BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Bruce Weston (0016973)
Ohio Consumers' Counsel

Christopher Healey (0086027)
Counsel of Record
Amy Botschner O'Brien (0074423)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Healey]: (614) 466-9571
Telephone [Botschner]: (614) 466-9575
christopher.healey@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
(willing to accept service by e-mail)

February 14, 2020

TABLE OF CONTENTS

Page

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Duke wants to do three things that harm its 430,000 natural gas consumers. It wants to charge its utility customers $23 million to clean up the Ohio River and a plot of land called the "Area West of the West" or "WOW" parcel, even though Duke doesn't own the Ohio River, doesn't use the WOW parcel for utility service, and never used the WOW parcel as part of its manufactured gas plant ("MGP") sites. It wants to charge its utility customers for excessive excavation and solidification of soil, which was unnecessary given that more efficient, safe cleanup methods exist and are consistent with the law. And it wants to keep some of the insurance money that it has collected related to its MGP cleanup, even though the Public Utilities Commission of Ohio ("PUCO") has already ruled that all of this money—$50.5 million—belongs to Duke's customers.

To protect consumers, the PUCO should not allow Duke to do any of these things. Instead, it should adopt the recommendations made by the Office of the Ohio Consumer's

Counsel ("OCC"), the PUCO Staff, Kroger, and the Ohio Manufacturers' Association Energy Group. Customers should pay nothing to clean up the Ohio River and the WOW parcel. Customers should immediately receive all $50.5 million in insurance proceeds. And customers should pay no more than $3.9 million to clean up Duke's MGP mess (which would be on top of the $55.5 million that they have already paid).

I. REPLY

A. The PUCO did not rule in the Rate Case that R.C. 4909.15(A)(4) allows Duke to charge customers for any and all MGP cleanup, no matter where the contamination is located.

1. A review of the Rate Case Order's discussion of R.C. 4909.15(A)(4) shows that the PUCO intended to prohibit Duke from charging customers for any costs incurred outside the bounds of the MGP Sites.

Duke's primary argument in this case is that the location of contamination doesn't matter.[1] According to Duke, customers should pay for all cleanup related to the MGP sites, no matter where the contamination is located. Duke's argument is meritless.

The PUCO ruled in Duke's most recent natural gas base rate case (the "Rate Case") that a utility can charge customers for expenses related to property, even if that property is not "used and useful" under R.C. 4909.15(A)(1).[2] But that is not the end of the story. The utility must also satisfy R.C. 4909.15(A)(4). Under that statute, a utility can only charge customers for the "cost to the utility of rendering the public utility service." Not all costs incurred by utilities are costs "of rendering the public utility service." The question that the PUCO must answer now is, does the Rate Case Order address whether Duke can charge customers to remediate the WOW parcel

[1] Post-Hearing Brief of Duke Energy Ohio, Inc. at 24-36 (Jan. 17, 2020) (the "Duke Initial Brief").

[2] Case No. 12-1685-GA-AIR, Opinion & Order at 53-54 (Nov. 13, 2013) (the "Rate Case Order").

and Ohio River (together, the "Offsite Areas"). The answer is yes, it does: the Rate Case Order prohibits any such charges.

The Rate Case Order addresses compliance with R.C. 4909.15(A)(4) on pages 54 to 60. This section of the order includes some language that Duke considers favorable to its position:

> 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]

Duke latches on to this quote, where the PUCO focused on Duke's legal obligation to remediate the sites, and the PUCO's statement that remediation costs are "a current cost of doing business."[4] Duke suggests that this is all you need to know about the Rate Case Order—that this one sentence is unambiguous proof that the PUCO has allowed Duke to charge customers for any and all cleanup costs, no matter where the contamination is found. But drawing this conclusion from this single sentence ignores both the plain language of other parts of the Rate Case Order and the context in which the PUCO made this statement.

First, the Rate Case Order also says:

> Upon our review of the record in these cases, we find that Duke has supported its claim that the remediation costs incurred on the East and West End sites were a cost of providing utility service. Duke has 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.[5]

[3] Post-Hearing Brief of Duke Energy Ohio, Inc. (Jan. 17, 2020) (citing Rate Case Order at 58-59) (the "Duke Initial Brief").

[4] Duke Initial Brief at 25.

[5] Rate Case Order at 58-59.

This language—which immediately precedes Duke's favored quote—says that Duke has supported its claim regarding remediation costs "incurred *on* the East and West End sites."[6] It does not say that Duke has supported a claim for remediation of *offsite* areas like the WOW parcel and Ohio River. Yet Duke omits the PUCO's reference to the sites themselves as distinct from the Offsite Areas.

Second, also in the same paragraph, the PUCO highlights the importance of cleaning up the properties "to maintain the usefulness of the properties."[7] This, too, suggests that the PUCO was referring to the MGP Sites themselves and not the Offsite Areas. At the time, the MGP Sites themselves were used for utility operations, including underground gas mains and pipelines; a gas operations center; storage, staging, and employee facilities; sensitive utility infrastructure; and propane facilities.[8] The Supreme Court of Ohio highlighted these facts on appeal when affirming the PUCO's approval of charges under R.C. 4909.15(A)(4).[9] The PUCO reasoned that it was important to remediate those areas to "maintain the usefulness of the properties" for providing utility service. The same cannot be said of the WOW parcel, which is an empty field with no utility distribution operations whatsoever, or the Ohio River, which is a river, neither owned by Duke nor used for utility service.[10]

Third, the PUCO's discussion of R.C. 4909.15(A)(4) in the Rate Case Order does not end with Duke's quoted language. To the contrary, the Rate Case Order devotes an entire paragraph specifically to the Purchased Parcel (which includes the WOW parcel) and how R.C.

---

[6] Rate Case Order at 58 (emphasis added).

[7] Rate Case Order at 59.

[8] Rate Case Order at 54.

[9] *In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 444-45 (2017).

[10] Tr. Vol. I at 193 (Bachand) (Duke not using the WOW parcel for distribution operations); Tr. Vol. I at 166 (Bednarcik) (Ohio River not used to render public utility service to customers).

4909.15(A)(4) applies to it. In denying Duke the ability to charge customers a $2.3 million premium for the Purchased Parcel, the PUCO focused on the fact that the Purchased Parcel was not used to render public utility service:

> Duke failed to prove, on the record, what, if any, of this purchased parcel was, or ever had been, used for the provision of manufactured gas or utility service for the customers of Duke or its predecessors. ... While it may be that a portion of the purchased parcel was formerly part of the MGP, Duke has failed to provide sufficient evidence on the record to distinguish the portion of the parcel that had been MGP-related from the portion that had never been related to the MGPs. *Thus, when applying the requirement for recovery set forth in R.C. 4909.15(A)(4), we are not willing to entertain Duke's unsubstantiated request for recovery of costs related to property [that] has not been shown on the record in these cases to provide, either in the past or in the present, utility services that caused the statutorily mandated environmental remediation. Moreover,* the record reflects that the requested $2,331,580 amount submitted by Duke for recovery relates to the price Duke paid to purchase the property from a third-party and not to the statutorily mandated remediation efforts. Therefore, we conclude that the requested $2,331,580 associated with the purchased parcel on the East End site should not be included in the amount of costs to be recovered through Rider MGP approved by the Commission in this Order.[11]

This paragraph is the only paragraph from the Rate Case Order regarding the applicability of R.C. 4909.15(A)(4) to the Purchased Parcel, yet Duke ignores most of it in its initial brief. The impact of this paragraph, however, cannot be ignored.

The PUCO identified two independent grounds for denying Duke the right to charge customers for the Purchased Parcel, separated by the word "moreover." First, the PUCO ruled that under R.C. 4909.15(A)(4), Duke could not charge customers for the Purchased Parcel because the Purchased Parcel had not been "shown on the record in these cases to provide, either in the past or in the present, utility services that caused the statutorily mandated environmental remediation." Second, the PUCO ruled that Duke could not charge customers for the $2.3

[11] Rate Case Order at 60 (emphasis added).

million premium it paid for the Purchased Parcel because it "relates to the price Duke paid to purchase the property from a third-party and not to the statutorily mandated remediation efforts."[12]

Duke says in its initial brief that the PUCO denied it recovery of the $2.3 million *only* because of the "nature of the costs," meaning that it was denied *solely* because they were for the purchase price and not for remediation.[13] That is, Duke points to the second independent justification for denying charges related to the Purchased Parcel and pretends that the first independent justification doesn't exist.

The PUCO's first ruling was that charges for the Purchased Parcel were denied because the Purchased Parcel has "not been shown on the record in these cases to provide, either in the past or in the present, utility services that caused the statutorily mandated environmental remediation."[14] This language is dispositive of the current cases. The WOW parcel, which is the disputed property in the current cases, is part of the Purchased Parcel. So the PUCO's ruling regarding the Purchased Parcel in the Rate Case Order applies to the WOW parcel.

As explained in OCC's initial brief, Duke cannot show that the WOW parcel or Ohio River were ever used to "provide, either in the past or the present, utility services that caused the statutorily mandated environmental remediation."[15] Consistent with the Rate Case Order, therefore, it is insufficient under R.C. 4909.15(A)(4) for Duke to merely show that its investigation and remediation costs are a "cost of doing business." The Rate Case Order is unambiguous: Duke cannot charge customers to investigate and remediate the Offsite Areas.

---

[12] Rate Case Order at 60.

[13] Duke Initial Brief at 29.

[14] Rate Case Order at 60.

[15] *See* OCC Initial Brief at 12-14 (showing that Duke never used the WOW parcel or Ohio River for MGP operations).

2. Duke cherry-picked language from the Rate Case Order and Ohio Supreme Court ruling unrelated to the PUCO's ruling on R.C. 4909.15(A)(4).

Duke argues in its initial brief that the 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)."[16] Duke arrives at this conclusion through a series of cherry-picked citations to the Rate Case Order, some taken out of context, and many taken from sections of the Rate Case Order that were not about R.C. 4909.15(A)(4).

For example, Duke begins its argument by quoting the Rate Case Order, where the PUCO said 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."[17] The PUCO did say this. But it said it in the section of the Rate Case Order approving deferral authority (which is not ratemaking). This quote was not about R.C. 4909.15(A)(4).

Duke then provides a lengthy block quote from the Rate Case where the PUCO discusses Duke's statutory obligation to clean the MGP Sites.[18] This time, the quote is from the section of the Rate Case Order addressing used and usefulness under R.C. 4909.15(A)(1), which the Supreme Court explicitly ruled has no bearing on R.C. 4909.15(A)(4).[19]

[16] Duke Initial Brief at 24 (emphasis in original).

[17] Duke Initial Brief at 24 (citing the Rate Case Order at 71).

[18] Duke Initial Brief at 24 (quoting the Rate Case Order at 54).

[19] Supreme Court Opinion ¶ 19.

Duke also quotes the Supreme Court of Ohio's decision in the appeal of the Rate Case, where the Court referred to Duke's "statutory mandate to remediate the contamination."[20] Yet again, this quote is taken out of context. Here, the Court was addressing parties' arguments regarding the used and useful standard and OCC's argument that the PUCO failed to follow its own precedent on that issue.[21] This language from the Supreme Court Opinion was not about R.C. 4909.15(A)(4).

In short, no conclusions can be drawn about the Rate Case Order's ruling on R.C. 4909.15(A)(4) or the Supreme Court ruling based on these cherry-picked quotations because none of them were part of the PUCO's or Supreme Court's interpretation and application of the applicable statute, R.C. 4909.15(A)(4).

B. The PUCO's 2016 ruling extending the time period for Duke's deferral was not ratemaking and thus has no bearing on whether Duke can charge customers for costs incurred in the Offsite Areas.

In the Rate Case Order, the PUCO ruled that Duke could not charge customers for cleanup costs at the East End Site after December 31, 2016.[22] The PUCO, however, left open the possibility of extending that deferral authority under "exigent circumstances."[23] In 2016, Duke filed an application to extend deferral authority beyond December 31, 2016, claiming exigent circumstances.[24] The PUCO ruled in favor of Duke, finding that exigent circumstances existed at the time and allowing Duke to continue deferring costs on the East End through December 31, 2019.[25]

---

[20] Duke Initial Brief at 24 (quoting Supreme Court Opinion ¶ 24).

[21] Supreme Court Opinion ¶¶ 22-25.

[22] Rate Case Order at 72.

[23] *Id.*

[24] Case No. 16-1106-GA-AAM.

[25] Case No. 16-1106-GA-AAM, Finding & Order (Dec. 21, 2016).

In its initial brief, Duke suggests that this deferral ruling (the "Deferral Order") supports its claim that it can charge customers to investigate and remediate the West of the West parcel. Duke is mistaken, for several reasons.

First, as the PUCO and Ohio Supreme Court have emphasized, a deferral is an accounting mechanism and nothing more—it is not ratemaking.[26] Indeed, the Deferral Order itself addressed this issue, reiterating that "deferrals do not constitute ratemaking" and that "the Commission is not determining what, if any, of these costs may be appropriate for recovery in a subsequent proceeding."[27]

Second, the PUCO did not make any factual findings or legal rulings regarding the WOW parcel in the Deferral Order. Duke notes in its initial brief that the Deferral Order discusses the WOW parcel.[28] The Deferral Order does mention the WOW parcel, but only in sentences where the PUCO is summarizing Duke's position.[29] At no point in the Deferral Order does the PUCO say that Duke can charge customers for cleanup costs in the WOW parcel or Ohio River.

Third, the issue of whether customers could be charged for costs incurred in the WOW parcel and Ohio River simply was not raised in the deferral case. The PUCO's ruling in that case came in December 2016. It was not until nearly two years later that the PUCO Staff issued its first report in these rider cases and parties began filing their respective comments on the issue of charges in the WOW parcel and Ohio River. The Deferral Order, therefore, provides no support for Duke's theory that it can charge customers for remediation costs in the WOW parcel and Ohio River.

---

[26] *See, e.g., Elyria Foundry Co. v. PUCO*, 114 Ohio St.3d 305, 311 (2007).

[27] Case No. 16-1106-GA-AAM, Finding & Order ¶ 38 (Dec. 21, 2016)

[28] Duke Initial Brief at 32-33.

[29] Deferral Order ¶ 36.

C. OCC witness Campbell's proposed remediation methods would allow Duke to comply with the Voluntary Action Program, at substantially lower cost to customers than Duke's excessive remediation methods.

1. Dr. Campbell is qualified to provide his expert opinion under the Voluntary Action Program.

Dr. Campbell is an expert on the remediation of environmental waste sites, including former MGP sites. This cannot be seriously disputed. Yet in its initial brief, Duke falsely claims that Dr. Campbell "lacks expertise."[30] Far from "lacking expertise," Dr. Campbell has been working on precisely these types of projects for nearly four decades. As OCC detailed in its initial brief, Dr. Campbell is a Ph.D. environmental engineer with experience at more than 50 MGP sites, he has been working with MGP sites for more than 30 years, and he has provided expert analysis for 12 MGP sites designated as superfund sites under CERCLA.[31] And lest there be any doubt, the State of Ohio certified him as a Voluntary Action Program ("VAP") certified professional ("CP"), giving him the power and authority to act as an agent of the state in evaluating compliance with the VAP, just the same as Duke's witnesses.

Duke's testimony and filings suggest that the remediation of an MGP Site under the VAP is somehow fundamentally different than remediation of MGP sites under other programs. The VAP did not reinvent the rules for remediation of MGP Sites, and the VAP did not create a new paradigm for such remediation. Duke's suggestion that the VAP is a universe unto itself is without merit.

[30] Duke Initial Brief at 43-44.

[31] *See* OCC Initial Brief at 24.

2. OCC witness Dr. Campbell's proposed remediation methods address the applicable VAP standards that have been shown to require active remediation.

Duke attempts to discredit OCC witness Dr. Campbell by claiming that his proposed, more cost-effective remediation methods would not meet all applicable standards and thus should be ignored.[32] Duke's claim is misleading and inaccurate.

Under the VAP, a party must be able to demonstrate to the satisfaction of a VAP CP that the sites in question meet all applicable VAP standards.[33] In some instances, following investigation of a site, it could be determined that no remediation is necessary because the applicable standards are already met. For instance, a party might believe that there is potential for groundwater contamination, but upon further investigation (through the use of groundwater monitoring wells, for instance), they might find that contamination is below the level that is considered unsafe for purposes of the VAP. In that case, no active remediation would be necessary. To meet some standards, however, active remediation might be necessary. Depending on the site, active remediation could mean using soil caps, dense non-aqueous phase liquid ("DNAPL") recovery wells, or in situ solidification ("ISS"), among other things.

Dr. Campbell testified that groundwater standards could be met through a combination of an Urban Setting Designation, DNAPL recovery wells, and variances.[34] He testified that soil standards could be met through a combination of engineering controls in the form of perimeter fencing and institutional controls in the form of an environmental covenant restricting future use

[32] Duke Initial Brief at 45.

[33] Ohio Adm. Code 3745-300-07.

[34] OCC Ex. 21 (Campbell Testimony) at 18-19.

of the MGP Sites to commercial/industrial uses, prohibiting use of groundwater, and the use of a risk mitigation plan.[35]

Duke complains that Dr. Campbell's proposal would not address all applicable standards at the MGP Sites, suggesting that Duke's more expensive methods are therefore necessary.[36] According to Duke, its chosen methods "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."[37] But Dr. Campbell explained why Duke is wrong on this issue.

As Dr. Campbell explained, there is no evidence that the Ohio River is even at risk.[38] For the Ohio River to be at risk, Duke would need to show that tar-like materials in the ground could potentially leach into the river. There is no evidence of this, as Dr. Campbell explained on cross examination:

Q. Did Duke also utilize ISS at both of the sites?

A. They did but the tar remains in place.

Q. Tar below the depth of the ISS.

A. ISS doesn't remove tar. It just adds the Portland cement to the soil.

Q. Doesn't the ISS prevent the tar from moving?

A. It does but it's not clear that it's moving under the current conditions either.[39]

In other words, Duke is spending tens of millions of dollars on excavation and in situ solidification to prevent tar from leaching into the River, even though Duke hasn't shown that

[35] OCC Ex. 21 (Campbell Testimony) at 25-28.

[36] Duke Initial Brief at 45-46.

[37] Duke Initial Brief at 46 (emphasis in original).

[38] Tr. Vol. IV at 855-57 (Campbell).

[39] Tr. Vol. IV at 857 (Campbell).

the tar is mobile, which would be the only way that it could leach into the River. Thus, while Duke criticizes Dr. Campbell for not proposing active remediation methods that protect the Ohio River, it is Duke that has failed the first step of adequately identifying and documenting the potential for harm to the River in the first place.

Duke also complains that Dr. Campbell's proposed remediation methods would "leave all of the oil-like material and tar-like material in the ground."[40] With this statement, Duke implies that Dr. Campbell's proposed methods might be dangerous and inadequate. They are not. Duke conveniently omits that its chosen remediation methods do precisely the same thing: in situ solidification (chosen by Duke) does *not* remove the material from the ground; it simply solidifies soil with cement to prevent the tar from moving.[41] And additional contaminants below the level of any in situ solidification performed by Duke remain in the ground as well, untouched.[42]

It is Duke's burden to prove that its chosen, expensive remediation methods are prudent. Dr. Campbell identified alternative methods that cost much less, and which would allow Duke to adequately protect human health and safety, consistent with the VAP. There is no reason for consumers to pay much more for Duke's excessive remediation methods when Duke has failed to show that they are necessary to comply with the VAP.

[40] Duke Initial Brief at 45.

[41] Tr. Vol. IV at 856 (Campbell) ("those tars and oils are still under the ground under what Duke has done as well").

[42] Tr. Vol. IV at 857 (Campbell).

D. The PUCO Staff's recommended $23 million disallowance protects consumers and is reasonable and reliable, unlike Duke's admittedly incomplete and erroneous $7.5 million recommended disallowance.

1. Duke concedes that its $7.5 million calculation is inaccurate.

The PUCO Staff provided a comprehensive calculation of the total amount that Duke spent investigating and remediating the Offsite Areas. The PUCO Staff recommended the following disallowances:[43]

Year	East End Disallowance	West End Disallowance
2013	$274,321	$22,456
2014	$135,380	$328,299
2015	$222,780	$97,728
2016	$561,999	$0
2017	$10,033,787	$382,298
2018	$8,913,856	$1,999,967
TOTAL	$20,142,123	$2,830,748

Duke, on the other hand, testified that the disallowance should be no more than $7,459,649.[44] In its initial brief, however, Duke conceded that its calculation was inaccurate because "certain invoices or costs admittedly could have been missed or not included in the allocation by Company witness Bachand, 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."[45] As OCC explained in its initial brief, there were more errors than just these, including inaccurate calculation of groundwater monitoring costs, ignoring parts of the WOW parcel outside of one small piece called the "Phase 2 Area," understating costs incurred in

[43] Staff Ex. 8 (Crocker Testimony), Table 1.

[44] Duke Ex. 14 (Bachand Supp. Testimony), TLB-6 Attachment.

[45] Duke Initial Brief at 51.

the WOW for 2013 and 2014, and several discrepancies between Mr. Bachand's testimony and Duke's discovery responses or other Duke witness testimony.[46]

Duke argues, however, that even if its analysis is incomplete and error-laden, it is still more accurate than the PUCO Staff's analysis, so the PUCO should rely on Duke's.[47] This line of reasoning fails for two reasons. First, it is Duke that has the burden of proof in this case.[48] If Duke's analysis is incomplete and unreliable, then Duke has not met that burden, regardless of any analysis performed by Staff. Second, Duke's criticisms of the Staff analysis are wrong—Staff's analysis is reasonable and reliable and should be adopted by the PUCO, as explained below.

2. Duke did not establish that it or its predecessors ever used the WOW parcel as part of the MGP Sites.

Duke first attempts to discredit the Staff by claiming that the WOW parcel was part of the East End Site. According to Duke, "the southeastern portion of the Area West of the West Parcel was acquired in 1928 ... and was part of the East End site during MGP operations."[49] The evidence simply does not support this factual claim.

According to Duke, we know that the WOW parcel was used for MGP operations because a piece of an iron tar tank was found buried underground in the WOW.[50] But Duke's own witness testified that the iron tar tank was removed no later than the year 1917—11 years *before* Duke's predecessors ever owned the WOW parcel.[51] So the uncontroverted evidence is

[46] OCC Initial Brief at 18-19.

[47] Duke Initial Brief at 51.

[48] Rate Case Order at 72.

[49] Duke Initial Brief at 48.

[50] Duke Ex. 8 (Bednarcik Supp. Testimony), JLG-1 Attachment.

[51] Tr. Vol. I at 90 (Bednarcik).

that neither Duke nor its predecessors ever used the WOW parcel for MGP operations. Thus, the Staff was correct to consider the WOW parcel to be "offsite" and to exclude it from the original footprint of the MGP Sites.

3. Duke's claim that it spent only $1.6 million on the West of the West parcel and the Ohio River near the East End Site in 2018 is unsupported by the record.

Duke challenges the Staff's proposed disallowance of $8,913,856 for the West of the West and the Ohio River near the East End Site in 2018.[52] According to Duke, it spent just $1.6 million on the West of the West and Ohio River near the East End in 2018.[53] The PUCO should find that the Staff's recommended $8.9 million disallowance is substantially more reliable than Duke's $1.6 million number, and it should therefore reject Duke's number.

The Staff's recommended disallowance is based on Staff witness Crocker having gone through every single invoice provided by Duke and applying her expert judgment to allocate the costs from these invoices to the WOW and the Ohio River.[54] In contrast, Duke's $1.6 million number is based on Duke witness Bachand's incomplete analysis, with numerous admitted errors, as explained in detail in OCC's initial brief.[55]

Duke also claims that the Staff's recommended disallowance is too high because "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."[56] But the evidence does not

[52] Duke Initial Brief at 51.

[53] Duke Initial Brief at 51 ($1,597,954 for Ohio River + $23,995 for the WOW).

[54] Staff Ex. 8 (Crocker) at 2.

[55] OCC Initial Brief at 16-21.

[56] Duke Initial Brief at 49.

support this theory. Duke's own testimony identifies the following for the West of the West in 2018: groundwater sampling and evaluation of non-aqueous phase liquid; air monitoring, including an air monitoring station located in the West of the West; analytical laboratory work; contractor support from Altamont Environmental; performance bonding; Duke internal expenses for project oversight and technical research; Duke internal laboratory labor; and Duke internal project manager costs for project management.[57]

Further, while Duke claims that it did not excavate soil from the WOW parcel in 2018, the evidence supporting this is ambiguous, at best. For one, this evidence was provided by Duke witness Bachand, who was shown to be an unreliable witness in general.[58] Further, even if Duke did in fact complete its soil excavation in 2017, it is possible that the soil excavation costs were paid in 2018, and thus would be allocated to 2018. As Duke witness Bachand testified, in some instances, costs incurred in one year were not invoiced until the following year, thus resulting in charges the following year.[59] In fact, at times, invoices were sent as many as four months after the work was performed.[60] Thus, it is possible that a material portion of Duke's 2017 in situ solidification and excavation costs were actually invoiced in 2018, thus further calling into question Duke's claim that there were no such costs paid in 2018. And as the Staff pointed in its initial brief, Staff witness Crocker was the only person in this case that reviewed every single invoice submitted to Duke in these consolidated cases, and she stood firmly behind all of the Staff's recommended disallowances.[61]

---

[57] Duke Ex. 14 (Bachand Supp. Testimony), TLB-1-Attachment at 2, TLB-5 Attachment at 1-2.

[58] *See* OCC Initial Brief at 16-21.

[59] Tr. Vol. II at 324 (Bachand).

[60] Tr. Vol. II at 324 (noting that invoices for work done in December 2016 were not sent until March of 2017).

[61] Post-Hearing Brief by the Staff of the Public Utilities Commission of Ohio, Inc. at 2 (Jan. 17, 2020) ("PUCO Staff Initial Brief").

4. Duke does not appear to challenge the Staff's proposed disallowances, other than disallowances for 2018 for the WOW parcel.

In its initial brief, Duke claims that the PUCO Staff "vastly overallocates costs to the Area West of the West Parcel and Ohio River, using a baseless and arbitrary methodology."[62] Duke's entire argument in this regard, however, focuses on the Staff's disallowance of costs related to the WOW parcel for 2018. Duke does not make any arguments regarding the Staff's disallowances for the East End for 2013, 2014, 2015, 2016, or 2017, for the West End for any of 2013, 2014, 2015, 2016, 2017, and 2018, or for the Ohio River for any of 2013, 2014, 2015, 2016, 2017, and 2018. All that Duke can muster is a single sentence: "And Staff's recommended disallowances for costs incurred in years 2013 through 2017 appear similarly disproportionate."[63] Without any further explanation beyond this single sentence, the PUCO should conclude that Duke has effectively admitted that the Staff's allocations for 2013 through 2017 at the East End, and for 2013 through 2018 at the West End and for the Ohio River are undisputed and accurate.

E. Duke's proposal to keep some of the $50.5 million in insurance proceeds for itself (which would harm customers) contradicts the Rate Case Order and is therefore barred by the doctrine of collateral estoppel.

The doctrine of collateral estoppel, also known as issue preclusion, operates to "preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."[64] It applies to PUCO proceedings.[65]

---

[62] Duke Initial Brief at 49.

[63] Duke Initial Brief at 50.

[64] *In re Ohio Power Co.*, 144 Ohio St.3d 1, 6 (2015) (quoting *Office of Consumers' Counsel v. PUCO*, 16 Ohio St.3d 9, 10 (1985)).

[65] *Id.* ("Res judicata, whether claim preclusion or issue preclusion, applies to administrative proceedings that are of a judicial nature."). *See also In re Application of the Dayton Power & Light Co.,* Case No. 08-1094-EL-SSE, Second Finding & Order ¶ 32 (Dec. 18, 2019) (applying the doctrines of res judicata and collateral estoppel).

In the Rate Case, Duke, Staff, and OCC litigated the issue of who should get the proceeds of Duke's insurance policies. The PUCO described each party's position regarding the allocation of insurance proceeds in that case:

- Duke. "Duke witness Wathen states that, to the extent the proceeds relate to any MGP costs that the Commission disallowed, Duke is under no obligation to use these proceeds to offset the Rider MGP revenue requirement."[66]

- OCC. "OCC recommends that, if recovery is permitted, any insurance policy proceeds ... be applied to the MGP-related costs, before they are split between the customers. ... To the extent the sums collected exceed the amount recoverable from customers, including any costs incurred in realizing such insurance proceeds, OCC/OPAE state that Duke should be permitted to retain such amount to offset its share of site assessment and remediation costs."[67]

- Staff. "Staff recommends that proceeds from any insurance policies be, at least partially, credited against the total cost to recover from ratepayers through Rider MGP. ... Staff believes 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."[68]

The PUCO then ruled on this issue: "We find that any proceeds paid by insurers ... for MGP investigation and remediation should be used to reimburse the ratepayers. The Commission also concludes that any proceeds returned to ratepayers should be net of the costs to achieve those proceeds, *e.g.*, litigation costs. ... Finally, we agree that, to the extent the proceeds collected from insurers ... exceed the amount recoverable from ratepayers, Duke should be permitted to retain such amount."[69]

In other words, in the Rate Case, Duke made precisely the same argument it is making here—that if any costs are disallowed, Duke should get to keep a corresponding portion of the

[66] Rate Case Order at 66.

[67] Rate Case Order at 66.

[68] Rate Case Order at 66.

[69] Rate Case Order at 67.

insurance proceeds. And the PUCO explicitly rejected that argument, ruling that Duke gets to keep insurance proceeds only after customers are reimbursed in full.

In its initial brief, Duke attempts to avoid this fate through a manufactured theory that this ruling was not a ruling at all but just a "general statement."[70] The Rate Case Order, however, is clear: it summarized the parties' competing positions on this issue and then made an explicit ruling on the issue. The PUCO ruled on this issue and did not make a mere "general statement" (whatever that might even mean).

Duke also argues that because the insurance decision allegedly was "not necessary to the outcome of the Gas Rate Case," collateral estoppel does not apply.[71] Again, Duke's theory fails. The PUCO's ruling on this issue was "necessary to the outcome of the Gas Rate Case" because it was an issue that all the parties raised and sought to have resolved. In the Rate Case, the PUCO authorized Duke to charge customers more than $55.5 million for MGP investigation and remediation costs. The insurance proceeds are to be used to offset those same costs. So the issue of insurance allocation was unmistakably "necessary to the outcome" of the Rate Case.

Further, in support of this argument, Duke relies on a single case involving divorce law, *Dudee v. Philpot*.[72] But in that case, the Ohio Supreme Court did not address any arguments about an issue being "necessary to the outcome" of a case, and in fact, it described the doctrine of collateral estoppel in a way that precisely explains why Duke should *not* be allowed to relitigate the insurance issue: "Where the defendant clearly has had his day in court on the

[70] Duke Initial Brief at 56.

[71] Duke Initial Brief at 56.

[72] Duke Initial Brief at 57 (citing *Dudee v. Philpot*, 2019-Ohio-3939).

specific issue brought into litigation at the later proceeding, he is estopped from relitigating that issue."[73]

The precise issue of insurance allocation was raised in the Rate Case. Parties took competing, well-defined positions on that issue. And the PUCO made an unambiguous ruling. That ruling is that customers get *all* of the insurance proceeds ($50.5 million), and *only* after customers are reimbursed in full does Duke get any. Customers have already paid $55.5 million under Rider MGP, so with $50.5 million in net insurance proceeds, they will never be reimbursed in full. Thus, there will never be any leftover insurance proceeds for Duke, and there is no basis for Duke to continue holding the insurance money hostage. Duke is doing nothing more than trying to litigate the issue again, which is barred by collateral estoppel.

F. Using all insurance proceeds to offset charges to customers is consistent with the PUCO's ruling in the Rate Case Order that Duke's shareholders should be responsible, in part, for cleaning up the MGP Sites.

Duke claims that it is unfair for its shareholders to pay for remediation costs without receiving any of the insurance proceeds because the PUCO already denied Duke the right to charge customers carrying costs.[74] According to Duke: "Clearly, the Commission thought that saddling the Company with the carrying costs was a fair allocation of burdens and did not anticipate further burdening shareholder with a large portion of the actual remediation costs."[75]

The PUCO did not "clearly" think this, nor think it at all.

First, the Rate Case Order never says that this is the *only* way that shareholders should pay for Duke's MGP costs.

---

[73] *Dudee*, ¶ 30.

[74] Duke Initial Brief at 59.

[75] Duke Initial Brief at 61.

Second, the Rate Case Order limited Duke's recovery of MGP costs to ten years, thus contemplating that shareholders would be responsible for any costs beyond that period.

Third, the Rate Case Order denied Duke the right to charge customers for any 2008 costs for the West End site, so shareholders paid those amounts.

Fourth, the Rate Case Order did not allow Duke to charge customers more than $2.3 million related to the Purchased Parcel, so shareholders paid that amount.

Fifth, as explained above, the Rate Case Order unambiguously stated that all insurance proceeds would go to customers, thus benefiting customers and not shareholders.

Sixth, as explained above and in OCC's initial brief, the Rate Case Order prohibits Duke from charging customers to investigate and remediate the Offsite Areas, so shareholders should pay those amounts.

In short, Duke grossly mischaracterized the Rate Case Order by claiming that the PUCO expected that the *only* costs to be borne by shareholders would be through the denial of carrying costs. The Rate Case Order contemplates multiple different ways that Duke's shareholders would be out of pocket for MGP costs. The PUCO should reject Duke's claim that the Rate Case Order intended the denial of carrying costs to be the only way that shareholders bear any responsibility for MGP cleanup.

G. Customers should get a credit on their bill for any insurance proceeds that exceed the approved charges in these cases.

As explained, customers are entitled to $50.5 million in insurance proceeds that Duke is currently holding in one of its bank accounts. Even if Duke is allowed to charge customers the entire $46 million that it is seeking in these cases, subtracting the $50.5 million in insurance money would result in a credit on customers' bills.

In its initial brief, the PUCO Staff writes that the "insurance proceeds should be credited against any recoveries authorized in this case."[76] The PUCO should clarify, in its Order, that when crediting the insurance proceeds, Rider MGP is a negative number, thus resulting in a credit on customers' bills. Staff witness Crocker testified that she expects the rider to be a credit to customers because the insurance proceeds are greater than the maximum amount that Duke is seeking to collect from customers in these cases.[77]

II. CONCLUSION

Duke's proposed $46 million in charges to consumers are inconsistent with the Rate Case Order because they include $23 million in charges for the Offsite Areas that Duke never used for manufactured gas activity. Duke's proposed $46 million in charges to consumers are excessive and imprudent because Duke employed remediation methods that were unnecessary to effectively and efficiently clean up the MGP Sites. And Duke's proposal that it be allowed to keep some of the $50.5 million in insurance proceeds is barred by the Rate Case Order.

The PUCO should require Duke to provide a $46,653,134 million credit to customers under Rider MGP ($3,876,102 in charges minus $50,529,236 in insurance proceeds[78]). This is the just and reasonable result that customers deserve.

[76] PUCO Staff Initial Brief at 10.

[77] Tr. Vol. IV at 918 (Crocker).

[78] *See* OCC Initial Brief at 8.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Christopher Healey
Christopher Healey (0086027)
Counsel of Record
Amy Botschner O'Brien (0074423)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
Telephone [Healey]: (614) 466-9571
Telephone [Botschner]: (614) 466-9575
christopher.healey@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply Brief was served by electronic transmission upon the parties below this 14th day of February 2020.

/s/ Christopher Healey
Christopher Healey
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

SERVICE LIST

Thomas.mcnamee@ohioattorneygeneral.gov
Robert.eubanks@ohioattorneygeneral.gov
John.jones@ohioattorneygeneral.gov
rdove@keglerbrown.com
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
Rocco.dascenzo@duke-energy.com
Jeanne.kingery@duke-energy.com
Larisa.vaysman@duke-energy.com
kmcmurray@fbtlaw.com
Paul@carpenterlipps.com
bojko@carpenterlipps.com

Attorney Examiner:

Megan.addison@puco.ohio.gov

Summary: Reply Reply Brief by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Healey, Christopher