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

POST-HEARING REPLY BRIEF OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION.

Duke Energy Ohio, Inc. (Duke) continues to ignore prior decisions issued by the Public Utilities Commission of Ohio (Commission) authorizing Duke to only recover from customers reasonable and prudently incurred costs in the years 2013, 2014, 2015, 2016, 2017, and 2018 associated with two former manufactured gas plants (MGP) sites that are no longer in service, no longer used and useful, and do not benefit customers.[1] Instead, Duke is seeking to re-litigate issues and recover from Ohio customers costs associated with environmental investigation and remediation in Kentucky and the Ohio River, as well as costs associated with property purchased by Duke and other areas beyond the footprint of the two MGP sites specifically delineated and authorized by the Commission for recovery of prudently incurred costs. Duke also has refused to

[1] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, et al., Opinion and Order at 72-73 (November 13, 2013) (Rate Case Order), aff'd, Slip Opinion No. 2017-Ohio-5536 (June 29, 2017).

refund to customers the net insurance proceeds that it has received to date, which total more than $50 million, even though the Commission previously and unambiguously directed Duke to do so. The Commission should reject Duke's attempts to expand and re-litigate the prior Commission rulings and should order Duke to refund immediately to customers insurance proceeds that it has received net only of the costs incurred to recover those proceeds.

In addition to OMAEG, initial briefs were filed by Duke, the Kroger Company (Kroger), the Office of the Ohio Consumers' Counsel (OCC), and the Staff of the Commission (Staff) on January 17, 2020.[2] OMAEG hereby files its reply brief, which addresses a number of factual and legal inaccuracies in Duke's initial brief, including: 1) Duke's continued attempts to ignore the doctrines of res judicata and collateral estoppel that prohibit Duke from recovering remediation costs incurred for work performed beyond the MGP sites (i.e., in the Ohio River, Kentucky, and the "Area West of the West" (WOW) parcel); 2) Duke's failure to prove that changed circumstances exist that would justify a departure from past precedent; 3) Duke's inability to establish that its remediation costs were prudently incurred and/or occurred on properties that Duke has used to provide public utility service as required by R.C. 4909.15(A)(4) as directed by the Commission; and 4) Duke's continued utter disregard for the Commission's mandate that Duke credit back to customers approximately $50 million in net insurance proceeds recovered for the remediation efforts of the MGP sites. That mandate is clear and unequivocal. Yet, Duke continues to hold hostage those millions of dollars in an account, without interest, in direct violation of the Commission's Rate Case Order.

[2] See Post-Hearing Brief of Duke Energy Ohio, Inc. (January 17, 2020) (Duke Brief); Post-Hearing Brief of The Kroger Co. (January 17, 2020) (Kroger Brief); Initial Post-Hearing Brief of The Officer of the Ohio Consumers' Counsel (January 17, 2020) (OCC Brief); Initial Brief submitted on behalf of The Public Utilities Commission of Ohio (January 17, 2020) (Staff Brief).

In short, Duke's Brief makes it clear that Duke's attempts to recover costs for remediation efforts have gone way beyond the scope authorized by the Commission in the Rate Case Order. As such, OMAEG agrees with Staff, OCC, and Kroger that, at a minimum, the Commission should disallow Duke's recovery of $23,234,412 of the requested $45,856,043.[3] OMAEG further agrees with Staff, OCC, and Kroger that certain of Duke's costs should be disallowed as unreasonable, imprudent, and unlawful under R.C. 4909.15(A)(4).[4] Finally, because Duke already has collected approximately $55.5 million from customers for environmental remediation of the MGP sites from 2008-2012,[5] OMAEG agrees with the recommendations of Staff, OCC, and Kroger that the insurance proceeds recovered by Duke, net only of collection costs, totaling $50,529,236 should be refunded immediately to customers.[6] Those proceeds should not be held until Duke's environmental remediation efforts are concluded. Nor should they be allocated to Duke or its shareholders in the novel, unsupported manner Duke seeks, particularly when the Rate Case Order was clear and unequivocal. And, Duke should not be allowed to collect any additional costs from customers through the MGP Rider, if any are authorized in this proceeding, until the full amount of the net insurance proceeds has been refunded.

Accordingly, the Commission should adopt the recommendations of Staff, OMAEG, OCC, and Kroger, enforce the mandates of the Rate Case Order, and reject Duke's efforts to recover an additional $46 million for remediation costs from 2013 through 2018, with an open-ended and indefinite deferral period beyond 2019.

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[3] Staff Brief at 1-9; OCC Brief at 1, 14-16; Kroger Brief at 7-15.

[4] Staff Brief at 1-9; OCC Brief at 12-14, 22-32; Kroger Brief at 11-14.

[5] Rate Case Order at 58-60, 63-65, 6, 71-79; see also Tr. Vol. III at 720 (Lawler) (Duke has charged customers the entire $55.5 million authorized in the Rate Case Order and MGP Rider has been reset to zero).

[6] Staff Brief at 9-10; OCC Brief at 8-10; Kroger Brief at 15-18.

II. ARGUMENT.

A. Contrary to Duke's Assertions, the Rate Case Order Expressly and Unambiguously Limited Cost Recovery to the Geographic Bounds of the MGP Sites.

The Rate Case Order was clear: Duke's cost recovery from customers for environmental remediation of the MGP sites is limited to the geographic bounds of the East End and West End MGP sites themselves—not the areas surrounding them.[7] Indeed, the Commission could not have been any clearer in its ruling as to the geographic scope of the authorized deferral of costs for 2013-2018. It repeatedly held:

> Such deferral authority should be *limited to* the East and West End sites and for a period finite as set forth below.
> * * * *
> Such deferral authority is *limited to* the East and West End sites and to a period of 10 years . . .[8]

Duke wants the Commission to ignore the "limited to" language in the Rate Case Order and simply argues that OMAEG "makes unwarranted leaps" in arguing that the Rate Case Order precludes the recovery of remediation costs incurred outside of the East and West End sites.[9]

In fact, it is Duke, not OMAEG, that is making "unwarranted leaps" and attempting to have the Commission read "*limited* to the East and West End sites" as not being limited at all to the East and West End sites. As OCC correctly points out, if the Commission had not intended such a limitation, it would not have included the limitation in the Rate Case Order.[10] Nonetheless, Duke wants that Commission-mandated limitation to be expanded to include the Ohio River, portions of

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[7] Rate Case Order at 71, 74.

[8] Id. (emphasis added).

[9] Duke Brief at 30.

[10] OCC Brief at 11.

Kentucky, and the Purchased Parcel, including the WOW parcel.[11] In essence, Duke takes the position that it should be entitled to cost recovery from Ohio customers for any remediation at any location.[12]

Duke's position, however, must be rejected under the doctrines of res judicata and collateral estoppel. While Duke limits its discussion of this issue to the doctrine of collateral estoppel,[13] under either doctrine, Duke's attempt to expand the Rate Case Order is prohibited. Specifically, res judicata and collateral estoppel, also known as claim preclusion or issue preclusion, applies to quasi-judicial administrative proceedings. See *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381, 653 N.E.2d 226; *Girard v. Trumbull Cty. Budget Comm.* (1994), 70 Ohio St.3d 187, 193, 638 N.E.2d 67. An administrative proceeding is quasi-judicial for purposes of res judicata if "'the parties have had an ample opportunity to litigate the issues involved in the proceeding.'" *Set Prods., Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260, 263, 31 OBR 463, 510 N.E.2d 373, quoting *Superior's Brand v. Lindley* (1980), 62 Ohio St.2d 133, 16 O.O.3d 150, 403 N.E.2d 996, syllabus; cf. *State ex rel. Wright v. Ohio Bur. of Motor Vehicles* (1999), 87 Ohio St.3d 184, 186, 718 N.E.2d 908 ("Quasi-judicial authority is the power to hear and determine controversies between the public and individuals that require a hearing resembling a judicial trial").

Here, Commission proceedings are without a doubt "quasi-judicial" in nature, and the claim and issue of geographic scope of remediation were indeed litigated in the Rate Case. A Commission order on the very same issue, involving the very same claim and parties, in a prior rate case cannot be disregarded or re-written after the fact simply because Duke does not agree

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[11] Duke Brief at 24-53.

[12] Duke Ex. 14 (Bachand Supp. Testimony) at 11.

[13] See Duke Brief at fn. 141.

with the Commission order. Duke is obligated to comply with the scope and mandates of the Rate Case Order.

While Duke attempts to argue that it is entitled to cost recovery for any and all remediation wherever located because the Rate Case Order found that the remediation costs were a cost of providing utility service,[14] what the Commission allowed was much more limited in geographic scope. Indeed, the language in the Rate Case Order that Duke relies upon actually makes it clear that the cost recovery was limited to remediation costs "incurred *on the East and West End sites*."[15] Not near or adjacent to the East and West End sites, but rather "on" those sites. This ruling is consistent with the Commission's clear ruling that "[s]uch deferral authority should be *limited to* the East and West End sites . . ."[16] Clearly, the claim and issue of the geographic scope of the deferral authority for the remediation costs was considered and decided by the Commission in the Rate Case Order.

Finally, in addition to being directly contrary to the express terms of the Rate Case Order, Duke's position also would lead to a result where Duke has a blank check from customers with no concrete limitation of cost recovery in time or geographic scope. As a matter of public policy, Duke cannot be allowed to expand the geographic bounds on ratepayer-funded recovery of its remediation obligations in violation of the Rate Case Order indefinitely simply because, for example, it finds the mere appearance of potential CERCLA-covered impacts, it is given new permission to enter and remediate a property it does not own, or it purchases more property near the sites.[17] As the Commission recognized in the Rate Case Order, Duke and its shareholders

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[14] Duke Brief at 25.

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

[16] Id. at 71, 74.

[17] See, e.g., Staff Ex. 2 (July 2019 Report) at 8 (Staff Note that "[c]osts for cleanup in the future appear to be escalating, and they appear to be focused on areas that Staff believes were not permitted by the original Rate Case Order.").

"should bear some of the responsibility for the remediation costs."[18] To allow Duke to continue to expand and extend the cost recovery for the East End and West End sites would allow Duke and its shareholders to continue to avoid bearing that responsibility. Enough is enough.

Significantly, nowhere in its Brief does Duke argue that there have been changed circumstances warranting that the doctrines of res judicata and collateral estoppel should not apply here.[19] Duke cannot. Courts and agencies will not generally deviate from these doctrines unless special circumstances warrant an exception to the normal rules of preclusion. *Montana v. United States*, 440 U.S. 147, 155, 99 S. Ct. 970, 975, 59 L. Ed. 2d 210 (1979). Issue preclusion bars re-litigation of issues "unless other circumstances justify according [the litigant] an opportunity to re-litigate that issue." *State v. Williams*, 1996-Ohio-408, 76 Ohio St. 3d 290, 296, 667 N.E.2d 932, 936. No such circumstances exist here. In the Rate Case Order, the Commission considered and decided the claims and issues herein related to the cost recovery of remediation efforts beyond the East and West End MGP sites. There has been no change in circumstances.

As a last gasp attempt to avoid the doctrines of res judicata and collateral estoppel, Duke incredulously asserts in its Brief that the Commission did not "'expressly' limit" cost recovery to the East and West End sites nor was that what was "'meant' by the Commission."[20] Frankly, it is beyond the pale for Duke to claim that the Commission did not so hold: "Such deferral authority should be *limited to* the East and West End sites and for a period finite as set forth below."[21] Contrary to Duke's implications, this is not language that OMAEG simply is paraphrasing or summarizing. This quotation is directly from the findings of the Commission. As Staff

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[18] Rate Case Order at 59; see also id., at 72.

[19] See, e.g., Duke Brief.

[20] Duke Brief at 34.

[21] Rate Case Order at 71.

recognized, it is unknown just how the Commission could have been more clear.[22] And, as OCC correctly points out, if the Commission did not intend to limit cost recovery to the East and West End sites, the Commission is more than capable enough to simply state that.[23] Properties beyond those sites were at issue in the Rate Case Order and rejected by the Commission. Simply put, Duke cannot avoid the impacts and limitations of the Rate Case Order simply by trying to rewrite or re-characterize the Rate Case Order or put its own spin on what the Commission "meant."

Accordingly, the Commission should enforce the Rate Case Order and find that the doctrines of collateral estoppel and res judicata prohibit Duke from receiving an open-ended and indefinite right to cost recovery for any and all MGP remediation no matter that location.

1. The Rate Case Order Precludes Cost Recovery for any Remediation of the Purchased Parcel, Including the WOW Parcel, the Ohio River, and the Commonwealth of Kentucky.

OMAEG agrees with the recommendations of Staff, OCC, and Kroger regarding the disallowance of the remediation costs incurred on the Purchased Parcel, including the WOW parcel, the Ohio River, and portions of Kentucky.[24] Specifically, as Staff witness Nicci Crocker attested, Staff acted consistently with the Rate Case Order and properly disallowed costs attributable to off-site investigation and remediation. Ms. Crocker testified that only "remediation activities that take place and are deemed prudent within the East End site (consisting only of the eastern parcel, the western parcel, and the central parcel) and West End site would be acceptable for recovery."[25] In accordance with the Rate Case Order, Staff concluded that investigation and

[22] Staff Brief at 2.

[23] OCC Brief at 11.

[24] Staff Brief at 2-4; OCC Brief at 10-17, 33; Kroger Brief at 7-14.

[25] See Staff Ex. 8 (Crocker Testimony) at 9.

remediation efforts "outside these property lines would not be acceptable."[26] During the six years of annual investigations, Staff reviewed invoices related to work taking place in the WOW parcel and in the Ohio River for both the East and West End sites, "which are the basis for most disallowances."[27] OMAEG supports and agrees with Staff's reasonable attempts to segregate costs that Duke failed to do.[28] While Duke states that it did not segregate costs because it was not ordered to do so by the Commission,[29] Duke knew or should have known from the Rate Case Order that it was not authorized to seek cost recovery for remediation beyond the East and West End sites in the first place. Duke's failure to segregate costs simply cannot be rewarded, and its subsequent attempt to tie costs for the Purchased Parcel and the Ohio River to the East and West End sites after the fact only highlights the lack of prudency with regard to Duke's segregation of costs.[30] In short, Duke was ordered to stay within the two sites in its remediation efforts, and any efforts to obfuscate remediation and investigation beyond those sites is improper.

With respect to the Purchased Parcel, including the WOW parcel, Duke continues to assert that the geographic location of that Parcel was not considered by the Commission in denying cost recovery for that parcel in the Rate Case Order.[31] Disconcertingly, Duke goes so far as to say that there is no geographic limitation on recovery at all in the Rate Case Order.[32] Duke, however, is wrong. First, the Commission expressly denied the recovery of any "costs *associated* with the

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[26] Id.

[27] Staff Ex. 8 (Crocker Testimony) at 22.

[28] See Staff Brief at 4-8.

[29] Duke Brief at 51.

[30] See Staff Brief at 4-8; OCC Brief at 21-22.

[31] Duke Brief at 33-35.

[32] Duke Brief at 26.

purchased parcel."[33] On that same page, the Commission held that it was unwilling to consider the request for recovery of costs related to that property because Duke failed to establish that the Purchased Parcel had provided, "either in the past or in the present, utility services that caused the statutorily mandated environmental remediation."[34] The Commission went on to conclude that "the requested $2,331,580 associated with the purchase parcel on the East End site should not be included in the amount of costs to be recovered through Rider MGP."[35] Simply stated, the Commission disallowed costs "associated" with the Purchased Parcel. It did not limit it to the purchase price premium for the parcel.[36]

Similarly, with respect to the Ohio River and Kentucky, Duke witness Bednarcik admitted that she did not consider the river to be part of the East and West End MGP sites.[37] And, Duke did not present any evidence that Duke has ever used the river to manufacture gas. Likewise, Duke admitted that some of its costs for which it sought recovery were for work done in Kentucky.[38] This cannot be the obligation of Ohio customers.

2. Because There is No Evidence That Duke or its Predecessors Used the Purchased Parcel, the Ohio River, or Portions of Kentucky to Render Public Utility Service, R.C. 4909.15(A)(4) Prohibits Cost Recovery from Customers.

Even if the issue of the geographic scope of remediation and investigation was re-opened anew in this proceeding (which it should not be), costs relating to the Purchased Parcel, including the WOW parcel, the Ohio River and Kentucky must still be disallowed. R.C. 4909.15(A)(4)

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[33] See Rate Case Order at 60.

[34] Id.

[35] Id.

[36] Rate Case Order at 43.

[37] Tr. Vol. I at 79 (Bednarcik) ("Q. And you would consider the Ohio River to be off-site, correct? A. I would.").

[38] Duke Ex. 7 (Bednarcik 14-375 Testimony) at 10; Tr. Vol. I at 77-78, 136 (Bednarcik); Tr. Vol. II at 297 (Bachand).

provides that customers can be charged only for "[t]he cost to the utility of rendering the public utility service[.]"

Here, there is no evidence that these properties were ever used to render public utility service to Duke or its predecessors' customers.[39] Indeed, the Commission previously held:

> With regard to the purchased parcel located to the west of the western parcel of the East End site, ... Duke **failed to prove, on the record, what, if any, of this purchased parcel was, or ever had been, used for the provision of manufactured gas or utility service for the customers of Duke or its predecessors**. Rather, the record indicates that, while the nine-acre purchased parcel **may have been impacted by the former MGP operations**, only a small portion of the parcel **may have been** associated with the actual MGP property originally owned by Duke and its predecessors. ... [W]e are not willing to entertain Duke's unsubstantiated request for recovery of costs related to property [that] has not been shown on the record in these cases to provide, either in the past or in the present, utility services that caused the statutorily mandated environmental remediation.[40]

Thus, even if the doctrines of res judicata or collateral estoppel are inapplicable, Duke still is not entitled to cost recovery for remediation efforts at the Purchased Parcel, including the WOW parcel, the Ohio River, or portions of Kentucky because those properties were not used to render public utility service as required by R.C. 4909.15(A)(4).

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[39] As set forth above, there is no evidence that the Ohio River, the Commonwealth of Kentucky, or the majority of the Purchased Parcel have ever been "used for the provision of manufactured gas or utility service[.]" As to the WOW parcel, the only purported evidence of MGP operations is the alleged existence of a small portion of an iron tar tank. See Tr. Vol. I at 201 (Bachand) (Duke is not aware of any MGP equipment on the WOW parcel other than the iron tar tank). But, Duke's own evidence shows that the iron tar tank was removed before Duke's predecessors ever owned the property. See Tr. Vol. I at 88, 90.

[40] Rate Case Order at 60.

3. The Presence of CERCLA Liability Does Not Determine Cost Recovery from Customers Under Rider MGP.

Duke attempts to expand the scope of cost recovery from Ohio customers by relying upon language from the Rate Case Order stating that Duke could clean up areas because it had CERCLA liability.[41] While Duke likely has such liability as the successor in interest to MGP operators, the existence of that liability, alone, does not entitle Duke to cost recovery from Ohio customers (its ratepayers) indefinitely in time and geography. Indeed, while Duke likes to tout the Commission's finding in the Rate Case Order that it is "legally obligated" and "these costs are a current cost of doing business," what Duke fails to acknowledge is the very next paragraph in which the Commission limits the recovery notwithstanding these legal obligations:

> While the Commission finds that recovery in this context is permissible under the statute, we conclude that recovery of incurred costs should be limited to a reasonable timeframe commencing with the event that triggered the remediation efforts mandated by CERCLA and ending at a point in time where remediation efforts should reasonably be concluded. We believe that such determination of said timeframe is essential and in the public interest, and will provide certainty that the remediation will be carried out in a responsible and expeditious manner by the Company and its shareholders, so that recovery through Rider MGP will be finite. . . .
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> In addition, we find the intervenors' argument that the shareholders should bear some of the responsibility for the remediation costs persuasive.[42]

Notwithstanding the foregoing, Duke relies heavily upon its CERCLA liability and the Commission's acknowledgment of such liability in the Rate Case Order as support for its claim for cost recovery. However, if anything, the Commission's findings in the Rate Case Order on this issue serve only to further underscore the recommendations of Staff, OMAEG, OCC, and

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[41] Duke Brief at 25.

[42] Rate Case Order at 59.

Kroger: that Duke's cost recovery for remediation efforts is limited in geographic scope and duration.

While Duke may have CERCLA liability, that does not automatically translate into cost recovery. As the Commission recognized in its Rate Case Order, there comes a time when Duke and its shareholders must shoulder the burden of these remediation costs. Now is that time. In fact, after collecting more than $55 million from customers for the MGP remediation efforts, it is now way past time that Duke and its shareholders should bear the burden.

B. Duke Failed to Sustain Its Burden to Demonstrate that the Remediation Costs Were Prudently Incurred.

As set forth in more detail in OMAEG's and OCC's Briefs, Duke did not put on one witness to demonstrate the reasonableness and prudency of the costs it seeks to recover from customers.[43] Duke approached the remediation of the East and West End sites by identifying investigation and remediation areas or "phases." As Duke states, "[a]lternatives were considered for each phase and evaluated based on a number of factors."[44] As set forth, supra, much of the remediation took place on properties where remediation was not authorized, or where ratepayer recovery was barred by res judicata. And, as to the properties where remediation was authorized, such remediation was excessive. Indeed, OCC witness Campbell testified to the unnecessary expenses incurred in Duke's remediation efforts.[45] Dr. Campbell showed, among other things, why solid covers, engineering controls, and institutional controls would have fulfilled Duke's remediation obligations, and that such remediation would have led to costs of only $2.2 million.[46] Dr. Campbell

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[43] OMAEG Brief at 15-16; OCC Brief at 28-30.

[44] Duke Brief at 39.

[45] See OCC Ex. 21 (Campbell Testimony); see also OCC Brief at 22-28.

[46] OCC Ex. 21 (Campbell Testimony) at 5, 12-14.

testified that "Duke consistently failed to use more cost-effective approaches available under the VAP Rules."[47]

In its Brief, Duke tries to attack Dr. Campbell's credibility, but his experience is above reproach. Dr. Campbell has experience with more than 100 clean-up sites.[48] And unlike Duke's witness Fiore, Dr. Campbell has applied the actual VAP rules to the issues at hand, instead of saying, as Mr. Fiore does, you "can't just read the [Ohio VAP] rules" to determine liability.[49] But Duke can and Duke should. If Duke is going to use the Ohio VAP rules to guide the clean-up, Duke must follow those rules. Duke has not demonstrated through Duke witness Fiore or otherwise what other rules would apply or why expanded cost recovery should be authorized. Duke attempts to argue that Dr. Campbell should have considered additional measures and that not engaging those additional measures would be imprudent,[50] but the additional measures Duke is talking about often relate to clean-up in the Ohio River, where clean-up was never authorized in the first place.

Likewise, the fact that Dr. Campbell recommends a variance as opposed to the very costly groundwater remediation that Duke chose to pursue does not violate the VAP rules.[51] While variances may be rare, in light of the reduced costs to Duke (and ultimately ratepayers), pursuing such a variance is not only prudent, but necessary.

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[47] Id. at 15.

[48] Id. at 2.

[49] Tr. Vol. II (Fiore) at 392.

[50] Id. at 46 ("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.")

[51] OCC. Ex. 21 (Campbell Testimony) at 15.

C. Duke's Requested Method Of Allocating Insurance Proceeds Violates the Commission Order, and Thus, is Unreasonable and Unlawful.

As set forth in the Briefs of the Staff, OMAEG, OCC, and Kroger,[52] in the Rate Case Order, the Commission clearly and unequivocally directed Duke to continue pursuing cost recovery from insurance companies and other potentially responsible parties and to reimburse customers the proceeds collected, net only of collection costs:

> The Commission agrees that Duke should continue to use every effort to collect all remediation costs available under its insurance policies, and Duke should continue to pursue recovery of costs from any third parties who may also be statutorily responsible for the remediation of the MGP sites. We find that **any proceeds paid by insurers or third parties 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. In crediting any proceeds back to the ratepayers, the Commission finds that no interest rate should be added to the credit. Finally, we agree that, **to the extent the proceeds collected from insurers and/or third parties exceed the amount recoverable from ratepayers, Duke should be permitted to retain such amount.**[53]

In compliance with the Rate Case Order, Duke found 100 historical general liability policies that potentially covered remediation of MGP impacts, and settled more than 50 claims with historical insurers.[54]

But, that is where Duke's compliance with the Rate Case Order regarding the insurance proceeds issue ceased. Duke has collected approximately $56.2 million in insurance proceeds relating to the remediation of the MGP sites, which netted against the cost to obtain the proceeds

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[52] See Staff Brief at 9-10; OMAEG Brief at 16-17; OCC Brief at 8-10; Kroger Brief at 15-18.

[53] Rate Case Order at 67 (emphasis added).

[54] Duke Brief at 15.

($5,702,751),[55] leaves a net balance of insurance proceeds of $50,529,236.[56] Yet, to date, Duke has ignored the Commission's directive and failed to reimburse any insurance proceeds to customers or net any costs collected from customers against the insurance proceeds recevied. Duke has been holding the majority of these funds for well over a year before the evidentiary hearing commenced on November 18, 2019.[57] Duke witnesses Butler and Lynch testified that Duke has now exhausted all efforts to collect from third parties for the MGP site remediation efforts.[58] Duke has already recovered from insurers or other potentially responsible parties, and it should have begun to immediately offset any costs to be recovered from customers with those proceeds, in compliance with the Rate Case Order.

Here, Duke once again seeks to re-litigate settled issues, stating that the Commission never "'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 . . . were disallowed."[59] This is plainly inaccurate based on the above-quoted Rate Case Order from the Commission. In fact, it is quite clear that the Commission specifically intended to decide "the particulars" of who had the right to insurance proceeds relating to the sites, and that was decided in favor of Duke's customers.

Moreover, to the extent that certain costs are deemed to be imprudent or otherwise disallowed as being beyond the scope of authorization for cost deferral, those imprudent or

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[55] See Tr. Vol. III at 617 (Butler); OCC Ex. 19 (Adkins Testimony) at 22, n.24.

[56] OCC Ex. 19 (Adkins Testimony) at 22, n.24.

[57] Duke Ex. 23 (Butler Supp. Testimony) at 8.

[58] Tr. Vol. III at 617.

[59] Duke Brief at 56.

disallowed costs should not be recouped by Duke through retaining insurance proceeds in violation of the Rate Case Order.

Even if the issue of insurance distribution had not been a litigated, settled issue in the Rate Case Order (which it had), there is no evidence before the Commission that would indicate that the proceeds should go to Duke's shareholders and not to customers. Duke states that the settlements were not restricted to specific property boundaries, but the policies themselves were never introduced into evidence. The evidence that is of record in this case establishes that the entire insurance proceeds, net only of collection costs, must be reimbursed to customers:

(i) customers have already paid more than $55 million for MGP remediation costs pursuant to the Rate Case Order;

(ii) Duke has recovered net insurance proceeds of $50.5 million;

(iii) the net insurance proceeds recovered by Duke do not exceed the amount recoverable from ratepayers; and

(iv) Duke has completed its collection efforts, and thus there are no more collection costs to net against the insurance proceeds.

Nothing in Duke's Brief changes these facts.

As OCC witness Adkins testified, "[i]t is high time that customers benefit from the insurance proceeds that have been collected. And there is no reason for further delay."[60] Accordingly, Duke should not be allowed to collect any additional costs from customers through the MGP Rider, if any are authorized in this proceeding, until the full amount of the net insurance proceeds has been refunded.

[60] OCC Ex. 19 (Adkins Testimony) at 22; see also Tr. Vol. IV at 918 (Crocker) (stating Staff's position that MGP Rider can be used to provide a credit to customers).

III. CONCLUSION.

For the above-stated reasons, the Commission should enforce the mandates of the Rate Case Order and apply the doctrines of res judicata and collateral estoppel, thereby prohibiting Duke from recovering remediation costs incurred for work performed beyond the MGP sites (i.e., the Purchased Parcel, including the WOW parcel, the Ohio River, and portions of Kentucky). Duke has failed to establish, or even assert, that there have been changed circumstances justifying a departure from past precedent. As such, OMAEG joins in the recommendations of Staff, OCC, and Kroger that, at a minimum, the Commission should disallow Duke's recovery of $23,234,412 of the requested $45,856,043. In addition, OMAEG respectfully asserts that the Commission should adopt the recommendations of Staff, OMAEG, OCC, and Kroger that certain of Duke's costs should be disallowed as unreasonable, imprudent, and unlawful under R.C. 4909.15(A)(4).

Finally, OMAEG recommends, along with Staff, OCC, and Kroger, that the Commission require Duke to immediately comply with the mandates of the Rate Case Order and return to customers the $50,529,236 in net insurance proceeds and find that Duke cannot collect any additional costs from customers through the MGP Rider, if any are authorized in this proceeding, until the full amount of the net insurance proceeds has been refunded.

Respectfully submitted,

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Summary: Brief POST-HEARING REPLY BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP
electronically filed by Mr. Shaun P Lyons on behalf of Ohio Manufacturers' Association Energy Group