Energy Ohio

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[72] *Id.*; Duke Energy Ohio Exhibit 23, Supplemental Testimony of Keith Butler, pp. 3-6; Hearing Tr., p. 690.
[73] Duke Energy Ohio Exhibit 24, Direct Testimony of Mike Lynch, p. 6.
[74] *Id.*, p. 4.
[75] *Id.*, pp. 6-7.
[76] *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM, Finding and Order, pp. 2 (November 12, 2009) (Commission paraphrasing Company's request).
[77] *Id.*, p. 1 ("According to Duke, the majority of these environmental remediation costs are related to former manufactured gas plant (MGP) sites.").

explained that the Company was legally responsible for "removing the environmental and/or public health hazard, in accordance with Chapter 3745-300, O.A.C., and/or CERCLA."[78]

After "review[ing] . . . the applicable federal and state rules and statutes," the Commission "f[ound] that these environmental investigation and remediation costs are business costs incurred by Duke in compliance with Ohio regulations and federal statutes."[79] On this basis, the Commission approved the Company's request to defer "costs related to the environmental investigation and remediation costs described above," holding that the request was "reasonable."[80] The Commission noted that any actual recoveries of the deferred amounts would have to be addressed in future proceedings.[81]

B. In 2013, the Commission approved over $55 million in 2008-2012 MGP investigation and remediation costs, held that the costs were prudently incurred to meet the Company's "statutory mandate" and were recoverable costs of utility service, and discussed the Company's potential future insurance proceeds.

The Company's first application to recover MGP investigation and remediation costs—resulting in a lengthy hearing, thorough Commission opinion, and Ohio Supreme Court affirmance over Staff's and Intervenors' objections—was the Company's Gas Rate Case, filed in 2012.[82] In that case, the Company, among other things, sought recovery of (1) approximately $57.9 million for MGP remediation costs,[83] and (2) approximately $5 million in carrying costs.[84] The parties settled the case with a stipulation, except for one element that they aggressively litigated: Duke Energy Ohio's ability to recover costs incurred in investigating and remediating environmental

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[78] *Id.*, p. 2.
[79] *Id.*, p. 3.
[80] *Id.*
[81] *Id.*, pp. 3-4.
[82] Gas Rate Case, Opinion and Order, p. 3.
[83] *Id.*, p. 26 ("Duke now requests authorization to recover $62.8 million in actual MGP costs . . . . Mr. Wathen explains that the proposed $62.8 million represents the actual costs, including carrying costs, that were incurred by Duke as of December 31, 2012.").
[84] *Id.*

impacts from the former MGP operations. In its Opinion and Order, the Commission made it clear that Duke Energy Ohio was entitled to recover MGP investigation and remediation costs incurred pursuant to its "legal[] obligat[ion] to remediate these sites."[85]

In the Gas Rate Case, as in this case, the Staff and certain Intervenors had attempted to limit the Company's recovery based on arbitrary geographic boundaries. Staff and Intervenors had argued that the Company should be permitted to only recover remediation costs associated with discrete areas surrounding utility equipment and infrastructure that was currently "used and useful" under R.C. 4909.15(A)(1).[86] The Commission flatly rejected this argument, explaining that the "used and useful" standard was simply "not applicable."[87]

The Commission identified the correct standard as R.C. 4909.15(A)(4),[88] a finding that was eventually affirmed by the Ohio Supreme Court.[89] The Commission explained that, to recover MGP investigation and remediation costs, the Company had only "to prove that the costs that have been incurred and deferred, are costs that were incurred for rendering utility service and were prudent."[90] And the Commission further found that the Company met this burden for nearly all of the investigation and remediation costs submitted because it had "substantiated, on the record, that the remediation costs were ***a necessary cost of doing business as a public utility in response to a federal law, CERCLA***, that imposes liability on Duke and its predecessors for the remediation of the MGP sites."[91]

The Commission explicitly identified the Company's legal and societal obligations to remediate as the central justification for cost recovery:

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[85] *See id.*, pp. 58-59.
[86] *Id.*, pp. 28-29.
[87] *Id.*, p. 54.
[88] *Id.*, p. 58.
[89] Gas Rate Case Supreme Court Opinion, ¶¶ 18-19.
[90] Gas Rate Case, Opinion and Order, p. 58.
[91] *Id.*, pp. 58-59 (emphasis added).

> Not only is Duke legally obligated to remediate these sites as the owner and operator of these sites, but it is undisputed on the record that Duke has the societal obligation to clean up these sites for the safety and prosperity of the communities in those areas and in order to maintain the usefulness of the properties; ***therefore, these costs are a current cost of doing business***.[92]

Accordingly, the Commission authorized recovery of the MGP remediation costs through a discrete cost recovery mechanism (Rider MGP), continued deferral of MGP costs, without any carrying charges, after December 31, 2012, and ordered Duke Energy Ohio to file separate annual Rider MGP applications to recover costs incurred during the previous year.[93] The Commission's Opinion and Order made no geographical limitations regarding where remediation had to be performed in order for the costs to be deferred or recovered, as recoverability was based on addressing the Company's liability under environmental laws.[94]

Rather, the Commission stated that "any prudently incurred MGP investigation and remediation costs ***related to*** the East End and West End sites" should be recovered under R.C. 4909.15(A)(4), and excluded only the purchase "premium" paid for the Purchased Parcel, costs incurred in 2008 on the West End site, and carrying costs.[95] With respect to ongoing remediation and investigation costs, the Commission held that "Duke should be authorized. . . to defer costs related to the environmental investigation and remediation costs beyond December 31, 2012."[96]

Throughout its Opinion and Order, the Commission repeatedly described the Purchased Parcel, as being "on" the East End site,[97] and the Commission's only cost exclusion associated

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[92] *Id.*, p. 59 (emphasis added).
[93] *Id.*, pp. 71-72.
[94] The Commission limited only the time within which the Company could defer and recover its ongoing remediation costs, absent exigent circumstances and denied carrying costs. East End site recovery was limited to December 31, 2016, and West End site recovery was limited to December 31, 2019. Gas Rate Case, Opinion and Order, p. 72. The former deadline has since been extended, and a request to extend the deadlines for certain areas is pending. *See In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 19-1085-GA-AAM, Application (May 10, 2019).
[95] Gas Rate Case, Opinion and Order, p. 60 (emphasis added).
[96] *Id.* p. 74.
[97] *Id.*, pp. 22-23, 41, 60 (twice).

with the Purchased Parcel was based on the expense being insufficiently tied to the Company's remediation obligations. The $57.8 million that the Company had originally requested to recover included approximately $2.3 million, which represented the amount by which that the Company's purchase price exceeded the market value of the Purchased Parcel.[98] The Commission found that this amount "relate[d] to the price Duke paid to purchase the property from a third party and ***not*** to the statutorily mandated remediation efforts."[99] The exclusion of $2.3 million associated with the purchase transaction (rather than any investigation or remediation) was not based on geography, but rather on the type of cost.

Although the prospect of insurance recoveries was distant in 2013, the Commission addressed the handling of future insurance proceeds. The OCC recommended that "any" insurance proceeds simply "be applied" to MGP costs.[100] The Company and Staff, however, recommended that "any proceeds paid by insurers for MGP investigation and remediation should be split between shareholders and ratepayers, commensurate with the proportion of MGP costs paid by ratepayers, until customers are fully reimbursed."[101] Mirroring Staff's language, the Commission directed the Company to use insurance proceeds "to reimburse the ratepayers."[102]

Several parties sought rehearing of the Commission's Opinion and Order in the Gas Rate Case to authorize cost recovery of MGP remediation and eventually appealed the issue to the Ohio Supreme Court, which upheld the Commission. After the Commission denied rehearing on this point,[103] the Supreme Court agreed that the "used and useful" standard did not limit the Company's ability to recover costs incurred in rendering public utility service under R.C. 4909.15(A)(4).[104]

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[98] *Id.*, pp. 42, 60.
[99] *Id.*, p. 60.
[100] *Id.*, p. 66.
[101] *Id.* (emphasis added) (Commission paraphrase of Staff position).
[102] *Id.*
[103] Gas Rate Case, Entry on Rehearing, ¶ 10.
[104] Gas Rate Case Supreme Court Opinion, ¶ 19.

The Supreme Court also rejected appellants' attempt to argue that the MGP remediation expenses were not a cost of rendering public utility service, noting that this was a "mere[] repackag[ing]" of "their used-and-useful argument."[105] Thus, the matter was resolved: in order to recover, the Company had to comply with the standard set by the Commission in the Opinion and Order: to "substantiate[] . . . that the remediation costs were a necessary cost of doing business as a public utility in response to a federal law, CERCLA."[106] The scope of recovery was defined by the Company's legal obligation to investigate and remediate the environmental impacts of utility service, with no mention of geographic boundaries.

C. Pursuant to the Gas Rate Case Order, the Company has applied to recover costs incurred in 2013, 2014, 2015, 2016, 2017, and 2018.

In 2014, 2015, 2016, 2017, and 2018, Duke Energy Ohio submitted annual applications, seeking to recover a total of approximately $26 million in costs incurred during each respective preceding year for remediation of the contamination associated with the former MGP sites.[107] No action was taken on these applications by Staff or the Commission until 2018, when the cases were consolidated[108] and on September 28, 2018, Staff filed its first report and recommendations in the consolidated cases, the 2018 Staff Report.

The 2018 Staff Report recommended a disallowance of $11,867,900 in remediation expense, primarily on the basis of Staff's perception of geography.[109] Notably, none of Staff's recommended disallowances were related to any claim of imprudence on the part of the Company. Staff disqualified all costs that they believed to be associated with the Purchased Parcel (which

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[105] *Id.*, ¶ 20 n.2.
[106] Gas Rate Case, Opinion and Order, p. 58.
[107] *See* Case Nos. 14-375-GA-RDR, 15-452-GA-RDR, 16-542-GA-RDR, 17-596-GA-RDR, 18-283-GA-RDR; *see also* 20018 Staff Report, p. 7 (giving total amount).
[108] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-0375-GA-RDR, *et al.*, Case Nos. 15-0452-GA-RDR, *et al.*, Case Nos. 16-0542-GA-RDR, *et al.*, Case Nos. 17-596-GA-RDR, *et al.*, and *Case* Nos. 18-283-GA-RDR, *et al.*, Entry, p. 3 (June 28, 2018).
[109] 2018 Staff Report, p.7.

they erroneously believed to be the same as the Area West of the West Parcel) and all of what it believed to be "offsite costs,"[110] including costs incurred related to the Ohio River. Where Staff was unable to attribute costs to the Area West of the West Parcel "directly," it attributed 50 percent of non-parcel-specific costs to the Area West of the West Parcel for 2013 through 2016, and 70 percent for 2017.[111] Finally, Staff recommended disallowing certain costs that it believed to be capital costs of substation relocation and installation, rather than MGP remediation costs.[112]

In 2019, Duke Energy Ohio made three MGP-related filings. First, Duke Energy Ohio submitted its annual application for recovery of approximately $19.8 million for the previous year's MGP investigation and remediation costs in Case No. 19-174-GA-RDR, *et al.* Second, the Company filed a motion in the previously-consolidated MGP Rider cases, to begin recovering remediation costs the Company had incurred since January 1, 2013, and to avoid setting approved Rider MGP to $0 (Rider Continuance).[113] Third, the Company filed an Application for Continued Deferral Authority of the Company's MGP expenses beyond December 31, 2019 (Deferral Extension).[114]

On July 12, 2019, the Staff submitted the 2019 Staff Report, addressing the Company's 2018 Rider MGP Application, the Rider Continuance, and the Deferral Extension. In the 2019 Staff Report, Staff recommended a disallowance of $11,366,243 of the Company's MGP investigation and remediation costs incurred in 2018, mostly on the basis of the same geographic distinctions as the 2018 Staff Report, stating that "Duke's recovery from customers was limited to

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[110] *Id.*, pp. 3-4, 5.
[111] *Id.*, p. 4.
[112] *Id.*, p. 5.
[113] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-0375-GA-RDR, *et al.*, Motion to Continue Rider MGP Recovery of Costs Incurred Since 2014 and Memorandum in Support (May 10, 2019).
[114] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Continue Deferral of Environmental Investigation and Remediation Costs,* Case No. 19-1085-GA-AAM, *et al.*, Application of Duke Energy Ohio, Inc., for Authority to Continue Deferral of Environmental Investigation and Remediation Costs and for Approval to Amend Rider MGP (May 10, 2019).

any investigation or remediation costs incurred within the two original MGP site footprints."[115] In addition to recommending exclusion of costs on geographic grounds, the 2019 Staff Report recommended disallowing the costs of relocation and construction of certain facilities as capital costs rather than MGP remediation costs.[116] Once again, Staff recommended no disallowances based upon prudency of costs incurred. The 2019 Staff Report further recommended that any "discussion pertaining to" recovery of ongoing MGP costs "should be directly tied to or netted against insurance proceeds."[117]

Although Staff does not, in either of its Staff Reports, challenged the prudence of the environmental investigation and remediation costs that the Company incurred, OCC has done so, both in comments and at the hearing on these consolidated cases. According to OCC, the Company could have remediated both MGP sites for approximately $2.2 million, by performing only minimal excavation, and relying on institutional controls, such as groundwater use prohibition and deed restrictions, and engineering controls, such as concrete or asphalt capping.[118] As demonstrated at the hearing and acknowledged by the OCC's expert witness,[119] such an approach would ***not*** meet all applicable standards as required under the Ohio VAP, but would only be sufficient to meet direct contact soil standards. The overwhelming evidence presented during the hearing shows that OCC is wrong.

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[115] 2019 Staff Report, pp. 5, 9.
[116] *Id.*, p. 6.
[117] *Id.* The Staff Report further recommended that the Commission deny both the Company's request for continued deferral authority and its motion to continue the Rider MGP to recover costs incurred from 2013-2017. The motion for Rider Continuance was denied, the month after the 2019 Staff Report issued. *See In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval*, Case No. 19-175-GA-ATA, Entry, p. 8 (August 13, 2019). The Deferral Extension is the subject of a separate proceeding before the Commission, Case No. 19-1085-GA-AAM, was not consolidated into these proceedings, and was subject to a separate procedural schedule.
[118] *See* OCC Exhibit 21, Direct Testimony of James R. Campbell, Ph. D., p. 7.
[119] *See* Hearing Tr., pp. 842-43.

IV. ARGUMENT

A. The Gas Rate Case Order recognized *all* MGP investigation and remediation expenses stemming from Duke Energy Ohio's statutory mandate as recoverable costs of utility service under R.C. 4909.15(A)(4).

In the Gas Rate Case, the Commission held that MGP remediation costs were a current cost of doing business under R.C. 4909.15(A)(4). The Commission stated explicitly that "the 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."[120] On appeal, in the context of affirming the Commission's Opinion and Order, the Ohio Supreme Court accepted the Commission's reliance on Duke Energy Ohio's "statutory mandate to remediate the contamination,"[121] which is not limited by property boundaries.

In the Gas Rate Case, the Commission explicitly rejected the proposition that the Company's recovery of remediation expenses was geographically limited to areas that provide service to customers and limited to property that is used and useful in the provision of utility service.[122] The Commission explained that this limitation was inapplicable because state and federal statutes ***require*** Duke Energy Ohio to remediate the contamination ***associated with*** the former MGP operations at both of its sites:

> 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.*** There is also no dispute that Duke had MGP operations, and still has utility operations on the East and West End sites, ... Therefore, in light of the circumstances surrounding the two MGP sites in question and the fact ***that Duke is under a statutory mandate to remediate the former MGP residuals from the sites***, the Commission finds that R.C. 4909.15(A)(1) and the used and useful standard . . . is not applicable to our review and consideration of whether Duke may recover the costs ***associated with its investigation and remediation*** of the MGP sites. Therefore, it is not necessary for the Commission to determine if the MGP sites would be considered used and useful under R.C. 4909.15.[123]

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[120] Gas Rate Case, Opinion & Order, p.71.
[121] Gas Rate Case Supreme Court Opinion, ¶¶ 24-25.
[122] Gas Rate Case, Opinion & Order, p. 54.
[123] *Id.* (emphasis added)

The Commission explicitly clarified that Duke Energy Ohio's ongoing legal obligation to clean up the MGP contamination and address its liability under CERCLA was the pivotal element of its analysis and that the scope of that obligation determined the scope of recoverable costs.

> Not only is Duke legally obligated to remediate these sites as the owner and operator of these sites, but it is undisputed on the record that Duke has the societal obligation to clean up these sites for the safety and prosperity of the communities in those areas and in order to maintain the usefulness of the properties; ***therefore, these costs are a current cost of doing business***.[124]

And the Commission further emphasized on rehearing that "[i]t is undisputed that CERCLA obligates Duke to investigate and remediate the MGP sites and that such obligations are clearly not voluntary on Duke's part."[125] Thus, in the Gas Rate Case, the Commission concluded that MGP remediation performed pursuant to the Company's remediation obligations was a cost to the utility of rendering public utility service for the test period.[126]

Accepting Staff's and Intervenors' current position, that property boundaries should dictate which costs are recoverable, would effectively permit an end-run around the Commission's choice in the Gas Rate Case to reject the paradigm of R.C. 4909.15(A)(1), and its geographical limitations based on whether the "***property*** of the public utility [is] used and useful" (emphasis added). But, as the Commission explained (and the Supreme Court affirmed), the proper central criterion for recoverability of MGP investigation and remediation costs is whether they were "a cost of providing utility service," which the Commission specified included "necessary cost[s] of doing business as a public utility in response to a federal law, CERCLA."[127] And the Supreme Court likewise rejected the relevance of property boundaries when it stated that the "used and useful"

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[124] *Id.*, p.59 (emphasis added)
[125] Gas Rate Case, Entry on Rehearing, ¶ 25.
[126] While the Commission's Opinion and Order acknowledged some limitations on recoverability, none of these pertained to the physical presence of MGP residuals on property. Rather, the Commission limited the time within which the Company could defer and recover its ongoing remediation costs, absent exigent circumstances. *See* Gas Rate Case, Opinion and Order, p.72.
[127] *Id.*, p. 58.

"limitation does not appear in R.C. 4909.15(A)(4)" and that R.C. 4909.15(A)(4) does not contain "any other language that ***ties recoverable costs to property*** that is used and useful."[128] In the face of this precedent, reimposing geographic boundaries on cost recoverability is untenable.

In successfully defending its Gas Rate Case decision before the Supreme Court, the Commission made it clear that it viewed the Company's remediation obligation as the pivotal standard for recoverability of costs. Everything the Commission said about the Company's obligation applies just as much to the Area West of the West Parcel and Ohio River as to the remaining portions of the sites:

> These costs are recoverable because they are ordinary and necessary, not because they benefit ratepayers. ***Compliance with federal environmental laws is certainly an ordinary and necessary part of Duke's operating obligation as a utility company***. While this specific instance of compliance may be unique, Duke's reconciliation of its two MGP sites ***fulfills legal mandates in effect today***. Under this standard Duke's remediation costs are recoverable.
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> Similarly the Court has considered stock issuance, registration, transfer and such costs. . . . ***These kinds of costs are naturally incurred by corporations and are unavoidable,*** they were, therefore, seen as incident to supplying gas to customers and recoverable. It is certainly ***natural that corporations comply with legal requirements that are unavoidable.*** The costs considered below are of just this sort. Environmental cleanup is *required*. All corporations must do it if they have impacted facilities. ***It is something that Duke must do if it is to continue to operate and provide service to the public.*** Therefore the Commission properly allowed recovery of these costs below and its decision should be affirmed.[129]

Contrary to the arguments of Staff and Intervenors, the Commission placed no implicit (much less explicit) geographic limitations on cost recovery in the Gas Rate Case by excluding a "premium" associated with the acquisition of the Purchased Parcel. The Commission's exclusion of the $2.3 million premium associated with the Purchased Parcel was not based on geography, but on the nature of the cost incurred. The Commission explained that this amount "relates to the

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[128] Gas Rate Case Supreme Court Opinion, ¶ 19 (emphasis added).
[129] *In re Application of Duke Energy Ohio, Inc.*, Case No. 14-328, Merit Brief Submitted on Behalf of Appellee, The Public Utilities Commission of Ohio, pp. 12-13 (July 2, 2014).

price Duke paid to purchase the property . . . and ***not*** to the statutorily mandated remediation efforts."[130] Although the Commission noted that there was insufficient evidence to differentiate between MGP-related and non-MGP-related portions of the property, such geography was not the focus of the evidentiary hearing. The Commission did not exclude any costs directly related "to the statutorily mandated remediation efforts" in the Gas Rate Case. Thus, rather than defining a geographical limitation to the Commission's overall determination that Duke Energy Ohio should be authorized to recover MGP investigation and remediation costs, the exclusion of the $2.3 million merely reaffirmed that the scope of recoverability was determined by the Company's statutory remediation obligations.

Indeed, a portion of the investigation costs that Duke Energy Ohio recovered through Rider MGP, as authorized in the Gas Rate Case, were incurred in the course of investigation of the Purchased Parcel (including the Area West of the West Parcel).[131] In fact, the maps and property figures in the Gas Rate Case clearly depict the East End site "boundary" as including the Purchased Parcel and extending into the Ohio River.[132] The Staff Report in the Gas Rate Case acknowledged that the Company had performed investigations on the "acquired land" in 2011 and that more tests were planned in 2012.[133] Costs of legally-required investigation in the Purchased Parcel occurred during the deferral period. The costs requested for recovery in the Gas Rate Case (and ultimately recovered through Rider MGP for costs incurred through December 31, 2012) included—among other things—the following pre-remediation investigative work:

- Soil sampling in the Area West of the West Parcel;

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[130] Gas Rate Case, Opinion and Order, p.60 (emphasis added).
[131] OMAEG asserted flatly at hearing that "The simple fact of the matter is that the [Gas Rate Case], the only costs incurred for the Purchased Parcel at the time was the purchased premium," but this is simply incorrect. Hearing Tr. 28.

[132] Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica Bednarcik, p. 6 (citing OMAEG Exhibit 2, Staff Report, Case No. 12-1685, pp. 53-54 (January 4, 2013)).
[133] OMAEG Exhibit 2. Staff Report, Case No. 12-1685, p. 34.

- VAP Phase I Property Assessment of Purchased Parcel; and
- A portion of the VAP Phase II Property Assessment on the Purchased Parcel.[134]

Apart from the $2.3 million purchase "premium" and carrying costs, the Commission did not disallow a single dollar of MGP investigation and remediation costs incurred at the East End site between January 1, 2008, and December 12, 2012.[135]

Nor did the Company, as Staff asserts, voluntarily remove any expenses from its applications for cost recovery on the basis that such expenses were incurred in the Area West of the West Parcel. In its reports and filed testimony, Staff has asserted that the Company "removed certain costs that were directly identified . . . as costs for activities associated with the WOW parcel" in 2014[136] and/or 2015.[137] On the contrary, the record demonstrates that this is based on a misunderstanding. The Company did remove some expenses from its application for 2014 costs, but it was only because those expenses were entirely unrelated to MGP remediation (or remediation generally). As Company witness Sarah Lawler explained:

> As far as I am aware, the only costs the Company removed from any rider filing occurred in the Rider MGP filing for calendar year 2014. In Ms. Laub's testimony in Case No. 15-452-GA-RDR, et al., she noted that the amount on Schedule PAL-2 for calendar year 2013 costs did not agree with the original filing for calendar year 2013 costs in Case No. 14-375-[GA]-RDR, et al. The amount had been reduced by $63,808 for corrections of invoices improperly included in the calendar year 2013 filing, which were discovered after the filing was made. These invoices were from Jones Lang Lasalle, the Company's facilities management contractor. The invoices were for facilities management fees that were completely unrelated to MGP investigation or remediation. The invoices made no mention of MGP investigation or remediation, let alone mention of "activities associated with the Area West of the West Parcel." They unfortunately had been coded incorrectly to the Rider MGP, and should not have been included for recovery as part of Rider

[134] *See* Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 10, 12, Attachment TLB-1, p. 1; Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica Bednarcik, p. 7.
[135] *See* Gas Rate Case, Opinion and Order, p. 73; Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 10 ("The Commission did not require Duke Energy Ohio to remove or exclude from recovery any of the costs of the investigation that had been performed in the Purchased Parcel.")
[136] 2018 Staff Report, p. 3; *see also* 2019 Staff Report, p. 5 (same assertion).
[137] *See* Staff Exhibit 8, Prefiled Testimony of Nicci Crocker, p. 4 (making similar assertion for 2014 and 2015).

MGP because they were not related to any remediation whatsoever, let alone related to remediation at either the East End or West End sites.[138]

Another category of costs that might have been misunderstood is costs associated with the Riverside Drive Property (the western portion of the Purchased Parcel). Although not removed from the Company's Rider MGP applications, the Company did not include most of the costs associated with the Riverside Drive Property. Staff witness Nicci Crocker testified during the hearing that Staff believed that the Company was excluding costs associated with the Area West of the West Parcel based on annotations on handwritten notes of "remove DCI" and "DCI" on invoices.[139] However, as explained by Company witness Bednarcik, once the Company had determined that the western portion of the Purchased Parcel was not affected by MGP impacts, this area was referred to as the "Riverside Drive Property" and the costs associated with that area were accordingly not included in the Company's annual applications for recovery.[140] Those costs were not included because they did not relate to the statutorily mandated remediation of MGP impacts; geography was not a consideration.

Duke Energy Ohio complied with the Commission's Opinion and Order in the Gas Rate Case by including only costs related to the MGP investigation and remediation at the East End site and the West End site. As testified by Company witnesses Lawler and Bednarcik, costs that were removed or not included were so treated based on the ***nature*** of the costs, not the location in which they were incurred. This cannot be construed as even implicitly legitimizing the sort of geographic boundaries for cost recovery eligibility that Staff seeks to impose. As envisioned in the Gas Rate Case, the Company must be permitted to recover costs for all expenses prudently incurred in

[138] Duke Energy Ohio Exhibit 31, Supplemental Testimony of Sarah Lawler, p. 7.
[139] Hearing Tr., p. 928.
[140] Hearing Tr., p. 84.

investigating and remediating environmental impacts of the former MGP operations pursuant to state and federal environmental laws, including the Ohio VAP.

B. *Res judicata* does not bar recovery of costs incurred outside the boundaries adopted by Staff.

At the hearing, OMAEG repeatedly argued that collateral estoppel[141] precludes the Company from contesting the questions of whether MGP costs incurred in the Purchased Parcel, the Area West of the West Parcel, and/or the Ohio River are eligible for recovery, because the Commission allegedly decided in the Gas Rate Case that, categorically, such expenses could not be recovered.[142] OMAEG, however, makes two errors in reading the Gas Rate Case Order: (1) it overlooks the Commission's key holding on recoverability of MGP costs, which was that costs incurred to resolve the Company's liability under Ohio and federal environmental laws are recoverable; and (2) it makes unwarranted leaps from general language and one very specific exclusion to project its desired geographic boundaries into the Gas Rate Case Opinion and Order.

"When an issue is not actually litigated and decided in the previous proceeding, collateral estoppel does not preclude the issue from being litigated in the subsequent proceeding."[143] To successfully assert collateral estoppel, also referred to as issue preclusion, a party must prove that: (1) the party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) there was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) the issue was admitted or actually tried and decided and was necessary to the final judgment; and (4) the issue is identical to the issue involved in the prior

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[141] The term *res judicata* is frequently used to refer to both claim preclusion and collateral estoppel. *See Metrohealth Med. Ctr. v. Hoffmann-Laroche, Inc.*, 80 Ohio St. 3d 212, 216, 685 N.E. 2d 529 (1997). Although the term "res judicata" was used at times during the hearing, the arguments made were all collateral estoppel arguments.

[142] Hearing Tr., pp. 25-29, 173-174, 376-77 (OMAEG arguing that the Company is precluded by the Gas Rate Case Order from relitigating the recoverability of remediation costs in the Purchased Parcel (including WOW)); 175-176, 178 (OMAEG arguing that the Company is precluded by the Gas Rate Case Order from relitigating the recoverability of costs incurred investigating or remediating the Ohio River).

[143] *State ex rel. Davis v. Public Emples. Ret. Bd.*, 120 Ohio St. 3d 386, 2008-Ohio-6254, 899 N.E. 2d 975, ¶ 30.

suit.[144] The only holding on the question of cost recoverability for which all four prongs are met actually ***contradicts*** OMAEG's (and Staff's) position that the Commission limited cost recovery to the boundaries adopted by Staff.

1. In fact, it is Staff and Intervenors who are barred from re-litigating the Commission's holding that investigation and remediation costs that are prudently incurred to meet the Company's obligation to remediate are recoverable.

Insofar as the issue at hand is the recoverability of MGP investigation and remediation costs generally, the only clear conclusion reached by the Commission in the Gas Rate Case is that the Company may recover costs incurred to resolve its liability under environmental laws for the environmental impacts of its predecessors' erstwhile MGP operations pursuant to R.C. 4909.15(A)(4). *See supra* Sections III-B and IV-A (explaining at length and quoting Gas Rate Case Opinion and Order). This conclusion is binding on the parties in the instant proceedings, and it precludes the geographic limitations on cost recovery propounded by Staff and Intervenors.

Likewise, the Gas Rate Case Opinion and Order did not exclude any recovery of actual remediation or investigation costs at the East End site. Apart from carrying costs, the only cost associated with the East End site that was disallowed was the "premium" paid to acquire the Purchased Parcel. The Commission's reasoning to exclude these costs were twofold: 1) the Company did not provide sufficient evidence to demonstrate which area of the Purchased Parcel had been MGP-related and which area was not, and 2) the purchase price was not related to the statutory obligation to remediate.[145] The Commission's Order did not state that the Company could not recover costs going forward that ***are*** related to the statutory duty to remediate impacts from the former MGP operations, nor did it say that any such remediation costs that may be incurred in these areas could not be demonstrated in the future as being part of the former MGP

[144] *Dudee v. Philpot*, 2019-Ohio-3939, 133 N.E. 3d 590, ¶ 29 (1st Dist.).
[145] Gas Rate Case, Opinion and Order, p. 60.

operations. Indeed, the Commission had no opportunity to reach such a holding because the dispute in the Gas Rate Case (pertaining to recoverability of MGP-related expenses) was over whether the "used and useful" standard in R.C. 4909.15(A)(1) (found inapplicable by the Commission) limited recovery to only "buffer zones" directly over natural gas facilities that were being used to serve customers.

Moreover, the Commission's decision in the Gas Rate Case was not the only or last time the Commission addressed the Company's need to investigate and remediate the Area West of the West Parcel. In 2016, the Commission granted the Company's request to extend and continue deferring East End site investigation and remediation costs beyond December 31, 2016 (2016 Deferral Extension).[146] The Commission's Decision in the 2016 Deferral Extension explicitly recognized the ongoing work that occurred (and would continue to be occurring) in the Area West of the West Parcel (which is a portion of the Purchased Parcel) as among the exigent circumstances that justified extending the Company's ability to defer investigation and remediation costs beyond the original date established in the Gas Rate Case for the East End:

> As Duke explains in its application, the composition of the Middle Parcel, which includes sensitive underground infrastructure, has complicated the Company's efforts to undertake the necessary environmental investigation and to identify the appropriate remediation techniques for the Middle Parcel ***and the area west of the West Parcel.*** Duke further explains that, although it was previously aware of the general nature of the subsurface conditions of the Middle Parcel, the Company was unable to reasonably or accurately confirm the level of contamination for that parcel ***and the area west of the West Parcel***, or the specific portions requiring remediation, until site assessments were completed in 2014. According to Duke, the site assessments confirmed that there are unique complexities present in these areas that will require further investigation and remediation. ***We agree with Duke that these are unexpected circumstances beyond the Company's control.***[147]

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[146] *In the Matter of the Application of Duke Energy Ohio, Inc for Authority to Defer Environmental Investigation and Remediation Costs,* Case No. 16-1106-GA-AAM, *et al.,* Finding and Order, p. 1 (December 21, 2016).
[147] *Id.*, pp. 13-14 (emphasis added).

Clearly, if the Commission had intended to exclude from recovery any statutorily required investigation and remediation work in the Area West of the West Parcel, it would not have explicitly cited to work performed in the Area West of the West Parcel and the need for further investigation and remediation in the area as exigent circumstances justifying continued deferral authority three years later. Indeed, the Commission would have done just the opposite and found such work could not constitute exigent circumstances.

For all the reasons above, and as is apparent from the Commission's Opinion and Order in the Gas Rate Case, the Commission has already decided that the Company's MGP-related investigation and remediation costs are recoverable—as long as prudently incurred—and no parties may relitigate this question.

2. The Commission had no need to address the specific question of whether property boundaries might be used to exclude investigation and remediation costs prudently incurred to meet the Company's remediation obligations.

In support of its contention that "the Commission expressly denied . . . recovery of any costs associated with the Purchased Parcel," and also Ohio River costs,[148] OMAEG referred repeatedly during the hearing to the same parts of the Commission's decision: (1) the exclusion of the $2.3 million premium paid for the Purchased Parcel on page 60; (2) the Company's (accurate) statement in the Gas Rate Case that the Company is responsible for the cleanup of all MGP impacts regardless of location; and (3) the Commission's alleged holding that "cost recovery . . . would be limited to the East and West End sites."[149] However, OMAEG failed to cite to any portion of the Gas Rate Case Order that actually discusses, much less expressly decides, whether geography can

[148] Hearing Tr., pp. 26-27.
[149] Hearing Tr., pp. 25-29, 173-174, 376-77.

be used to exclude costs incurred by the Company for MGP investigation and remediation from cost recovery. Thus, OMAEG fails to meet the crucial third and fourth prongs of *res judicata.*

To have a preclusive effect, a decision must be "express[]," not merely "what [was] meant."[150] The geographic limitations that OMAEG seeks to have the Commission adopt were neither expressly stated nor "meant" by the Commission in the Gas Rate Case. As described *supra*, in Section IV-A, the exclusion of the premium paid for the Purchased Parcel was not based on geography, as evidenced by the fact that the Commission in the Gas Rate Case did not order Duke Energy Ohio to also remove investigation and remediation expenses incurred in the Purchased Parcel from the amount it was authorized to recover. The Company's statement that it is responsible for "cleanup of any impacts off-site" cited by OMAEG[151] speaks for itself—there is nothing in the Gas Rate Case Order disagreeing with it, much less expressly. None of these come close to an "express" adoption (or even an implicit one) of the limitations Staff propounds.

Finally, the Commission's general statement that "deferral authority should be limited to the East and West End sites,"[152] does not limit, much less "expressly" limit, cost recovery to only work performed within arbitrary current or former property boundaries within the two sites, however those boundaries may be defined (which they are not in the Opinion and Order). This language appears in two places in the Gas Rate Case Opinion and Order, both in general summaries of the Commission's conclusion to grant deferral authority for MGP-related costs beyond December 31, 2012, and outlining the procedural scope of that authority.[153] The context makes it clear that this language is attempting to ensure that the Commission's decision is not construed as

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[150] *State ex rel. Kroger Co. v. Indus. Comm'n*, 80 Ohio St. 3d 649, 651, 687 N.E.2d 768 (1998) (internal quotation marks and citation omitted).
[151] *See* Hearing Tr. 28 (OMAEG quoting Gas Rate Case, Opinion and Order, p. 43).
[152] Gas Rate Case, Opinion and Order, p. 71.
[153] *Id.*, p. 71, 74. On page 74, the language is slightly different: "Such deferral authority is limited to the East and West End sites and to a period of 10 years beginning with the commencement of the CERCLA remediation mandate on the sites."

directly applicable to ***other*** MGP sites or even other sites with different types of environmental contamination. It is important to recall that the initial authority to defer these costs grew out of a much more general request by the Company to defer "environmental investigation and remediation costs," of which MGP costs were only a "majority," *i.e.*, not the entirety.[154] By limiting its decision to the sites under discussion here, the Commission is warning readers not to construe its grant of deferral authority here as broad precedent under which the costs of remediating ***all*** MGP sites (the Company's or those of other utilities) or the costs of addressing ***all*** statutory environmental liabilities will henceforth automatically be considered prudently incurred costs of providing utility service. The Commission is not—as other parties in this case assert—attempting to exclude from recovery the costs of investigating and/or remediating MGP contaminants associated with the former MGP operations at issue in this case, but merely signaling its future intent to evaluate applications for recovery of environmental investigation and remediation costs at other utility sites (MGP or other) on a case-by-case basis.

After all, as stated above, the same opinion repeatedly refers to "the purchase[d] parcel on the East End site,"[155] suggesting that the Commission considered the Purchased Parcel to be part of the East End site for purposes of investigation and remediation. OMAEG's reading of the Order as setting "express[]"[156] geographic limits on MGP cost recovery is simply untenable. Moreover, such an interpretation is irreconcilable with the Commission's Finding and Order in the 2016

[154] *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM, Finding and Order, p. 1.
[155] Gas Rate Case, Opinion and Order, p. 22, 60 (twice).
[156] Hearing Tr., pp. 26-27.

Deferral Extension Case[157] and inconsistent with state and federal environmental laws and regulations.

C. The Company has demonstrated that the costs submitted for recovery were prudently incurred to meet its remediation obligations under state and federal law, and therefore such costs are recoverable.

1. The Company has demonstrated that the costs were prudently incurred to meet its remediation obligations, as contemplated by the Gas Rate Case order, and therefore are recoverable.

The Commission authorized recovery based on a causal relationship: whether costs were prudently incurred remediating MGP contamination in accordance with environmental laws in rendering utility service: "any prudently incurred MGP investigation and remediation costs ***related to the East and West End sites***" were held recoverably as a "cost incurred by Duke for rendering utility service" under R.C. 4909.15(A)(4).[158] According to the Commission, it was the Company's liability under CERCLA for remediating MGP contamination that made the remediation costs "a necessary cost of doing business as a public utility" and therefore recoverable under R.C. 4909.15(A)(4).[159] Because the Company has liability under CERCLA for ***all*** areas where MGP contaminants are present or have migrated, all prudently incurred MGP remediation costs "related to" the East End and West End sites are recoverable, regardless of whether they fall into some arbitrary geographic "footprint."

In the Gas Rate Case, the Commission approved the Company's overall approach to MGP investigation and remediation. The Commission concluded that:

- "CERCLA imposes retroactive and strict liability for remediating MGP sites on past and present owners"; and

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[157] *In re: Application of Duke Energy Ohio, Inc for Authority to Defer Environmental Investigation and Remediation Costs,* Case No. 16-1106-GA-AAM, *et al.,* Finding and Order, pp. 13-14 (December 21, 2016) (discussing the need to complete certain investigation and identify remediation techniquest for the Area West of the West Parcel as justifying extension of deferral authority).
[158] Gas Rate Case, Opinion and Order, p. 60 (emphasis added).
[159] *Id.*, p. 58.

- "Ohio EPA's VAP is an appropriate program for responsible entities to use when remediating contaminated sites in Ohio."[160]

And the Commission explicitly rejected the argument that "since the VAP is a voluntary program, Duke Energy Ohio could have chosen to waylay its remediation efforts."[161]

Not only did the Commission approve the Company's decision to address its liability under CERCLA and remediate MPG impacts via the VAP, the Commission found that the Company had met its burden to establish that its investigation and remediation costs incurred were prudent (apart from the Purchased Parcel premium and 2008 costs incurred at the West End site). Among other things, the Commission specifically noted that Duke Energy Ohio "made reasonable and prudent decisions" by:

- "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";
- "presenting MGP experts, including the Ohio EPA's VAP CP that is working on one of the sites [Shawn Fiore] . . . to explain and support Duke's claims";
- "consider[ing] remediation alternatives";
- "incorporat[ing] various engineering and institutional control measures . . . in its remediation plans";
- "obtain[ing] competitive bids for the major phases of the work at both . . . sites"; and
- having an appropriate process to "manage the cost of changes to the initial scope of work due to discoveries in the field."[162]

And, in general, the Commission observed that the Company's expert witnesses had "in-depth, firsthand knowledge of the MGP sites at issue."[163]

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[160] *Id.*, p. 47.
[161] *Id.*
[162] *Id.*, p. 64.
[163] *See id.*

For the investigation and remediation activities during years 2013 through 2018, just as in the Gas Rate Case, Duke Energy Ohio has continued to follow the Ohio VAP process and has presented testimony from experienced expert witnesses with in-depth, firsthand knowledge of the MGP sites at issue to establish the prudence of its remediation decisions and expenditures. Company witness Shawn Fiore, who has been a VAP CP for over 20 years and has investigated over 22 MGP sites in Ohio, has explained what those standards are under the VAP and what is required for the MGP sites to meet them.[164] And, as detailed below, the managers of the MGP sites' investigation and remediation, Company witnesses Jessica Bednarcik (until 2014) and Todd Bachand (2014 to present), describe the investigation and remediation work performed, the measures taken to ensure that incurred costs were reasonable and prudent, and the relationship of the work to the sites' former MGP operations. Collectively, their testimony demonstrates that the work performed at the sites and the costs incurred were prudent and should be recoverable.

a. An NFA letter cannot be issued unless the MGP sites meet all applicable standards.

The VAP requirements for addressing MGP residuals have not changed since the Gas Rate Case.[165] And the Company's approach has not changed either – the Company continues to follow the same remediation process described in the Gas Rate Case.[166] In the expert opinion of Company witness Fiore, based on extensive MGP investigation and remediation experience and first-hand knowledge of the MGP sites, the investigation and remediation work conducted by the Company in years 2013 through 2018 at both sites has been prudent and reasonable, and in conformance with VAP regulations and industry standards to meet ***all*** applicable standards under the VAP.[167]

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[164] *See id.*, pp. 30-31, 33-34; *see also* Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, pp. 5-6, 11-13.
[165] *Id.*, pp. 5-6.
[166] *Id.*, pp. 11-13.
[167] *Id.*, pp. 14 (West End site), 15 (East End site).

The remedial approach taken at both the East End site and West End site was consistent with approaches taken at similarly contaminated properties and with activities determined to be reasonable and prudent in the Gas Rate Case, as well as reasonable and prudent to mitigate site risks to address the Company's liability and meet ***all*** applicable standards under the VAP.[168]

The VAP does not prescribe any specific remedial options for the issuance of an NFA letter, but rather sets forth standards that must be achieved, based on current and reasonably anticipated land users.[169] Applicable standards for the East End and West End sites include—but are not limited to—standards derived from generic numerical standards (adjusted for the presence of multiple chemicals), unrestricted potable use standard for groundwater, vapor to indoor air standards, leaching to groundwater standards, protection of groundwater meeting potable uses standards (POGWMPUS), surface water standards, as well as standards derived from human health and ecological risk assessments.[170]

As is common environmental investigation and remediation practice, Duke Energy Ohio approached the remediation of the East End site and West End site by identifying investigation and remediation areas or "phases." Several remedial alternatives were considered for each phase and evaluated based on a number of factors.[171] As is typical, multiple remedial options were considered and assessed for their protectiveness of human health and the environment, long- and short-term effectiveness and permanence, implementability, suitability, compliance, and costs.[172] Remedial options can be combined to achieve all applicable standards.[173] A site owner may have considerable discretion in ***how*** to meet the standards, but one thing is for certain: an NFA letter ***cannot*** be issued until ***all*** applicable standards are met.

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[168] *Id.*, p. 20.
[169] *Id.*, p. 9.
[170] *Id.*, p. 12.
[171] *Id.*, pp. 9, 10, and Attachment SSF-2 (detailing evaluations conducted at the sites).
[172] *Id.*, p. 11
[173] *Id.*, p. 9.

For the East End and West End sites, meeting all applicable VAP standards has required the Company to, among other things, adequately mitigate significant volumes of free product, *i.e.*, oil-like material and tar-like material (OLM and TLM).[174] Generally, the VAP assumes that properties with free product exceed the unrestricted potable use standard for groundwater, and may also exceed other applicable standards, including POGWMPUS, leaching to groundwater, vapor intrusion, direct contact standards, and others.[175] Potential migration of the OLM and TLM from the upland areas of the East End site and West End site to the Ohio River must be addressed under state and federal environmental laws and regulations. At the Company's MGP sites, the MGP residuals have and will impact groundwater in excess of applicable standards. And the residuals' migration would likely cause the sites to fail other applicable standards.[176] In particular, the Ohio River, as a surface water body, could be impacted by migration of the free product. Thus, the presence and migration of free product would make it impossible—without active remediation—to issue an NFA letter.[177]

b. West End Site

Investigation and remediation activities at the West End site since the Gas Rate Case have been conducted in a manner consistent with the efforts described in the Gas Rate Case. Areas impacted by MGP residuals are being addressed with a combination of excavation and *in-situ* stabilization.[178]

Investigation and remediation activities completed in the uplands areas of the West End site have indicated that there is potential for the Ohio River bank and sediments to be impacted by

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[174] *Id.*, p. 10.
[175] *Id.*, pp. 10-11, 12-13.
[176] *Id.*, pp. 13-14.
[177] *Id.*, p. 13.
[178] *Id.*, p. 14; Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, Attachment TLB-1 (detailing remediation activities).

MGP residuals associated with the upland former MGP facilities.[179] Because the VAP requires evaluating ***all*** contaminants present on or emanating from a site, the Company is currently investigating to determine whether applicable standards for an NFA letter are met.[180]

c. East End Site

Investigation and remediation activities at the East End site since the Gas Rate Case has been conducted in a manner consistent with the efforts described in the Gas Rate Case.[181] The situation at the East End site is more complicated because there are OLM and TLM present in the Middle Parcel that currently cannot be accessed due to the sensitive underground infrastructure and facilities that are necessary and integral to the current propane peaking operations at the site.[182] Otherwise, areas impacted by MGP residuals have and continue to be addressed with a combination of excavation and *in-situ* stabilization.[183]

To meet VAP standards, investigation and remediation of the Area West of the West Parcel was necessary and prudent. The Area West of the West Parcel was not designated as a separate parcel to indicate its exclusion from the East End site, but rather was designated as such only because it was investigated and remediated separately from the West Parcel. Because the Company did not own or have access to the Area West of the West Parcel until 2011, after remediation of the West Parcel of the East End site had been largely completed, it was impossible, and would have been imprudent to attempt, to include the Area West of the West Parcel as part of the West Parcel.[184] However, regardless of the Area West of the West Parcel's past ownership, the Company was liable for the MGP impacts present on the Area West of the West Parcel and

[179] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, p. 16.
[180] *Id.*; Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, Attachment TLB-1 (detailing investigation and remediation activities, including in Ohio River).
[181] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, p. 15.
[182] *Id.*, pp. 15, 19.
[183] *Id.*, p. 15.
[184] Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica Bednarcik, p. 8.

therefore this remediation was necessary.[185] Accordingly, after investigation at the Area West of the West Parcel identified MGP residuals and impacts, the Company utilized the same remedial approach as with other areas of the property with similar conditions.[186]

With regard to the portion of the Purchased Parcel that is not part of the Area West of the West Parcel (that is, the Riverside Drive Property), the only costs at issue in this case total $89,223, which were incurred in 2013 to investigate this area and determine that no remediation of MGP impacts would be required.[187] Investigation was necessary to delineate the extent of MGP contamination as required under CERCLA and the VAP. Duke Energy Ohio does not seek to recover any other costs associated with the Riverside Drive Property in the instant proceedings.

Given the high potential for MGP contaminant migration, the Company's obligation to investigate and, if necessary, to conduct remediation also included the Ohio River. Investigation and remediation activities completed in the uplands areas of the East End site have indicated that there is potential for the Ohio River bank and sediments to be impacted by MGP residuals associated with the upland former MGP facilities.[188] As with the river bank and sediments related to the West End site, the Company is currently investigating to determine whether all applicable standards for an NFA letter are met.[189] This investigation is necessary to meet the Company's remediation obligations under CERCLA and to ensure that ***all*** VAP standards are met.[190]

d. Total recoverable costs

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[185] *Id.*, p. 12; Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 13-14.
[186] Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica Bednarcik, pp. 13-14; Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, Attachment TLB-1 (detailing remediation activities).
[187] Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica Bednarcik, pp. 11, 16-17.
[188] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, p. 16.
[189] *Id.*; Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, Attachment TLB-1 (detailing remediation activities, including in Ohio River).
[190] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 13-14.

The remediation work described above and necessitated by the Company's legal obligation to remediate the impacts associated with the former MGP operations has caused the Company to prudently incur the following costs during the years 2013 through 2018:

Year	Amount
2013	$8,346,697[191]
2014	$686,031[192]
2015	$1,061,056[193]
2016	$1,296,160[194]
2017	$14,651,798[195]
2018	$19,804,031[196]

As supported by the testimonies referenced in the table, and the arguments in this post-hearing brief, the Company has demonstrated that, pursuant to R.C. 4909.15(A)(4), it is entitled to recover these prudently incurred costs in full.

2. The only witness to challenge the prudence of the Company's investigation and remediation costs lacked expertise and proposed solutions that would not have met the Company's legal obligations.

While Staff has challenged certain costs as being ineligible for recovery based upon geographic restrictions and accounting treatment, Staff has not challenged the prudence of the Company's overall investigation and remediation approach (including the decision to follow the VAP), the necessity or type of the work performed by the Company, or the prudence of the costs incurred.[197] Only OCC attempts to challenge the necessity of the Company's investigation and remediation efforts and the prudence of the costs incurred. OCC presents only a single witness in support of its challenge: James Campbell, Ph.D.

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[191] Duke Energy Ohio Exhibit 7, Direct Testimony of Jessica Bednarcik (14-375-GA-RDR), p. 12 (describing as "approximate[ly] $8.35 million"); 2018 Staff Report, p. 7 (giving exact amount).
[192] Duke Energy Ohio Exhibit 9, Direct Testimony of Todd Bachand (15-542-GA-RDR), p. 13 (describing as "approximate[ly] $686,000"); 2018 Staff Report, p. 7 (giving exact amount in table).
[193] Duke Energy Ohio Exhibit 10, Direct Testimony of Todd Bachand (16-542-GA-RDR), p. 12.
[194] Duke Energy Ohio Exhibit 11, Direct Testimony of Todd Bachand (17-596-GA-RDR), p. 13.
[195] Duke Energy Ohio Exhibit 12, Direct Testimony of Todd Bachand (18-283-GA-RDR), p. 13.
[196] Duke Energy Ohio Exhibit 13, Direct Testimony of Todd Bachand (19-174-GA-RDR), p. 17.
[197] *See, e.g.* Hearing Tr., p. 955 (Staff witness Ms. Crocker clarifying that she was not testifying that costs incurred in the West of the West Parcel were imprudent).

In the Gas Rate Case, OCC attempted a similar challenge with the same witness, which the Commission rejected in large part due to Dr. Campbell's lack of expertise. In explaining its conclusion, the Commission made a point of noting that the intervenors' witnesses "did not have expertise with regard to the Ohio EPA's VAP and the associated rules and regulations," and "did not have the in-depth, firsthand knowledge of the MGP sites at issue."[198] In that regard, little has changed since the Gas Rate Case.

Although Dr. Campbell became a VAP CP sometime in 2014,[199] he has accumulated virtually no meaningful experience as a VAP CP.[200] Dr. Campbell has never issued a voluntary action opinion or an NFA letter, and has never applied for a CNS.[201] He has not even performed any work under the VAP and has not participated in any projects conducted under the VAP.[202] Indeed, Dr. Campbell testified that he became a VAP CP "[s]pecifically for this case and in general for the credential."[203] Between the 2013 Gas Rate Case and 2019, he even allowed his VAP certification to lapse for a year and only renewed the certification for this matter.[204]

As Company witness Fiore testified, "[y]ou can't just read the rules and understand what the VAP is."[205] The practicing CP has to understand the rules, guidance, and agency requirements, "so it's a lot more than just reading the rules."[206] Company witness Dan Brown, a VAP CP for 25 years, also testified that only through interacting with the agency and working through the VAP does the CP learn the nuances of the VAP.[207] But even if mere classroom training was sufficient,

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[198] Gas Rate Case, Opinion and Order, p. 64.
[199] Hearing Tr., p. 831.
[200] *See id.*, p. 845 (Dr. Campbell explains that he has not performed any work under the VAP other than perhaps his testimony in the current proceeding).
[201] *Id.*, pp. 841, 843, 845.
[202] *Id.*, p. 845.
[203] *Id.*, p. 831.
[204] *Id.*, p. 835.
[205] *Id.*, p. 392.
[206] *Id.*
[207] Hearing Tr., pp. 553-54.

Dr. Campbell is severely lacking in that area as well. He did not bother to attend the most recent annual VAP CP training held in November 2019 and has not taken any classes or training on the investigation and cleanup of MGP sites under the VAP.[208] It is not even clear whether he reviewed the VAP rules in preparation for testifying in this case, as he did not know what a "voluntary action opinion" was, a term which appears frequently in the VAP rules and is discussed on his certification.[209] Thus, even if mere knowledge of the text of the VAP requirements was a meaningful qualification, Dr. Campbell does not have it.

Related to MGP work specifically, Dr. Campbell has not attended any conferences over the last ten years where remediation strategies for MGP sites were discussed.[210] Dr. Campbell did mention during the hearing that he represents a potentially responsible party at a former MGP site in Milwaukee, Wisconsin, where the site's primary remedial approach is *in-situ* stabilization, the exact remediation strategy that he argues is unnecessary and imprudent in this case.[211]

Dr. Campbell's proposed alternative remediation strategies further demonstrate his lack of expertise and inexperience—shockingly, he himself admits that his proposed strategies are "not designed to meet all applicable [VAP] standards."[212] Dr. Campbell recommends using engineering controls in the form of the existing fences on the sites, constructing a two-foot soil cover or asphalt/concrete cap, placing institutional controls in the form of an environmental covenant limiting use of the property to commercial/industrial uses only, prohibiting potable use of groundwater through an Urban Setting Designation (USD) and using a risk mitigation plan for future excavation work at Duke Energy Ohio's MGP sites.[213] This would leave all of the oil-like material and tar-like material in the ground, and merely put procedures in place to protect human

[208] *Id.*, pp. 835-36.
[209] *Id.*, p. 837.
[210] *Id.*, p. 849.
[211] *Id.*, pp. 849-850.
[212] *Id.*, p. 854.
[213] Hearing Tr., pp. 851-52.

contact with the contamination. As acknowledged during the hearing, Dr. Campbell is essentially recommending the same remedies he recommended in 2013 to address essentially the same conditions, which he admits would not meet all applicable standards under the VAP. [214] The Commission did not accept Dr. Campbell's proposed remedies for the sites in 2013, and should not accept these same remedies now.[215]

Dr. Campbell's attempted criticism of Duke Energy Ohio's "soil remedy" overlooks the VAP's requirement to meet ***all*** applicable standards, not only some standards. The remedial approach implemented at the East End site and West End site (generally excavation and *in-situ* stabilization) were not selected to only meet direct contact soil standards, but were performed to meet ***all*** applicable standards and critically, to protect the Ohio River.[216] Constructing a soil cover or placing a cap on the Ohio MGP sites would not address the mobile OLM and TLM at the sites.[217] Further, because of the presence of liquid tar near the surface in some portions of both sites, placement of an engineering control, such as pavement or a soil cover, could alter subsurface conditions and further mobilize the tar.[218] Institutional controls, *i.e.*, land use restrictions, would not achieve all applicable standards either because they will only address certain direct contact standards or groundwater potable use standards.[219] They would not allow the sites to achieve surface water standards, POGWMPUS, leaching to groundwater, vapor intrusion to indoor air and other standards.[220]

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[214] *Id.*, pp. 854, 859.
[215] Gas Rate Case, Opinion and Order, p. 64.
[216] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, p. 13.
[217] *Id.*, p. 17.
[218] *Id.*, p. 17; Duke Energy Ohio Exhibit 16, Direct Testimony of Dan Brown, pp. 24-25.
[219] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, pp. 17-18; Duke Energy Ohio Exhibit 16, Direct Testimony of Dan Brown, pp. 25-27.
[220] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, pp. 17-18; Duke Energy Ohio Exhibit 16, Direct Testimony of Dan Brown, pp. 19-21 (driver of remediation at the East End site and West End site include meeting groundwater standards, POGWMPUS, as well as surface water and sediment standards due to the adjacent Ohio River).

Dr. Campbell also recommends that the sites could apply for a USD to prohibit groundwater use for potable use.[221] However, as Mr. Fiore and Mr. Brown testified, even if the sites could obtain a USD, they would not meet ***all*** applicable standards under the VAP.[222] Standards including protection of ecological resources, surface water standards, and POGWMPUS, would not be achieved through a USD.[223] A USD would only restrict potable use of groundwater at the sites, which would be ineffective because there is currently no potable use of groundwater at either site.[224] Additionally, Dr. Campbell's cursory recommendation to apply for a variance to affect how and where the groundwater standards are applied is not a viable option at the sites. As Mr. Fiore testified, "[t]here have never been any variances granted"[225] by the Ohio EPA under the VAP. Moreover, with the presence of mobile oil-like material and tar-like material, in the subsurface adjacent to the Ohio River, it is highly unlikely that a variance would be granted for Duke Energy Ohio's MGP sites in any event.[226] Dr. Campbell claimed to take a "fresh look" at the documents related to the MGP sites, but in reality, because he simply recommended the same remedies as he had in the 2012 Gas Rate Case, which the Commission did not accept, the review appears quite stale.[227]

D. Even if, in the Gas Rate Case, the Commission had limited cost recovery to costs incurred in the "original footprint" of the sites—which it did not—the Company has demonstrated that, at most, only $7.5 million would be disallowable.

Staff's recommended disallowances were not only based on a misreading of the Opinion and Order in the Gas Rate Case (as detailed above), but also based on both (1) factual errors, including errors in defining the sites' "original footprint" and ignorance of MGP facilities in the

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[221] OCC Exhibit 21, pp. 16-17; Hearing Tr., p. 852.
[222] Hearing Tr., p. 444; Duke Energy Ohio Exhibit 16, Direct Testimony of Dan Brown, p. 20.
[223] Hearing Tr., p. 444-445.
[224] *Id.*, p. 445.
[225] *Id.*, p. 413.
[226] *See* Hearing Tr., p. 413.
[227] *Id.*, p. 865.

Area West of the West Parcel; and (2) arbitrary and baseless allocations that drastically overinflated the percentage of remediation costs attributable to the areas Staff recommended be excluded.

1. Staff incorrectly excludes the Area West of the West Parcel and the Ohio River from the "original footprint" and overlooks the presence of MGP facilities in the Area West of the West Parcel.

As described above, Staff is fundamentally mistaken about the Commission's approach to MGP remediation cost recovery in the Gas Rate Case; the Commission clearly authorized the Company to recover prudently incurred costs within the scope of its obligation to remediate, with no geographical limitation. However, even if Staff's approach of setting geographic limits was legally correct—which it is not—Staff's misunderstandings of the relevant area's history and geography resulted in an erroneous application of its recommended approach.

Staff's recommended disallowances of work attributed by Staff to the Area West of the West Parcel were based on several geographic and historical misconceptions. First, Staff erroneously believed that the Area West of the West Parcel was the same area as the entire Purchased Parcel.[228] However, as described *supra* in Section II-A, the Area West of the West Parcel comprises a fraction of the Purchased Parcel. Second, Staff believed that the Area West of the West Parcel was "outside the original footprint of the East End site."[229] However, the southeastern portion of the Area West of the West Parcel was acquired in 1928 (along with the northern portion of the West Parcel) and was part of the East End site during MGP operations.[230] Third, Staff appeared to be unaware that the Area West of the West Parcel contained actual MGP equipment, including the remnants of an iron tar tank.[231] Fourth, Staff purported to be using "the

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[228] *See* 2018 Staff Report, p. 3 (referring to "the parcel of land adjacent to the East End site . . . known as the 'Purchased Parcel' . . . of the 'Area West of the West Parcel' or 'WOW'"); 2019 Staff Report, p. 5 & n.4 (similar).
[229] *See* 2018 Staff Report, p. 3 (referring first to the Area West of the West Parcel and then to "other tracts of land located outside the original footprint"); 2019 Staff Report, p. 5 (similar).
[230] Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica Bednarcik, p. 11.
[231] *Id.*, p. 14.

boundaries . . . defined by property maps provided by the Company during the Duke Gas Rate Case," but was mistaken. The boundaries of the maps provided by the Company in the Gas Rate Case actually ***included*** the Purchased Parcel and a portion of the Ohio River as part of the East End site.[232]

A correct understanding of the sites' boundaries and history would have led Staff to recommend cost recovery of at least part of the Area West of the West Parcel and Ohio River costs, if not all of them.

2. Staff vastly overallocates costs to the Area West of the West Parcel and Ohio River, using a baseless and arbitrary methodology.

Even setting aside, for the sake of argument, Staff's conceptual, geographic, and historical errors, it must also be recognized that Staff's methodology results in an extreme over-allocation of investigation and remediation costs to the Area West of the West Parcel and Ohio River.[233]

Staff's recommended disallowance of costs for 2018, totaling over $9.3 million (out of $17 million), is a key example. Regarding the Area West of the West Parcel, the Company explicitly stated, in response to a Staff data request, that "[t]here was no active remediation activities conducted in the [Area West of the West Parcel] requiring construction management/detailed design in 2018," and that "[s]oils were not excavated from the [Area West of the West Parcel] in 2018."[234] Thus, the only costs that could possibly have been attributed to the Area West of the West Parcel in 2018 would have been a small fraction of the site-wide monitoring costs and the installation of soil borings along the entire top of the riverbank at the East End site.

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[232] *Id.*, p. 6.

[233] Staff made two small corrections to its recommended adjustments in testimony, but the impact was less than $300,000 (in the Company's favor). *See* Staff Exhibit 8, Prefiled Testimony of Nicci Crocker, pp. 7-8.

[234] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 19 (citing Attachment TLB-5, STAFF-DR-04-001)

However, despite the Company's explanation of the work that was performed at the East End site in 2018, Staff summarily "removed 50 percent of remaining costs because at least half of the costs were equitably assignable to the [Area West of the West Parcel]."[235] As testified by Staff witness Crocker, Staff's approach in allocating such costs was not typical and was admittedly not an exact calculation:

> I've not had a case of this type at all before. In general there's usually an asset or an activity that's directly tied to something and in the absence of that, that's where an allocation was suggested was – I introduced an allocation because there were clearly costs that were contained in those other portions, but I had no ability, with the invoices that were provided, to tie specific tasks to that.[236]

As for the work at the East End site in the Ohio River, the Company incurred $1.7 million in investigation costs there in 2018.[237] In 2018, the Company was performing active remediation, excavation and *in-situ* stabilization, of the Phase 3 Area, Phase 4 Area, and Phase 6 Areas of the Middle Parcel, which accounted for almost all of the 2018 costs.[238] Therefore, Staff's recommended disallowance of approximately $7.6 million for work allegedly performed in the Area West of the West Parcel is an irrational amount considering that no remediation whatsoever took place in the Area West of the West Parcel that year.[239] And Staff's recommended disallowances for costs incurred in years 2013 through 2017 appear similarly disproportionate.[240]

Company witness Bachand prepared a more realistic allocation of costs associated with the Area West of the West Parcel and Ohio River that demonstrates that Staff, at most, should have

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[235] 2019 Staff Report, p. 6; see also Hearing Tr., pp. 951-52.
[236] Hearing Tr., p. 981.
[237] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 19 (citing TLB-6).
[238] *See* Duke Energy Ohio Exhibit 13, Direct Testimony of Todd Bachand (19-174-GA-RDR), pp. 10-11.
[239] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 19.
[240] *Id.*, pp. 19-20.

recommended disallowance of approximately $7.5 million (sum of the totals in the last row)[241] instead of over $23.2 million:[242]

Year	Purchased Parcel (including Area West of the West)	Ohio River (East End)	Ohio River (West End)
2013	$ 66,826	$ 0	$ 0
2014	$ 19,526	$ 0	$ 0
2015	$ 80,556	$ 0	$ 0
2016	$ 185,731	$ 0	$ 0
2017	$ 4,217,601	$ 90,932	$ 653,742
2018	$ 24,995	$ 1,597,954	$ 521,784
TOTAL	**$ 4,595,237**	**$ 1,688,886**	**$ 1,175,527**

For invoices that did not include a specific reference that would have identified the relevant parcel, Company witness Bachand compared the invoices to the scope of work performed in all the parcels (*e.g.*, by identifying how many out of fourteen wells at the entire East End site were actually drilled in the Area West of the West Parcel).[243]

As with Staff's allocation, the Company's allocation is admittedly not an exact calculation of costs, but attempts to be more accurate than the calculation provided by Staff based on work that was actually performed in each year.[244] However, as Duke Energy Ohio was never instructed to segregate costs based on geographic location (nor is that how the project was scoped or implemented), certain invoices or costs admittedly could have been missed or not included in the allocation prepared by Company witness, including laboratory costs, the Company's internal costs, site-wide surveying costs, ARCADIS's sediment investigation costs in 2013, and $61,749 from one Rumpke invoice (although other Rumpke invoices had been included in the Company's allocation).[245] The costs of investigation and remediation of the East End site and the West End

[241] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, Attachment TLB-6. This attachment is the source of the numbers in the above table.
[242] 2019 Staff Report, p. 9.
[243] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 22.
[244] Hearing Tr., pp. 240-41.
[245] *Id.*, pp. 246-61.

site were more than $45 million over six years and there were tens of thousands of pages of invoices[246] that were reviewed by Company witness Bachand, who made his best effort to apportion costs after-the-fact, based on the work that was actually performed in the Area West of the West Parcel and the Ohio River. While admittedly not exact, which would be nearly impossible to calculate retrospectively for a project of this size, magnitude and complexity, the bases for the Company's apportionment calculation (which was set forth in Attachment TLB-6) result in a more reasonable and accurate apportionment than Staff's calculation.

Staff blamed the Company for any inaccuracies in its allocations, arguing that the Company's "failure to delineate" which expenses were incurred in which parcel required Staff to estimate apportionment.[247] But the Company had no reason to track costs separately by parcel because all the costs were equally incurred to address the Company's legal liability for remediating the impact of former MGP operations.[248] In 2014, the Company began to segregate the Riverside Drive Property costs, but only because it was determined that the Riverside Drive Property had not been impacted by MGP operations; meaning, no further costs related to this site would be included in Rider MGP.[249]

As Mr. Bachand explained, routinely and accurately segregating remediation activities and costs by parcel throughout the East End site and West End site would have been impractical and extremely unusual in the remediation industry, and would have significantly increased costs:

> I chose [to] follow ***the means and methods in which we do our work in the industry*** which is assign a task-by-task scope of work for investigation and ***typically a task is not segregated out by parcel or by area***. It's for the site as I indicated. So the site work would be performed on an investigation basis. The costs for remediation were broken out but the rest of them we said it's impractical.
> . . . .

[246] Hearing Tr., p. 292.
[247] *See* Staff Exhibit 8, Prefiled Testimony of Nicci Crocker, pp. 5-6.
[248] Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica Bednarcik, p. 9.
[249] *Id.*

> [W]here does prudency come into play here? If I have my contractors segregating out their -- out all their costs, somebody has to pay for that. Versus the way we've been doing the work where it is site-wide and they don't have to worry about stopping and tracking every single well, how much work is going into sampling each well. It's a site-wide program. That's cheaper than saying give me a proposal to sample well -- the two wells here and so on and so forth all the way around the site. ***That takes more time and that costs more money*** [].[250]

The Company's manner of invoicing and tracking costs was typical for the industry and for similar remediation sites.[251] Many of the tasks were scoped and performed site-wide which is the prudent and customary manner in which MGP sites such as these are investigated and remediated. And sometimes work in the Area West of the West Parcel was scoped and budgeted together with Middle Parcel work when both were performed during mobilization of the same contractor(s).[252] Sequencing the work together this way permitted the Company to reduce remediation costs and remediate more efficiently.[253] As Company witness Bachand testified at hearing, the Commission did not request in the Gas Rate Case that Duke Energy Ohio track costs by parcel, nor is it customary in the industry to do so.[254] The Company should not be punished for following standard industry practice or not anticipating that Staff would seek a different approach years after the 2013 Order in the Gas Rate Case.

3. Staff is mistaken in its categorization of certain costs incurred at the West End site as unrelated to environmental remediation.

In both the 2018 Staff Report and the 2019 Staff Report, Staff recommended excluding from Rider MGP certain remediation costs incurred at the West End site on the basis that it viewed

[250] Hearing Tr., p. 225-226 (emphasis added).
[251] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 21.
[252] *Id.*
[253] *Id.*; *see also* Hearing Tr., pp. 353-54.
[254] Hearing Tr., p. 331.

these as capital costs associated with other projects and not as expenses to be included in the rider. Both recommendations were based misunderstandings of the costs incurred.

First, Staff recommended disallowing costs incurred from 2013 through 2017 that it believed to be "associated with relocation of an electric substation" rather than MGP remediation.[255] However, the Company did not include any costs of substation relocation in Rider MGP. The costs referred to by Staff were actually associated with the management of MGP-contaminated soil and waste. When the poles and footings for the new substation were installed, previously solidified MGP-contaminated soils in the area had to be disturbed. The proper handling and disposal of the soil and waste contaminated with MGP was properly submitted for recovery in Rider MGP and not a cost of substation relocation.[256]

Second, Staff recommended disallowing recovery via Rider MGP of $226,091 incurred in 2018 to relocate certain nitrogen tanks and construct a new staircase.[257] Staff mistakenly believed these to be capital costs, associated with the electrical substation at the West End site.[258] However, the relocation of the nitrogen tank system, piping, and metal stairs was required for MGP remediation. This equipment was located directly in the footprint of the remediation area, and had to be relocated in order to access the area.[259] Thus, both of the items that Staff recommended

[255] 2018 Staff Report, p. 5.
[256] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 18.
[257] 2019 Staff Report, p. 6.
[258] *Id.*
[259] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 18.

excluding from recovery using Rider MGP as "capital costs" were actually remediation ***expenses*** recoverable in Rider MGP.

E. Insurance proceeds cannot be distributed as long as total MGP costs and cost recoveries remain uncertain because the proceeds must be allocated proportionally to recovery.

1. Duke Energy Ohio has acted reasonably and prudently in pursuing insurance proceeds.

Duke Energy Ohio, as directed by the Commission in the Gas Rate Case, has used every effort to collect all amounts available under its insurance policies.[260] Duke Energy Ohio witness Michael Lynch, an attorney with "almost 30 years of experience in insurance coverage"[261] including seeking coverage for almost 75 MGP sites, explained how the Company sued the solvent insurance companies that provided first, second and third excess layer liability policies for the period beginning 1940, the first year for which it had any policy evidence, through the mid-1980s, after which, such policies began to exclude environmental property damage such as the MGP areas at issue.[262] The record fully describes Company's efforts to achieve such settlements, including years of negotiation, aggressive litigation, discovery, motion practice, and depositions that enabled such recovery.[263] No party has alleged that the Company's efforts to achieve such settlements were insufficient, unreasonable, or otherwise fell short of the Commission's Gas Rate Case Opinion and Order. Rather, in its 2018 Staff Report, Staff observed that the Company appeared to be complying with the Commission's Gas Rate Case Order.[264]

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[260] Gas Rate Case, Opinion and Order, p. 67.
[261] Hearing Tr., p. 629.
[262] Duke Energy Ohio Exhibit 24, Direct Testimony of Michael Lynch, pp. 3-4.
[263] *See e,g.*, Duke Energy Ohio Exhibit 17, Direct Testimony of Keith Bone (14-375-GA-RDR), pp. 7-8; Duke Energy Ohio Exhibit 18, Direct Testimony of Keith Bone (15-452-GA-RDR), p. 7; Duke Energy Ohio Exhibit 19, Direct Testimony of Keith Bone (16-542-GA-RDR), p. 3; Duke Energy Ohio Exhibit 20, Direct Testimony of Keith Bone (17-596-GA-RDR), p. 3; Duke Energy Ohio Exhibit 21, Direct Testimony of Keith Bone (18-283-GA-RDR), p. 3; Duke Energy Ohio Exhibit 22, Direct Testimony of Keith Bone (19-174-GA-RDR), p. 4; Duke Energy Ohio Exhibit 24, Direct Testimony of Michael Lynch, p. 6.
[264] 2018 Staff Report, p. 6.

2. *Res judicata* does not bar an allocation of insurance proceeds.

At hearing, OCC argued that the Commission had decided that "if there is insurance money, it goes to customers" and, therefore, the Company is precluded from "re-litigat[ing]" the questions of appropriate allocation and timing of distribution of the insurance proceeds.[265] But OCC overlooked that, in order for *res judicata* to apply,[266] "the issue under consideration must have been 'passed upon' or 'conclusively decided' in an earlier proceeding."[267] "*Res judicata* does not apply if the issue at stake was not specifically decided in the prior proceeding."[268] To have a preclusive effect, the decision must be "express[]," not merely "what the commission meant."[269] In this case, an immediate refund of unallocated insurance proceeds reflects neither what the Commission meant, nor what it said.

The Commission's general statement that insurance proceeds "should be used to reimburse the ratepayers"[270] neither expressly decides nor was "meant" to decide the particulars of how insurance proceeds would be allocated or when they would be refunded in the event that a portion of the Company's MGP remediation and investigation costs—incurred pursuant to the Company's established legal obligation to remediate—were disallowed. There were no insurance proceeds to distribute at that time. There were no remediation and investigation costs being disallowed at that time. Although the parties did debate how insurance proceeds might be disbursed, a decision on future insurance proceeds was not necessary to the outcome of the Gas Rate Case. Because the

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[265] Hearing Tr., pp. 573-574. OMAEG and Kroger supported OCC's motion to strike testimony regarding the insurance proceeds based on *res judicata*. Hearing Tr., pp. 574-75.
[266] The term "res judicata" is sometimes used to refer to both claim preclusion and issue preclusion (also known as collateral estoppel). OCC makes only a collateral estoppel argument here, so the Company does not address the separate doctrine of claim preclusion.
[267] *State ex rel. Kroger Co. v. Indus. Comm'n*, 80 Ohio St. 3d 649, 651, 687 N.E.2d 768 (1998).
[268] *Id.* (internal quotation marks and citations removed).
[269] *Id.* (internal quotation marks and citations removed).
[270] Gas Rate Case, Opinion and Order, p. 67.

details of disbursement were neither decided nor necessary to the outcome of the case,[271] *res judicata* does not apply.

3. The insurance proceeds obtained were for settlement of all investigation and remediation of MGP impacts, without limitations as to geography or time, and therefore must be allocated proportionally to the Company's cost recovery.

Denying recovery of the statutorily mandated remediation and investigation costs incurred by the Company without also allocating a pro rata share of the insurance proceeds that were acquired to resolve total MGP liability at the East End site and the West End site from insurance carriers would effectively doubly penalize the Company for its efforts to comply with federal law and for incurring costs that were already determined by the Ohio Supreme Court as a necessary expense of providing utility service. The Commission determined that Duke Energy Ohio was statutorily obligated to address contamination associated with the former MGPs, and the Supreme Court affirmed the Commission.[272] And it is uncontroverted that all environmental contamination discovered was due to the provision of historic MGP service to customers. To the extent the Commission, contrary to its own and the Ohio Supreme Court's prior findings that MGP investigation and remediation costs are costs of providing utility service under R.C. 4909.15(A)(4), apportions any amount of the remediation expense incurred thus far at either the East End or West End sites as unrelated to utility service, then a proportional amount of the insurance proceeds must also be apportioned between the Company and its customers.

It must be recognized that the insurers' obligation to provide coverage is not limited in any way to the remediation of a specific parcel of property at either site, as it is based on liability under environmental laws. Nor are the proceeds limited in time in the same way that the Commission's Opinion and Order limited recovery. If the Commission decides—contrary to its own Opinion and

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[271] *See Dudee*, 2019-Ohio-3939, ¶ 29.
[272] Gas Rate Case, Opinion and Order, pp. 47, 54, 58-59; Gas Rate Case Supreme Court Opinion, ¶ 35.

Order in the Gas Rate Case—to limit recovery to only a ***portion*** of the costs required to address the Company's statutory liability, it should only credit to customers a similar ***portion*** of the insurance proceeds, which were meant to cover the ***entire*** cost.

Such an interpretation is consistent with the Commission's Order in the Natural Gas Base Rate Case. Assuming *arguendo*, that the Commission's use of the term "MGP sites" was intended to geographically limit recovery of statutorily imposed obligation to remediate contaminated areas to specific parcels, then so too must the Commission's directive to the Company to "pursue recovery of costs from any third parties who may also be statutorily responsible for the remediation ***of the MGP sites***."[273] Intervening parties and Staff cannot have it both ways. If the recovery of costs for remediating areas impacted by former MGP operations is limited to specific areas, so too is the allocation of insurance proceeds. The record is conclusive that the magnitude of insurance settlement proceeds were for ***all*** impacted areas, not just those Staff (and others) claim are eligible for recovery. Customers should only be reimbursed for insurance proceeds obtained for and related to areas that are ultimately recoverable through Rider MGP.

The breadth of these settlements is significant in both magnitude of dollars achieved and scope of coverage. Mr. Lynch testified that, in total, the Company has achieved $56,231,987 in insurance settlement proceeds (before factoring in legal fees incurred to achieve such proceeds).[274] As Mr. Lynch testified, the settlements achieved were not limited by geographic boundaries of property currently or historically owned by the Company. In fact, the settlements paid by historic insurers were for the Company's:

> liability to investigate and remediate environmental damage allegedly caused by the Company's historical operations at the MGP Sites, including to neighboring

[273] Gas Rate Case, Opinion and Order, p. 67 (emphasis added).
[274] Hearing Tr., p. 630. Under cross-examination Duke Energy Ohio witness Lawler agreed that the net amount of insurance proceeds after legal fees is approximately $50 million. *Id.*, p. 710.

landowners, to the groundwater, including groundwater beyond Duke Energy Ohio's property boundaries, and to the sediments of the Ohio River.[275]

Moreover, the settlements were not restricted to a particular type of contaminant or year in which the damage occurred.[276] The settlements are not restricted by property boundaries, and recognize that the contaminants at issue continue to migrate through soil, groundwater, and sediments until they are remediated.[277] Achieving the significant proceeds required releasing the historic insurers from all past, present and future environmental cleanup costs no matter: (i) when the costs were or are incurred; (ii) when the environmental property damage giving rise to the costs occurred; (iii) what contaminants caused the property damage; and (iv) whether the property damage that is the subject of the cleanup is within or beyond the boundaries of the property currently owned by Duke Energy Ohio.[278]

As explained by Duke Energy Ohio witness, Mr. Keith Butler, the scope of settlement for all MGP contamination at the East End site and the West End site is relevant.[279] Staff and intervening parties maintain that only MGP contamination that was on a property where original MGP operations occurred should be recoverable under the Company's Rider MGP.[280] Mr. Butler explained that it is irreconcilable and inequitable to say on one hand that cost recovery for statutorily imposed remediation is limited due to geography, thereby apportioning remediation cost responsibility between the Company and customers based upon some meets and bounds of real property, and on the other, to direct that all insurance proceeds be used to only offset or cover remediation expenses allocated to customers through rates.[281] Again, as set forth in Mr. Lynch's testimony, the magnitude of insurance settlement proceeds was achieved based upon resolving 100

[275] Duke Energy Ohio Exhibit 24, Direct Testimony of Michael Lynch, p. 6.
[276] *Id.*, p.7.
[277] *Id.*, pp. 6-7.
[278] *Id.*
[279] Duke Energy Ohio Exhibit 22, Direct Testimony of Keith Butler, pp. 10-11
[280] *Id.*, p. 11.
[281] *Id.*, pp. 10-11.

percent of the Company's MGP liability without regard to property boundaries.[282] Denying full recovery of MGP remediation expense based upon an arbitrarily determined boundary line, without regard to the actual physical presence of contamination or acknowledgement of its mobility, and absent any legitimate allegation of imprudence,[283] and also denying any corresponding allocation of insurance proceeds is unreasonably punitive. The level of insurance proceeds attained was directly a result of the scope of all contamination, all areas, all byproducts. This includes contamination that was found and remediated in the Area West of the West Parcel on the East End site, as well as in and along the banks and sediments of the Ohio River at both East End and West End sites.

The Commission's Opinion and Order in the Gas Rate Case did not exclude any MGP investigation or remediation costs based upon geographic limitation; in fact, the Company recovered its investigation costs deferred from 2011 and incurred during the rate case test year for the Area West of the West Parcel on the East End site.[284] Thus, it was impossible to know that MGP investigation and remediation costs recovery could be denied based upon anything other than prudence. The only property-boundary issue addressed by the Commission in the Gas Rate Case was the $2,331,580 related "to the price paid to purchase property from a third-party and not to the statutorily mandated remediation efforts."[285] The costs at issue in these proceedings, including those incurred in the Area West of the West Parcel on the East End site and in and along the banks and sediments of the Ohio River are directly related to the statutorily mandated remediation efforts, and the insurance settlement proceeds achieved were in contemplation of all such remediation.

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[282] Duke Energy Ohio Exhibit 24, Direct Testimony of Michael Lynch, pp. 6-7.
[283] Staff did not recommend any disallowances on the basis of imprudence in the 2018 and 2019 Staff Reports. And the only witness who testified in support of OCC's allegations of imprudence failed to support his claims. *See supra* Section IV-C-2.
[284] *See* OMAEG Exhibit 2, Staff Report, Case No. 12-1685, p. 34.
[285] Gas Rate Case, Opinion and Order, p. 60.

Refusing to allocate insurance proceeds proportionally would effectively saddle shareholders with responsibility for costs far beyond what the Commission authorized in the Gas Rate Case, where it engineered a very specific and explicit balance of responsibilities. Numerous parties in the Gas Rate Case had argued against treating the MGP investigation and remediation costs as a cost of utility service on the basis that such costs "are the responsibility of the shareholders."[286] After considering these arguments, the Commission concluded that the appropriate item to assign to shareholders was the carrying costs: "we find the intervenors' argument that the shareholders should bear some of the responsibility for the remediation costs persuasive, in that the carrying costs should not be borne by the ratepayers."[287] This was a substantial amount; over $5 million in the Gas Rate Case and nearly ten percent of the amount ultimately recovered.[288] And the Company's inability to recover carrying costs has cost the Company an additional $4.7 million, as of December 31, 2018.[289] Clearly, the Commission thought that saddling the Company with the carrying costs was a fair allocation of burdens and did not anticipate further burdening shareholders with a large portion of the actual remediation costs.

If the Commission adopts Staff's interpretation of the Opinion and Order and apportions remediation cost responsibility between the Company and customers, or otherwise limits the Company's recovery of costs, including as it relates to timing of remediation, so too must the insurance proceeds be appropriately apportioned—this would be the only equitable allocation of the insurance in this circumstance.

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[286] *See id.*, p. 55-56 (describing various intervenors' arguments on this point).
[287] *Id.*, p. 59.
[288] *Id.*, p. 26.
[289] Duke Energy Ohio Exhibit 30, Direct Testimony of Sarah Lawler (19-174-GA-RDR), pp. 6-7. Specifically, this $4.7 million is the carrying costs through December 31, 2018, associated with the total amount of costs incurred and deferred after December 31, 2012.

4. The Commission should wait to allocate insurance proceeds until all MGP investigation and remediation required by law is complete because the correct allocation will not be known until then.

Finally, although the Commission established an arbitrary time limitation on the Company's deferral authority with an ability to seek an extension under exigent circumstances, the insurance claims and settlements established no such end date in terms of remediation work that was necessary as it was based on remediation liability under environmental laws and not the timing of the work to be performed. Therefore, the Commission cannot apportion any insurance proceeds until all remediation is complete. These insurance proceeds are to settle ***all*** liability for ***all*** MGP contamination. An equitable and proportional allocation of the proceeds—necessary in case any amounts are disallowed—cannot occur until the total investigation and remediation costs are known ***and*** the proportion of that amount shouldered by customers is known.

III. CONCLUSION

For all of the reasons above, the Commission should approve in their entirety all of the Company's applications for cost recovery of MGP investigation and remediation costs incurred during the years 2013 through 2018, as these were costs prudently incurred to address the Company's legal obligation under environmental laws—as recognized by the Commission and affirmed by the Ohio Supreme Court—to investigate and remediate all MGP impacts associated with the former MGP operations. If, however, the Commission limits recovery to the "original MGP site footprints," as perceived by the Staff,[290] any disallowance should be limited to no more than $7.5 million and any refund of insurance proceeds to customers must await completion of all investigation and remediation activities and must be allocated proportionally based on the relative responsibility for the costs of the investigation and remediation, as between customers and the Company.

[290] 2018 Staff Report, p. 5; 2019 Staff Report, p. 5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was served on the following parties of record by electronic service, this 17th day of January, 2020.

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Summary: Brief Post Hearing Brief of Duke Energy Ohio, Inc. electronically filed by Mrs. Tammy M Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Vaysman, Larisa