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 REPLY BRIEF OF DUKE ENERGY OHIO, INC.

February 14, 2020

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I. INTRODUCTION

In their post-hearing briefs,[1] Staff and Intervenors continue to resist the rulings of the Public Utilities Commission of Ohio (Commission), as set forth in the Gas Rate Case[2] and vigorously defended in the Ohio Supreme Court, for the recovery, by Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company), of costs prudently incurred to investigate and remediate the impacts of former manufactured gas plant (MGP) operations at the East End and West End sites.

The Commission has already defined the scope of cost recovery: the Company may recover MGP investigation and remediation costs incurred as "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."[3] And yet, despite the Commission's repeated emphasis on the Company's remediation obligation under the law as the basis for cost recovery, both Staff and Intervenors seek to confine recoverable costs by imposing artificial geographic boundaries and arbitrarily excluding costs for investigation and/or remediation activities performed in certain areas. The Commission's Opinion and Order offers no basis for such geographic limitations, and improperly invoking preclusion doctrines cannot change its substance. Grasping at straws, Intervenors assert an additional grab bag of far-fetched grounds for imposing geographic limitations, none of which survive scrutiny.

The Commission has already defined a standard for prudence in the Gas Rate Case as well. After carefully reviewing and cataloguing every possible dimension of the Company's approach to overseeing, scoping, contracting, and executing the required investigation and remediation

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[1] Initial Brief Submitted on Behalf of the Public Utilities Commission of Ohio (January 17, 2020) (Staff Br.); Initial Post-Hearing Brief by The Office of the Ohio Consumers' Counsel (January 17, 2020) (OCC Br.); Post-Hearing Brief of the Ohio Manufacturers' Association Energy Group (January 17, 2020) (OMAEG Br.); Post-Hearing Brief of the Kroger Co. (January 17, 2020) (Kroger Br.).

[2] *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) (Gas Rate Case).

[3] *Id.*, pp. 58-59.

work, the Commission found the Company's witnesses to be knowledgeable and their approach to be reasonable and prudent. The Commission rejected arguments by the Office of the Ohio Consumers' Counsel (OCC) that the Company failed to sufficiently consider cheaper remedial alternatives. And yet, Intervenors now attack the Company for proceeding consistently with the approach already approved by the Commission, brandishing virtually identical arguments (and the same witness) on previously rejected remedial alternatives and ignoring the fact that those alternatives do ***not*** meet all applicable standards, as admitted by OCC's own witness.

Staff and Intervenors also purport to discern a clear directive in the Gas Rate Case forbidding any allocation of insurance proceeds in the event of disallowances and requiring immediate refund. Intervenors demand an immediate refund of all insurance proceeds, net of legal costs. Staff requests an immediate refund of any amounts the Commission will award in this proceeding, but sides with Intervenors in opposing any allocation of insurance proceeds if the Commission limits the scope of the Company's cost recovery by arbitrarily partitioning the work necessary to address the Company's environmental liabilities. This position ignores that the Company obtained its insurance proceeds in exchange for ***all*** of its environmental claims, regardless of the location of the required remedial and investigative activity. If customers are only required to pay for a portion of the investigation and remediation required to address the complete liability, then fairness alone dictates that they should only receive a corresponding portion of the insurance settlement proceeds meant to compensate the Company for all of the liability.

Finally, two Intervenors submit untimely and procedurally misplaced arguments, asking the Commission to deny the Company's request for extended deferral authority, which is currently pending in a separate, un-consolidated proceeding to which neither of these two Intervenors is party. The Commission should not even entertain these requests. In any event, the Company has established the necessary exigent circumstances to warrant a grant of the requested extension.

II. ARGUMENT

A. The Gas Rate Case Opinion and Order did not impose any geographic limitations on the recovery of MGP investigation and remediation expenses stemming from Duke Energy Ohio's obligation to investigate and remediate MGP impacts associated with the East End site and West End site.

Staff and Intervenors all maintain that the Gas Rate Case Order precludes the Company from recovering any investigation and remediation costs incurred in the Area West of the West Parcel at the East End site (Area West of the West Parcel) or the Ohio River, even if those costs are associated with investigating and remediating MGP impacts.[4] Intervenors interpret the Opinion and Order to preclude recovery of expenses incurred "outside" what they perceive to be "the sites," including costs incurred in the Area West of the West Parcel and the Ohio River.[5] Despite these efforts to define the East End site and West End site based upon arbitrary geographical "footprints," the Gas Rate Case Order does not define or limit the sites to any such footprints (whether these footprints are based on the "original MGP sites" or "current property boundaries" as conflictingly argued by Kroger and OMAEG).[6]

1. The Gas Rate Case Opinion and Order did not limit the recovery of the Company's obligatory MGP investigation and remediation expenses to expenses incurred within any particular property boundaries or in areas previously used to manufacture gas.

Staff and certain Intervenors cite general phrases from the Opinion and Order for the very specific proposition that the Company cannot recover any costs incurred in the Area West of the West Parcel, notwithstanding the fact that (1) a portion of the area has been confirmed to have been part of the original East End site,[7] and (2) the area contains MGP impacts requiring remediation under environmental laws.[8] First, Staff cites the Commission's general conclusion

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[4] Staff Br. 2-4; OCC Br. 10-14; OMAEG Br. 5-8; Kroger Br. 11-12.
[5] OCC BR. 11-12; OMAEG Br. 5-8; Kroger Br. 11-12.
[6] Kroger Br. 11; OMAEG Br. 7.
[7] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 14-15.
[8] *Id.*, p. 13.

that "Duke's request to recover the costs related to the purchased parcel . . . should be denied," to support its conclusion that ***all*** costs associated with the Area West of the West Parcel must be excluded.[9] Likewise, OMAEG and Kroger construe the Commission's deduction of the premium paid for the Purchased Parcel as a blanket exclusion of any "costs associated with the Purchased Parcel" from the Company's total recovery to support the same proposition.[10] The summary statements cited by Staff and Intervenors, however, only describe the outcome: exclusion of the only costs then at issue: the costs to re-acquire land that was formerly part of the East End MGP operations and contiguous property. That outcome does not automatically imply a categorical prohibition on recovery of future environmental investigation and remediation costs. In fact, there would not have been a reasonable basis for such an exclusion, as Company witness Bednarcik testified, "both the northern portion of the West Parcel and the southeastern portion of the Area West of the West Parcel were acquired together in 1928 and thus were part of the East End site during MGP operations."[11]

Second, OCC and other Intervenors cite the Commission's statements that deferral authority is "limited to the East and West End sites" to argue for exclusion of all "offsite" costs.[12] As the Company previously explained, this language was used in general summaries of the Commission's decision to grant additional deferral authority for MGP-related costs and was meant to limit the procedural scope and precedential reach of its grant to the instant sites, as opposed to other MGP sites or other contaminated sites in the Company's service area.[13] The context in which the Commission used the "limited to" language makes clear that it was not intended to dictate a detailed and specific geographic boundary for cost recovery at the East End and West End sites.

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[9] Staff Br. 2-3 (quoting Gas Rate Case, Opinion and Order, p. 73).
[10] OMAEG Br. 13; *see also* Kroger Br. 8.
[11] Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica L. Bednarcik, p. 11.
[12] OCC Br. 11-12; *see also* OMAEG Br. 5-6; Kroger Br. 9.
[13] Duke Energy Ohio Br. 34-35.

Furthermore, such a reading would be inconsistent with the Commission's reliance on the Company's CERCLA liability, which is not bound by such limitations.[14]

OMAEG suggests that the Commission would have been more explicit if it had intended to grant deferral authority for costs of investigating and remediating all MGP impacts (including migrated contaminants).[15] But the fact that the Commission did not use any of the pedantic lists offered by OMAEG as examples to outline the scope of future MGP cost recovery (*e.g.*, "costs associated with the East End and West End sites, plus any contaminated portions of other areas surround[ing] the East End and West End sites, such as a purchased parcel of land") does not mean that the Commission did not authorize a ***category*** of costs that ***included*** all of these items, as required under environmental laws. And, indeed, the Commission did so in the Gas Rate Case, as described in the Company's initial brief,[16] by authorizing the Company to recover prudently incurred costs of complying with its federal and Ohio Voluntary Action Program (VAP) obligations: "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 Company's legal and societal obligation to investigate and remediate potential environmental impacts does not end with parcel boundaries, as witnesses for both the Company and the OCC agreed.[18]

Staff and Intervenors assert that the Gas Rate Case Opinion and Order excludes costs incurred in the Area West of the West Parcel from recovery because the Area West of the West

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[14] Gas Rate Case, Opinion and Order, pp. 58-59, 71; *see also* Duke Energy Ohio Br. 21-27 (discussing Gas Rate Case), 40 (discussing migration of contaminants); Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 11-12 (describing Company's environmental obligations).
[15] OMAEG Br. 6.
[16] Duke Energy Ohio Br. 17-21, 24-26 (discussing and quoting Gas Rate Case, Opinion and Order).
[17] Gas Rate Case, Opinion and Order, p. 71 (emphasis added).
[18] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 11-12 (describing Company's environmental obligations); Hearing Tr., pp. 898-899.

Parcel was "never . . . used to provide service."[19] But this is an incomplete and incorrect portrayal of the Commission's analysis. As the Company explained in its initial brief,[20] the excluded costs were not investigation or remediation costs incurred to address contamination from former MGP operations, but a premium paid to re-acquire the property. Thus, ***only in the context of deciding whether to authorize recovery of property-acquisition costs***, the question of whether the ***property*** itself had been previously used to provide utility service was relevant; the Commission declined to grant a request "for recovery of costs related to ***property***," where such property had not been shown to have provided past or present utility services ***and*** such costs were not for the statutorily required investigation or remediation work.[21] In other words, the Commission would not have even considered the property's past and present use for utility service if the costs in question had stemmed from "statutorily mandated" environmental investigation or remediation, rather than merely been "related to property."

Extending this additional requirement to costs incurred during "statutorily mandated remediation efforts,"[22] would be contrary to the Gas Rate Case, in which the Commission authorized, among other items, the recovery of investigation costs in the Area West of the West Parcel at the East End site.[23,24] And it would also be completely inconsistent with the proceedings in the Gas Rate Case, during which the question of whether MGP operations had been formerly present at the Area West of the West Parcel was not a central point of inquiry, as it surely would

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[19] Staff Br. 3; *see also* OCC Br. 12-14 (making same argument, relying on same language from Opinion and Order); OMAEG Br. 6-7; Kroger Br. 11-12.
[20] Duke Energy Ohio Br. 26-27.
[21] *See* Gas Rate Case, Opinion and Order, p. 60 (emphasis added).
[22] *Id.*
[23] *See* Duke Energy Ohio Br. 27-28 (describing such costs and citing record evidence).
[24] Because the Gas Rate Case Opinion and Order did not limit cost recovery only to areas used to provide utility service in the past, any uncertainty over whether the Company's predecessors actually operated the iron tar tank found in the Area West of the West Parcel, *see* OCC Br. 13-14, is immaterial to the question of whether costs can be recovered.

have been if it was a defining boundary for all future cost recoveries of even prudently incurred investigation and remediation expenses.

Staff and OMAEG also attempt to marshal evidence that the Commission did not view the Area West of the West Parcel and the Ohio River as "part of" the MGP sites, citing out-of-context descriptions of portions of the Purchased Parcel, such as, for instance, "vacant."[25] As the Company explained in its initial brief, a portion of the purchased parcel, known as the Area West of the West Parcel ***and*** a portion of the area currently considered part of the Ohio River are indeed within the historic property boundaries owned by the Company and its predecessors.[26] Second, the Commission articulated a clear standard for recovery of remediation costs: the Company must "substantiate[], 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."[27] Out-of-context site descriptions are irrelevant, and there is no requirement that the Commission specifically mention every possible future application of its standard—the only relevant question is whether the Commission's standard is met.

2. The Gas Rate Case Opinion and Order did not limit cost recovery only to areas currently being used to provide current utility service or "utility plant" areas.

OCC and OMAEG argue that, in the Gas Rate Case, the Commission and Ohio Supreme Court limited MGP cost recovery to investigation and remediation costs incurred in property parcels currently being used to provide utility service and held by the Company as "utility plant."[28] But neither the Commission nor the Supreme Court imposed any such limitation. In this stubborn

[25] OMAEG Br. 7-8; Staff Br. 4.
[26] Duke Energy Ohio Br. 9, 48-49 (collecting record evidence).
[27] Gas Rate Case, Opinion and Order, pp. 58-59 (emphasis added).
[28] OCC Br. 30-32; OMAEG Br. 14.

attempt to resuscitate the "used and useful" standard—which it admits the Commission and Ohio Supreme Court rejected—[29]OCC intentionally omits crucial language from the Opinion and Order, as well as the Ohio Supreme Court's opinion. In arguing that both of the Commission and Supreme Court's holdings hinged on findings that the MGP sites were used for ***current*** utility operations, OCC ignores that this finding was cited in each opinion as only one of several possible avenues to the ultimate conclusion that MGP investigation and remediation costs were recoverable.

First, the Commission cited the ongoing operations at the MGP sites as one of at least three "circumstances surrounding the two MGP sites in question" that justified its rejection of the "used and useful" standard:

> 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 . . . CERCLA. There is also no dispute that Duke had MGP operations, and still has utility operations, on the East and West End sites, ... Moreover, for the East End site, a residential development is planned adjacent to the site, and, for the West End site, construction and relocation of facilities resulting from the Brent Spence Bridge Corridor Project is necessary. ***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 applied to the date certain for rate base costs 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.[30]

OCC cites this mention of present utility service in a list of several circumstances as evidence that present utility service is required for costs to be recovered.[31] OCC's inference is unjustified and unreasonable. Applying that same logic—that every circumstance here is required before costs can be recovered in a given area—the Commission would also have to require findings of both an impending adjacent residential development and new construction project at any "parcel" before costs could be deemed recoverable, even though the so-called "parcels" are merely designations

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[29] OCC Br. 30-31 & n.155.
[30] Gas Rate Case, Opinion and Order, p. 54 (emphasis added).
[31] OCC Br. 31 & n. 158.

by the Company for remediation purposes.[32] That would be a ludicrous standard, and surely the Commission intended no such thing. The question was not ***where*** costs could be recovered, but ***whether*** MGP-related remediation costs could be recovered. The Company's current use of the sites to provide utility service was only one of the "circumstances" leading to the conclusion that such costs were recoverable, but not a limitation on where they could be incurred. This is further supported by the section of the Opinion and Order finding that the Company's investigation and remediation costs are recoverable as a cost of rendering public utility service under R.C. 4909.15(A)(4).[33] The Commission states in this section that "the determinative factor is whether the remediation costs [...] are costs incurred by Duke for rendering utility service,"[34] and finds that the Company supported its claims that "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."[35]

Second, the Ohio Supreme Court did ***not*** hold that the Company's current use of the MGP sites to provide utility service was a requirement for cost recovery ***or*** a geographic limitation on cost recovery. Rather, in a subsequent proposition of law, having already rejected the "used and useful" standard, the Court pointed out that ***appellants*** considered current use to provide utility service a requirement and that the Commission had addressed this question (regardless of whether it needed to):[36]

> ***So far as appellants are concerned***, the commission would have fully satisfied Ohio's ratemaking laws if it had found a relationship between Duke's recovery of MGP-remediation costs and the company's current provision of distribution

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[32] Duke Energy Ohio Exhibit 8, Supplemental Testimony of Jessica Bednarcik, p. 9.
[33] Gas Rate Case, Opinion and Order, pp. 58-59.
[34] *Id.*, p. 58.
[35] *Id.*, pp. 58-59.
[36] *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, ¶ 32 (Gas Rate Case Supreme Court Opinion) (emphasis added).

> service. But the commission did just that. . . . . In short, the commission did exactly what ***appellants say*** that it failed to do. Therefore, this argument lacks merit.

At no point did the Ohio Supreme Court itself opine that this finding was necessary to authorize cost recovery. It merely concluded that—regardless of whether it was necessary (and it was not), the finding was made and therefore there was no possible basis for reversal.

Thus, neither the Commission nor the Supreme Court reached any holding that only costs incurred for investigation or remediation tasks performed on property currently used to render utility service may be recovered. Given that, there is likewise no basis for OCC and OMAEG's contentions that property must be "utility plant" in order for the Company to recover the costs of investigating and remediating potential or actual MGP impacts therein.

3. The doctrines of *res judicata* and collateral estoppel do not limit the Company's recovery to expenses incurred within any particular property boundaries.

OMAEG and Kroger attempt to add weight to their interpretations of the Gas Rate Case Opinion and Order as limiting cost recovery in the ways described above by arguing that collateral estoppel and/or *res judicata* the Commission to adopt their interpretations.[37] However, the doctrine of collateral estoppel does nothing to salvage Intervenors' fundamental misinterpretations of the Opinion and Order.

As the Company explained in its initial brief, preclusion principles, if applicable at all, would bar ***Staff and Intervenors*** from re-litigating the Commission's resolution in the Gas Rate Case that the Company can recover costs incurred to resolve its liability under environmental laws for the impacts of the former MGP operations pursuant to R.C. 4909.15(A)(4).[38] The Commission has already allowed recovery of investigation costs in the Area West of the West Parcel in the Gas

[37] OMAEG Br. 11-13; Kroger Br. 7-10. Kroger's definition of *res judicata* makes it clear that Kroger is also making a collateral estoppel argument.
[38] Duke Energy Ohio Br. 31-33.

Rate Case.[39] This conclusion is binding on parties to the instant case, whether as precedent or by preclusion principles.

Further, to the extent that OMAEG and Kroger contend that the Commission imposed their desired geographic limitations in the Gas Rate Case—which it did not—it certainly did not do so expressly, which is required for collateral estoppel to apply. As the Company explained in its initial brief, Ohio law only gives a decision preclusive effect on a given issue if its determination of the issues was "express[]"; it cannot be merely "what [was] meant."[40] As explained in Section II.A.1, the geographic limitations that OMAEG and Kroger seek to impose were neither expressly stated nor "meant" by the Commission in the Gas Rate Case. Although OMAEG and Kroger both argue that the Commission did "expressly" impose such limitations, all of their arguments are based on strained or out-of-context readings of cherrypicked phrases from the Opinion and Order, which do not even implicitly support their desired outcome. Indeed, such limitations would have been inconsistent with the Commission's approval of the recovery of, among other costs, certain investigation costs incurred in the Area West of the West Parcel.[41]

The only new *res judicata*/collateral estoppel argument OMAEG and Kroger make that they and/or others did not make elsewhere in interpreting the Opinion and Order, is that the Commission specifically rejected the proposition that the Company is responsible for the remediation of all MGP impacts from the former MGP operations because it recited the Company's interpretation of its remediation obligation in a rote summary of the parties' arguments.[42] But there is no express statement by the Commission to such effect; the fact that the Commission denied recovery of costs unrelated to investigating or remediating the Company's

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[39] *See id.* at 27-28 (describing such costs and citing record).
[40] *Id.* at 34 (quoting *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)).
[41] *See* Duke Energy Ohio Br. 27-28 (describing costs and citing record).
[42] OMAEG Br. 13 & n.35; Kroger Br. 9 & n.26.

CERCLA liability cannot be construed as adopting (much less expressly adopting) the opposite of every argument in the Company's briefs. In this instance, the Commission noted, in its rote summary of all arguments, the Company's position that it was entitled to recover all remediation costs.[43] But the costs in question and pointed to by Intervenors were ***not*** remediation costs; they were costs related exclusively to ***purchasing*** real estate. The most logical conclusion is that the Commission simply found the Company's argument about the recoverability of remediation costs to be inapplicable to the "purchase premium." And certainly, the Commission made no express statement disqualifying any category of investigation or remediation costs from recovery. Thus, there is no basis to find the Company's interpretation of the Gas Rate Case Opinion and Order now precluded.

B. There is no other basis in Ohio laws or regulations for limiting the Company's cost recovery geographically.

1. The Commission may and should permit cost recovery for any MGP investigation and remediation work performed on the Kentucky side of the Ohio River.

While OCC merely states that Ohio customers "should not be paying" MGP investigation and remediation costs incurred in Kentucky (presumably as a matter of policy),[44] OMAEG boldly asserts that the Commission lacks statutory authority to "authorize the recovery of remediation costs incurred outside the State of Ohio,"[45] and Kroger echoes this jurisdictional argument.[46] OCC's policy argument carries no weight in the face of Commission precedent; as explained in Sections II.A and II.C, the Commission has already authorized cost recovery for all obligatory investigation and remediation of impacts of the former MGP operations and the Company has met its burden to demonstrate the prudence of its expenditures. And the other Intervenors'

[43] Gas Rate Case, Opinion and Order, p. 43.
[44] OCC Br. 33.
[45] OMAEG Br. 9.
[46] Kroger Br. 12-13.

jurisdictional argument is simply incorrect; the Commission has statutory authority under R.C. Chapter 4909 to authorize cost recovery for a utility's costs incurred to serve Ohio customers, regardless of where the costs were incurred.

Before addressing Intervenors' errors of legal reasoning, it must also be understood that they exaggerate the extent to which any work was performed "in Kentucky." The sediment sampling work to date has been mostly located in areas that were formerly on land that was part of the original site boundaries that are now submerged due to the flooding of the Ohio River during the construction of the Markland dam.[47] When Company witness Bednarcik was the project manager for the sites, a small number of borings during the preliminary sediment investigation were located on the Kentucky side of the Ohio River.[48] But even then, the investigation was looking for impacts caused by ***Ohio*** MGP operations. The fact that the investigation extended into areas that cross the current border between Ohio and Kentucky is a red herring, as the Company's liability is defined by the impacts of Duke Energy ***Ohio***'s MGP operations at the East End and West End sites, which exclusively served Ohio customers. None of the costs at issue are related to MGP operations in Kentucky or for service to customers located in Kentucky.

OMAEG's interpretation of R.C. 4905.05 contradicts the Ohio Supreme Court. The Court has clarified explicitly that the geographic limitations set forth in R.C. 4905.05 do ***not*** govern the fixation of rates:

> R. C. Chapter 4905 is concerned with the general powers of the commission, ***whereas R. C. Chapter 4909 regulates the fixation of rates***. R. C. 4909.04, 4909.05 and 4909.18 all mention property "used and useful" by utilities in rendering service and do not limit such property to the boundaries of the state. ***The test then under the statutes regulating fixation of rates*** is whether the property is "used and useful" in rendering the utility's service and ***not the location of the property***.[49]

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[47] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, pp. 16-17 (describing shift of water line over time) and Attachment TLB-1, p. 4.
[48] Hearing Tr., pp. 135-136.
[49] *Cleveland Electric Illuminating Co. v. Public Utilities Comm'n*, 42 Ohio St. 2d 403, 421-22, 330 N.E.2d 1 (1975) (emphasis added).

OMAEG attempts to construe this as a narrow "exception[]" for used and useful property,[50] but the Supreme Court's reasoning demonstrates that this principle applies to all of Chapter 4909. Here, the Commission has already determined that the applicable statute is R.C. 4909.15(A)(4), which, like the sections listed by the Court, contains no geographic limitations. Hence "[t]he test . . . under the statutes regulating fixation of rates"[51] here is whether the cost is a "cost to the utility of rendering the public utility service,"[52] and not the location of the cost.

The Commission cases cited by OMAEG establish only the irrelevant proposition that the Commission does not authorize cost recovery for costs of serving Kentucky ***customers***. This principle is irrelevant here, where the Commission authorized the recovery of investigation and remediation costs resulting from former MGP operations ***used to serve Ohio customers***. Where the Commission excluded hotel expenses in Kentucky, it was not out of concern for where the work was performed, but specifically out of concern that the Company had not sufficiently demonstrated that the hotel expenses were incurred entirely "for the benefit of Duke Energy Ohio's customers," as opposed to being incurred at least partially for Kentucky customers.[53] The former MGP operations driving the need for remediation in this case served ***Ohio*** customers only. Indeed, in the case cited by OMAEG, Staff specifically noted that "Duke's facilities are located in the Greater Cincinnati metropolitan area and . . . this area encompasses Northern Kentucky for business purposes,"[54] indicating that there was no problem with recovering expenses incurred in Kentucky ***if*** for service of Ohio customers. The second case OMAEG cites involves the Commission's refusal to take jurisdiction over "the provision of telephone service to the

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[50] OMAEG Br. 9-10.
[51] *Cleveland Electric*, 42 Ohio St. 2d at 422.
[52] R.C. 4909.15(A)(4).
[53] *See In the Matter of the Application of Duke Energy Ohio, Inc's Distribution Storm Rider.*, Case No. 18-282-EL-RDR, Staff Reply Comments, p.1 (November 28, 2018); *see also id.*, Finding and Order, pp. 2-3 (February 20, 2019).
[54] *Id.*

Covington, Kentucky area."[55] Neither of these cases purports to limit the Commission's jurisdiction to authorize the recovery of costs that the Commission has determined to be costs of rendering ***Ohio*** public utility service to ***Ohio*** customers under R.C. 4909.15(A)(4), as is the case here.

Moreover, Ohio customers have historically paid for utility facilities located within other states, when such facilities are or were used to provide service to Ohio customers.[56] For instance, Duke Energy Ohio owns substantial transmission facilities that are located in Northern Kentucky that are instrumental in providing service for Ohio customers. Indeed, Ohio customers pay a significant portion of the costs of operating these facilities through the Base Transmission Rider (Rider BTR).[57] Likewise, until 2014, the Dayton Power and Light Company (DP&L) owned a 31 percent interest in the East Bend Generating Station, which is located in Rabbit Hash, Kentucky. For nearly two decades prior to deregulation in Ohio, and indeed for many years thereafter, through fuel and rate stabilization charges, Ohio customers were paying for the costs of the East Bend Station, located in Kentucky, which, until 2006, was partially owned by Duke Energy Ohio,[58] and through 2014, was partially owned by DP&L. That the Commission allowed recovery from Ohio customers of costs related to assets owned by Ohio electric utilities, but located in Kentucky, directly refutes OMAEG's argument.

For all of the reasons above, utilities are fully entitled to recover costs incurred for utility service to Ohio customers, even if those costs are incurred outside of Ohio.

2. In order to meet the Company's requirements under environmental laws, prudent investigation and remediation of MGP impacts requires

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[55] *In the Matter of the Petition of the Blanchester Comm. for Extended Area Serv.*, No. 80-423-TP-PEX, Entry, p. 1 (May 7, 1980).

[56] *See FERC Form No. 1 of Duke Energy Ohio, Inc.*, FERC Accession No. 20190415-8040, pp. 422-426 (April 12, 2019) (listing various Kentucky facilities).

[57] *See In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, Opinion and Order, p. 35 (December 19, 2018) (referring to Rider BTR).

[58] In 2006, Duke Energy Ohio transferred its interest in East Bend to Duke Energy Kentucky. In 2014, DPL completed its sale of its interest in East Bend to Duke Energy Kentucky.

investigation of the Ohio River and remediation of any MGP pollutants found.

OMAEG asks the Commission to exclude any costs incurred to investigate and remediate the Ohio River because (1) there is insufficient evidence linking MGP contaminants in the Ohio River to the former MGP operations at the East End and West End sites (Kroger echoes this argument);[59] and (2) the Ohio River is a "navigable river," subject to federal jurisdiction for certain purposes.[60] Neither argument offers a basis for such an exclusion.

a. The Company has sufficiently demonstrated that Ohio River investigation costs were prudently incurred in the course of fulfilling its legal environmental obligations, as recognized in the Gas Rate Case.

Both OMAEG and Kroger cite to the same hearing testimony of Company witness Bachand for the proposition that "evidence of tar in the Ohio River is not conclusive of MGP impacts," and claim that this is a reason to bar the Company's recovery of costs incurred related to the Ohio River.[61] But they overlook a key point: the question of whether the former MGP operations did, in fact, contaminate the Ohio River is not relevant to this case, as no Ohio River ***remediation*** costs have been submitted for recovery. The proper question is whether the costs the Company seeks to recover for ***investigation*** of the Ohio River were prudently incurred costs in the course of fulfilling the Company's legal obligation to investigate and remediate (where necessary) impacts from the former MGP operations. As the record here demonstrates, they were.

The Company is required to investigate the Ohio River, regardless of what ultimately turns out to be the source of the tar, or even if no MGP impacts are ultimately found in the Ohio River. Mr. Bachand explained that only "[i]f the results of the required investigations demonstrate that remediation is necessary," the Company "will need to address these impacts."[62] While the

[59] OMAEG Br. 11 (asking to disallow remediation costs); Kroger Br. 13-14 (asking to disallow both investigation and remediation).
[60] *Id.* at 10.
[61] *Id.* at 11; *see also* Kroger Br. 13 (similar wording).
[62] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 13.

Company anticipates the connection between MGP operations and any Ohio River contaminants will be relevant to assessing whether ***remediation*** is necessary, there is absolutely no requirement to prove such a connection, much less a "conclusive" connection, for recovery of ***investigation*** costs.

The Commission has already held that the Company can recover "environmental ***investigation*** and remediation costs . . . incurred . . . in compliance with Ohio and federal regulations and statutes."[63] Company witness Bachand has explained that, "[u]nder CERCLA and the VAP, the Company is required to evaluate whether the former MGP operations have impacted the Ohio River and whether there is a risk to human health and the environment associated with any such impacts."[64] Thus, the costs of such evaluation, *a.k.a.* investigation costs, are recoverable as they are related to the Company's statutorily mandated remediation efforts at the East End and West End sites and were prudently incurred.

b. The Ohio River's status as navigable river does not affect the Company's cost recovery.

OMAEG suggests that the Ohio River's status as a navigable river ought to somehow preclude or limit cost recovery for investigation and remediation in the river.[65] OMAEG states general propositions: that states may not encroach upon interstate commerce or interfere with the federal Clean Water Act. But OMAEG does not even attempt to apply these to the instant case; *i.e.,* to offer any reason why the Company's investigation work in the Ohio River—or corresponding cost recovery—would impede either interstate commerce or interfere with the Clean Water Act. Nor does OMAEG attempt to explain how interference with interstate commerce or the Clean Water Act would be a basis to reject recovery of costs to investigate the Ohio River, as

[63] Gas Rate Case, Opinion and Order, pg. 47 (emphasis added).
[64] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 13.
[65] OMAEG Br. 10.

required under environmental laws. These principles offer no basis for denying cost recovery in this case.

Realizing that it has no basis for constitutional or statutory preemption, OMAEG concedes that "at a minimum, cost recovery for remediation efforts in the Ohio River should be based on reasoned judgment that the cleanup is prudent based upon expert testimony and evidence that the remediation is necessary as a result of MGP impacts from the Ohio sites."[66] No witness has suggested that the Company is permitted, by environmental law, to refrain from investigating whether there are MGP impacts in the Ohio River. Assuming, without deciding, that this is the proper standard, the Company has amply met OMAEG's proposed standard with regard to its Ohio River investigation expenses (the Company has not yet sought recovery of any Ohio River remediation costs), as detailed in its initial brief and elaborated herein.[67]

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.

Although Staff seeks to impose geographic limitations on the Company's MGP investigation and remediation cost recovery, Staff does not dispute the prudence of the costs incurred or their necessity under federal and state laws and regulations. Only Intervenors, as detailed in this section, insist that the Company's approach to investigation and remediation was imprudent. However, the Company's demonstration of prudence in this case has been virtually identical to how it met the same burden in the Gas Rate Case, and the Commission should reach

[66] OMAEG Br. 10.
[67] Duke Energy Ohio Br. 36-43; Section II.B.2.a, *supra*.

the same conclusion—that there is no basis to disqualify any investigation or remediation costs on prudence grounds.

1. The Company's testimony and evidence exceed the burden to demonstrate prudence.

Not only do they challenge the Company's actions in the field, but OCC and OMAEG assert that the Company has failed to meet its burden to demonstrate the costs were prudent because, allegedly, no Company witnesses testified to the prudence of the costs.[68] This allegation is simply false. OCC and OMAEG arrive at this allegation only by attempting to disqualify the pertinent testimony of several Company witnesses on specious semantic grounds. Not only do they fail to cite any authority for what appears to be a prudence standard manufactured from whole cloth, but their approach contradicts the precedent set by the Gas Rate Case.

As detailed in the Company's initial brief, the Company has continued to follow the investigation and remediation approach approved by the Commission in the Gas Rate Case.[69] And, just as in the Gas Rate Case, several Company witnesses testified to the reasonableness and prudency of the MGP investigation and remediation costs the Company seeks to recover:

- For each year, 2013 through 2018, the project manager of the activities at the sites at the time—Jessica Bednarcik for 2013, Todd Bachand for the remaining years—testified explicitly that the Company was continuing to follow the procedures described by Ms. Bednarcik in oral and written testimony in the Gas Rate Case, and that the costs the Company sought to recover for that year were reasonably and prudently incurred.[70] Mr. Bachand explained that his review of invoices for prudency meant "making sure that the costs are accurate and true and are justifiable."[71]

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[68] OCC Br. 28-30; OMAEG Br. 15-16 (stating "Duke did not put on one witness to demonstrate the reasonableness and prudency of the costs." and "Duke has not met its burden to demonstrate that the remediation costs incurred under VAP were justified, let alone just, reasonable, and prudent.").
[69] *See* Duke Energy Ohio Br. 36-38.
[70] Duke Energy Ohio Exhibit 7, Direct Testimony of Jessica Bednarcik (14-375-GA-RDR), p. 12; Duke Energy Ohio Exhibit 9, Direct Testimony of Todd Bachand (15-452-GA-RDR), p. 13; Duke Energy Ohio Exhibit 10, Direct Testimony of Todd Bachand (16-542-GA-RDR), p. 12; Duke Energy Ohio Exhibit 11, Direct Testimony of Todd Bachand (17-596-GA-RDR), p. 13; Duke Energy Ohio Exhibit 12, Direct Testimony of Todd Bachand (18-283-GA-RDR), p. 13; Duke Energy Ohio Exhibit 13, Direct Testimony of Todd Bachand (19-174-GA-RDR), p. 17.
[71] Hearing Tr., p. 293.

- Company witness Shawn Fiore testified that the Company's investigation and remediation activities to date have followed "the same process as was described in the Natural Gas Rate Case"[72] and have been "reasonable and prudent to mitigate site risks to address Duke Energy Ohio's liability and to meet all applicable standards under the VAP."[73]

- Company witness Dan Brown testified that the costs incurred were "reasonable, prudent and necessary" and consistent with industry standards and costs incurred at other sites[74] and consistent with how the Commission defined prudency in the Opinion and Order;[75] and

- Company witness Sarah Lawler testified that the costs the Company seeks to recover were "properly allocated to customer classes" and that their "rate design was properly performed" in accordance with the Gas Rate Case.[76]

As in the Gas Rate Case, the witnesses testifying to the prudence of the costs incurred possessed "in-depth, firsthand knowledge of the MGP sites at issue," and had extensive expertise in the Ohio VAP standards and/or experience in environmental remediation.[77]

OCC suggests that all of this evidence pertaining to prudence be disqualified and disregarded, simply because none of the above witnesses sought to usurp the Commission's role as the ultimate arbiter of the costs that the Company will recover. According to OCC, these witnesses' reluctance to opine on the ultimate legal conclusion of whether customers should pay the costs means the Company failed to meet its burden to demonstrate the prudence of its expenses.[78] OCC cites no authority for its novel position that conclusory testimony on the ultimate legal conclusion of cost recoverability is required to demonstrate prudence for cost recovery purposes. The Gas Rate Case, however, provides an obvious precedent: it is the Commission that must reach a conclusion as to prudence based on the entire record, considering the sum total of all of the expert witnesses and their credibility in their individual areas of expertise.

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[72] Duke Energy Ohio Exhibit 15, Direct Testimony of Shawn Fiore, p. 13.
[73] *Id.*, p. 20.
[74] Duke Energy Ohio Exhibit 16, Direct Testimony of Dan Brown, pp. 37-38.
[75] Hearing Tr., p. 503.
[76] Duke Energy Ohio Exhibit 30, Direct Testimony of Sarah Lawler (19-174-GA-RDR), p. 10.
[77] *See* Gas Rate Case, Opinion and Order, p. 64.
[78] OCC Br. 29-30.

This is exactly what the Commission did in the Gas Rate Case, when it considered whether "the record substantiate[d] that Duke made reasonable and prudent decisions."[79] The Commission examined the record and drew its own conclusion: that the Company did indeed meet its burden. Among other things, the Commission held that the Company was reasonable and prudent in its "utiliz[ation of] the Ohio EPA's VAP," in employing a VAP CP and various consultants, and in its approach to executing the required investigation and remediation: considering remediation alternatives, selecting contractors, managing scope changes, etc.[80] With regard to the prudency of the "level of remediation," the Commission held that the Company's witnesses "provided ample information on the [Company's decision-making] process to support a conclusion on prudency."[81] This same prudency standard has been amply met here.

2. OCC Witness Campbell's suggested remedies do not meet all applicable VAP standards and he woefully underestimates the remediation costs for the MGP sites.

Despite Intervenors' arguments to the contrary, Dr. Campbell's testimony should be disregarded. Just as in the Gas Rate Case, he is far less experienced and knowledgeable than the Company's expert witnesses.[82] OCC and OMAEG defend Dr. Campbell's testimony arguing that the Company should have used cheaper remedies for the MGP impacts at the sites; *i.e.*, institutional and engineering controls.[83] But, Intervenors fail to mention the most important fact about Dr. Campbell's suggested remedies: as Dr. Campbell himself admitted, his proposed soil remedies ***do not meet all applicable VAP standards***.[84] Thus, standing alone, the institutional and engineering controls he touts would not be adequate remedies under the VAP.

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[79] Gas Rate Case, Opinion and Order, p. 64.
[80] *Id.*
[81] *Id.*
[82] Gas Rate Case, Opinion and Order, p. 64.
[83] OCC Br. 22-28; OMAEG Br. 15.
[84] Hearing Tr., pp. 852-854.

Duke Energy Ohio will eventually incorporate institutional and engineering controls at the MGP sites, but it is premature to do so now because, as Company witness Fiore testified, such controls would not meet all applicable standards under the VAP.[85] Other reasons Dr. Campbell's testimony should be disregarded include that Dr. Campbell has no meaningful expertise with regard to the Ohio VAP and associated regulations,[86] has no in-depth firsthand knowledge of the MGP sites,[87] and recommends the same remedies rejected by the Commission in 2013.[88]

Additionally, OCC contends that Duke Energy Ohio is exceeding the VAP standards and spending more money on remediation because it is spending customer dollars.[89] That is not true. Company witness Fiore was asked "[s]o based on your experience, is Duke seeking to remediate either the East End site or West End site to a standard higher than the VAP would require?" He answered: "No. We are seeking to meet . . . all applicable standards."[90]

Excavation and in-situ stabilization (ISS) are typical remediation methods for MGP sites. The U.S. EPA has even required excavation and ISS at the Milwaukee MGP site that Dr. Campbell is involved in.[91] As demonstrated in the testimony and other evidence, Duke Energy Ohio and its consultants did consider costs and a number of other relevant factors in choosing a remedy, as evidenced in the Focused Remedial Alternatives Analysis for both East End and West End[92] and

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[85] Hearing Tr., pp. 444-46.
[86] Gas Rate Case Opinion and Order, p. 64; Hearing Tr., p. 831 (where Campbell testifies that he only became a VAP CP for this case); *see also* Hearing Tr., pp. 835-836, 841, 843, 845, 849 (where Campbell admits he allowed his VAP certification to lapse, did not attend the recent VAP CP training, did not know "voluntary action opinions" was a defined term under the VAP, has never prepared an NFA letter or a CNS, and has not attended any conferences over the last five years on MGP remediation).
[87] Hearing Tr., pp. 829-830 (Campbell states he did not visit the MGP sites since 2012 and did not discuss the sites or his recommendations with Ohio EPA).
[88] Hearing Tr., pp. 852, 857-858.
[89] OCC Br. 23.
[90] Hearing Tr., pp. 447-448.
[91] Hearing Tr. pp. 850-851.
[92] Duke Energy Ohio Exhibit 35, Report on Focused Remedial Alternatives Analysis, East End Gas Works, Cincinnati, Ohio, by Haley & Aldrich, Inc.; Duke Energy Ohio Exhibit 36, Focused Remedial Alternatives; and Duke Energy Ohio Exhibit 37, Focused Remedial Alternatives Analysis for the Phase 3 and Tower Areas by CH2M Hill Engineers, Inc., November 2017.

as discussed in Dr. Campbell's testimony.[93] Dr. Campbell appeared to suggest that the Company could obtain a No Further Action (NFA) letter before meeting all applicable standards, by simply promising to meet all applicable standards "many years into the future."[94] However, even he conceded that the standards would ultimately have to be met.[95] As it did in the Gas Rate Case, the Commission should disregard Dr. Campbell's recommendations, which, by his own admission would not meet all applicable standards under the VAP and, therefore, would not result in a remedy that would resolve the Company's liability under state or federal environmental laws.

3. The Commission has already acknowledged that Duke Energy Ohio's use of the Ohio EPA's VAP to proactively address its environmental liability under state and federal laws for the Ohio MGP sites and move toward achieving a No Further Action letter and/or a Covenant Not to Sue is appropriate.

OMAEG states that Duke Energy Ohio has not obtained a Covenant Not to Sue (CNS) or NFA letter.[96] Then it argues that costs incurred under the VAP for remediating the Ohio MGP sites are not justified because the remediation work "would not preclude additional CERCLA liability" and "entry into a VAP and performance under that VAP fails to demonstrate that ... Duke has not exceeded its obligations under Federal and State law...."[97] However, as the Commission found in the Gas Rate Case, Duke Energy Ohio made reasonable and prudent decisions by acknowledging its liability under state and federal law for the environmental conditions at the MGP sites and using the Ohio EPA's VAP in a proactive manner to address the MGP impacts.[98] It is true that Duke Energy Ohio has ***not yet*** obtained an NFA or a CNS for the sites, as the sites do not ***yet*** meet all applicable standards under the VAP. Both the Company's and OCC's experts

[93] Hearing Tr., pp. 888, 892, 903-904.
[94] Hearing Tr., p. 838.
[95] *Id.*
[96] OMAEG Br. 15.
[97] *Id.* 15-16.
[98] Gas Rate Case, Opinion and Order, p. 64.

agree that to obtain an NFA or CNS, ***all*** standards must be met, not just some.[99] As Company witness Brown testified, the VAP is the primary program Duke Energy Ohio is using to address its environmental liability, but regulations that relate to CERCLA, surface water, and RCRA are all intertwined when dealing with environmental cleanups.[100]

4. The costs of removing soil added by DCI Properties, Inc. were prudently incurred.

OCC argues that soil removal costs for soil that may have been brought onto the Area West of the West Parcel by DCI Properties, Inc. (DCI) when it owned the parcel are not prudently incurred remediation costs.[101] In order to remediate the subsurface impacts in the Area West of the West Parcel, shallower impacted soils were excavated and disposed and deeper soils were solidified. It was not reasonable and likely would not have been less expensive for Duke Energy Ohio to separately excavate and segregate the soils that were brought as fill by DCI from the impacted soils that were excavated and disposed. Excavation, regardless of whether DCI brought soil onto the property or not, would have been necessary to remediate the property, so these soil removal costs are prudently incurred remediation costs.

D. The costs excluded by the Commission at the West End site were not capital costs or "re-remediation" costs, but recoverable MGP investigation and remediation costs.

Staff and OCC continue to defend Staff's recommendations to exclude certain costs incurred at the West End site as "capital costs" rather than remediation costs.[102] However, these exclusions would be erroneous because the costs in question were prudent MGP investigation and/or remediation expenses.

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[99] Hearing Tr., pp. 432, 437-38, 446-47, 852, 854.
[100] Hearing Tr., p. 510.
[101] OCC Br. 34.
[102] *See* 2018 Staff Report, p. 5; 2019 Staff Report, p. 6.

Staff asks the Commission to exclude an indeterminate amount[103] in costs that it attributes to "relocation of an electric substation," and therefore "a capital investment for the electric side of the Company."[104] However, Staff's conclusion is based on a flawed premise: that, if the Brent Spence Bridge were not being replaced, "nothing would need to move."[105] This is incorrect. As Company witness Bachand explained, relocation of the nitrogen tank system, piping and metal stairs were "required in order for Duke Energy Ohio to access the Phase 3 Area" for remediation.[106] Thus, these items had to be relocated, even in the absence of any electric substation relocation. As no party disputes the amount of the costs, they are necessarily recoverable as reasonable and prudently incurred MGP investigation and remediation cost.

Additionally, both Staff and OCC claim that the Company incurred unnecessary costs when it removed "previously solidified soil" from the West End site.[107] Although the installation of new poles led to the disturbance of the previously solidified soil, similar soil disturbance of ***un***contaminated soil would ordinarily not require environmental remediation—the soil would not need to be removed or require any special disposal. It was only due to contamination from the previous MGP operations, that this disturbed soil had to be removed and properly disposed of.[108] Thus, its removal was a prudently incurred cost of MGP investigation and remediation.

E. 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 the actual costs incurred in the Area West of the West Parcel and Ohio River were substantially lower than the amounts determined by Staff.

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[103] Staff identifies the amount to be excluded from 2018 costs as $226,091. 2019 Staff Report, p. 6. But does not identify the amount to be excluded from 2013-2017 costs. *See* 2018 Staff Report, p. 5; Staff Exhibit 8, Prefiled Testimony of Nicci Crocker, pp.8-9, 14.

[104] Staff Br. 9; OCC agrees with Staff that these costs should be excluded, but offers no additional evidence or arguments. *See* OCC Br. 33-34.

[105] *Id.*

[106] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 18; *see also* Hearing Tr., pp. 313-14.

[107] Staff Br. 9; *see also* OCC Br. 33; *see also* 2018 Staff Report, p. 5 (noting the corresponding exclusion recommendation for the "previously solidified soil").

[108] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 18.

Even if Staff and Intervenors were correct in reading the Opinion and Order to limit cost recovery to the "original footprint" of the MGP sites—which they are not—and the Area West of the West Parcel and areas investigated in and along the Ohio River bank and sediments were not part of the "original footprint"—which they were—Staff's recommended exclusion of over half of the MGP investigation and remediation costs incurred by the Company rests on errors of geography and cost allocation. As the Company explained in its initial brief: (1) Staff misconstrued the locations of the actual boundaries of the so-called "original footprint," which included a portion of the Area West of the West Parcel and some territory in what Staff considers to be the Ohio River;[109] and (2) Staff's methodology for cost allocation overstated the total costs Staff perceived to be incurred in the Area West of the West Parcel and Ohio River.[110] In their initial briefs, Staff and OCC attempt to justify Staff's methodology and to challenge the Company's alternative analysis.

1. The Company approach to invoicing was consistent with industry standards, and does not justify over-allocation of costs to the Area West of the West Parcel and Ohio River.

Both Staff and OCC justify any errors in Staff's review as being caused by the Company, because the Company did not segregate the costs incurred in the Area West of the West Parcel and Ohio River.[111] But, until the 2018 Staff Report, the Company was unaware that Staff interpreted the Gas Rate Case Order as categorically excluding costs incurred in the Area West of the West Parcel and the Ohio River from cost recovery under Rider MGP. There was nothing in the Gas Rate Case Opinion and Order requiring the Company to segregate costs. And, moreover, as Company witness Bachand explained, by the time the Company learned of the Staff's interpretation of the Gas Rate Case Order, the investigation and remediation tasks were scoped

[109] Duke Energy Ohio Br. 48-49.
[110] Duke Energy Ohio Br. 49-51.
[111] Staff Br. 5; OCC Br. 14.

and performed site-wide or on more than one parcel to leverage mobilization of the same contractors, as is standard industry practice for this type of work.[112] These tasks and scopes of work were also the basis for the project invoicing.

Staff argues that its allocation would have been easier if the Company did not use "obtuse" language to describe the remediation work in the Area West of the West Parcel[113] and if the Company had separated expenditures for activities associated with the Area West of the West Parcel and the Ohio River.[114] However, the language used was typical for remediation work. For example, Staff indicates that the VAP Phase II Property Assessment and the Phase 2 Area (Area West of the West Parcel) labels for remediation work were difficult to understand.[115] However, "VAP Phase II Property Assessment" is common environmental terminology specifically defined in the Ohio VAP regulations.[116] It reflects that, at the Ohio MGP sites, the remediation has been phased to allow the gas plant to continue operating.[117] At the East End site, there are five phases spread across the Middle Parcel and the Area West of the West Parcel.[118] Because the Area West of the West Parcel remediation came after Phase 1 on the Middle Parcel, it was called Phase 2. This is not obtuse or challenging, especially since Duke Energy Ohio provided Staff and OCC with copies of the final remedial design package that contained the labeled phased remediation locations for the Middle Parcel and Area West of the West Parcel in July 2017,[119] and described them in testimonies.[120] Duke Energy Ohio did not believe any work was conducted outside the

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[112] Duke Energy Ohio Br. 53.
[113] Staff Br. 5.
[114] *Id.*
[115] Staff Br. 5.
[116] Ohio Admin. Code 3745-300-07 regarding Phase II property assessments for the Voluntary Action Program, http://codes.ohio.gov/oac/3745-300-07v1.
[117] Hearing Tr., p. 298 (where Company witness Bachand explains that phases of construction were broken out to allow the gas plant to continue operating).
[118] Hearing Tr., p. 298.
[119] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 22 and Attachment TLB-7.
[120] Duke Energy Ohio Exhibit 12, Direct Testimony of Todd Bachand (18-283-GA-RDR), at 9; Duke Energy Ohio Exhibit 13, Direct Testimony of Todd Bachand (19-174-GA-RDR), p. 10; Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 22.

East End and West End sites and, until Staff issued its 2018 Staff Report in September 2018, the Company had no idea that Staff considered all work performed in the Area West of the West Parcel and the Ohio River to be ineligible for cost recovery as a matter of law and desired a labeling scheme consistent with such a categorization.

Strictly segregating remediation activities and costs by parcel throughout the East End and West End sites would have been impractical and extremely unusual in the remediation industry, and would have significantly increased costs.[121] Duke Energy Ohio was not instructed to segregate costs based on geographic location or parcel by the Commission,[122] nor is that how the project was scoped or implemented per the industry standard.[123] Staff suggests that recording invoices separately for the Area West of the West Parcel and the Ohio River would have been a "simple request."[124] But as Company witness Bachand testified, separating invoices by parcel for investigation and remediation work is not customary or practical in the environmental world because it was not how the work was planned or executed.[125] To attempt to do so late in the process would add more lab costs, more quality control and quality assurance costs, and more internal and external time for Company witness Bachand and Haley & Aldrich to create and track more invoices, which is not prudent.[126] The Company's approach to invoicing and tracking costs, on the other hand, was typical for the industry and for similar remediation sites.[127] And the Company had no reason to do otherwise; it had absolutely no inkling that Staff was contemplating recommending exclusion of any costs based purely on the costs' perceived location until

[121] *See* Duke Energy Ohio Br. 52-53 (quoting Hearing Tr., pp. 225-226).
[122] Hearing Tr., p. 331.
[123] Hearing Tr., pp. 225-226, 291, 297-98.
[124] Staff Br. 5.
[125] Hearing Tr., pp. 226, 291, 297-98.
[126] Hearing Tr., pp. 330-31, 353-354.
[127] Duke Energy Ohio Br. 53.

September 2018, when Staff filed the 2018 Staff Report, covering the preceding five years' worth of MGP activity.[128]

Penalizing the Company for conducting investigation and remediation according to the best judgment of its experts—in whose expertise the Commission had expressed confidence[129]—and in a manner that maximized cost-efficiency would not only be inequitable, but would be at odds with the Commission's endorsement of the Company's approach in the Gas Rate Case. Neither Staff witness Crocker nor OCC witness Adkins identified any specific directive in the Commission's Gas Rate Case Opinion and Order requiring such segregation.[130] OCC attempts to imply that the Company accepted a requirement to segregate costs by "properly exclud[ing]" certain costs associated with the Area West of the West Parcel in 2013 and 2014,[131] but, as the Company explained in its initial brief, this is untrue.[132] Given that the Commission had relied on the Company's environmental liability to assess recoverable costs in the Gas Rate Case, the Company believed this would continue to be the standard.

At times, Staff overlooked available information. For example, Staff recommended a disallowance of over $9 million of $17 million for 2018 costs, largely for work Staff asserts was performed in the Area West of the West Parcel, despite the Company's explanation in a response to a Staff Data Request that "[t]here [were] no active remediation activities conducted in the Area West of the West Parcel requiring construction management/detailed design in 2018" and that

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[128] By the time Staff filed its first post-Gas Rate Case Staff Report (the 2018 Report) evaluating MGP Rider costs, the Company had made five separate annual filings supporting its proposed cost recovery.
[129] Gas Rate Case, Opinion and Order, p. 64.
[130] Hearing Tr., p. 808 (Adkins); Hearing Tr., p. 933 (where Crocker states that she reviewed expenditures to ensure ratepayers were not charged for costs outside the boundaries of the Ohio MPG sites based on the Gas Rate Case, but does not reference a footnote or cite where in the Gas Rate Case).
[131] OCC Br. 15.
[132] *See* Duke Energy Ohio Br. 28-29.

"[s]oils were not excavated from the Area West of the West Parcel in 2018."[133] Company witness Bachand explained that this was not an anomaly, but that "Staff's recommended disallowances in other years appear to be similarly flawed."[134] OCC also attempts to rely on the expertise of both Staff and OCC witness Adkins to bolster the reliability of Staff's analysis. But, by their own admissions, neither Staff witness Crocker nor OCC witness Adkins are experts in environmental remediation.[135]

Given Staff's understandable relative inexperience with typical environmental remediation practices, and insufficient consideration of certain key available information, Staff's recommended exclusions should be given no weight, even if the Commission agrees with Staff's geographic limitations interpretation. If the Commission believes the Gas Rate Case Opinion and Order imposes geographic limitations, it should rely on the Company's more reasonable alternative analysis.

2. Company witness Bachand's alternate cost analysis for the Area West of the West Parcel and the Ohio River is, in general, reasonable and supported because he showed his work using approved invoices and the "errors" discussed by Intervenors were nominal considering the nearly $46-million remediation efforts.

Though Intervenors point out "errors" in Company witness Bachand's thorough retroactive analysis of invoiced costs related to the Area West of the West Parcel and the Ohio River, Mr. Bachand's analysis is generally reasonable when reviewing the timeline of investigation and remediation activities and the invoices in tandem. The scope and breadth of the costs of investigation and remediation of the East End site and the West End site were more than $45 million over six years and Mr. Bachand reviewed tens of thousands of pages of invoices.[136] Exact

[133] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 19. Staff later conceded a minor adjustment for the soil removal in Ms. Crocker's filed testimony. *See* Staff Exhibit 8, Prefiled Testimony of Nicci Crocker, pp. 7-8.
[134] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 19.
[135] Hearing Tr., pp. 736-737, 932, 981.
[136] Hearing Tr., pp. 292, 329.

apportionment of costs after-the-fact would be impossible for a project of this size, magnitude, and complexity, but best efforts were made to calculate a fair allocation, based on the work that was actually performed in the Area West of the West Parcel and the Ohio River and to explain those calculations.

While it may not be exact, the Company's apportionment calculation[137] is, in the main, reasonable and largely accurate. OCC attempts to present a "laundry list of mistakes,"[138] but many of the "mistakes" listed by OCC were not, in fact, mistakes in Mr. Bachand's allocation in Attachment TLB-6. For example:

- OCC states that Company witness Bachand "ignored groundwater monitoring and soil boring costs" in the Area West of the West Parcel.[139] This is not true. Company witness Bachand's allocation lists the site-wide groundwater monitoring for 2014 through 2018, pro-rating the amount based on the two wells located in the Area West of the West Parcel.[140]

- OCC states that Company witness Bachand only included costs of a subsection of the Area West of the West Parcel.[141] As shown in the Property Map figure and explained in Company witness Bachand's testimony, remediation was only performed in the Phase 2 Area, which is located mostly on the Area West of the West Parcel although it extends into the West Parcel.[142] So there would be no other costs incurred in other parts of the Area West of the West Parcel.

- Similarly, OCC states that Company witness Bachand stated during the hearing that soil disposal costs in the Phase 2 Area for 2016 were $83,957, but that, in a discovery response a year earlier and before any Staff Reports were issued, he had stated that 2016 soil disposal costs were $156,845. The amount found in the discovery response was a mistake and the amount provided in the allocation calculation is correct. Only two invoices identified in the discovery response allocation (59301 and 59449) included 2016 soil disposal costs for the Area West of the West Parcel.[143] The other three invoices included in the document production addressed soil disposal costs in the Phase 1 Area; *i.e.*, work solely in the Middle Parcel.

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[137] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, Attachment TLB-6.
[138] OCC Br. 18-19.
[139] OCC Br. 18.
[140] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, Attachment TLB-6.
[141] OCC Br. 18.
[142] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, p. 14 and Attachment TLB-2.
[143] Duke Energy Ohio Exhibit 14, Supplemental Testimony of Todd Bachand, Attachment TLB-6.

Although OCC was able to identify a few errors, including one Rumpke invoice for $61,749 that was missed amongst the tens of thousands of invoices associated with the project, and a $22,397 discrepancy in costs attributed to the Area West of the West Parcel for 2013,[144] these minor oversights not render Mr. Bachand's apportionment calculation "unreliable," particularly when the Company went to great lengths to explain its calculation and the amounts are so miniscule in comparison to the over $45 million at stake here.

If the Commission concludes that the Gas Rate Case Order limits the Company's recovery of statutorily mandated investigation and remediation costs and excludes costs for activities performed in the Area West of the West Parcel and in the Ohio River, the Company's calculation provides a good faith estimate of the costs that can be attributed to these areas.

F. Staff and Intervenors fail to justify immediate distribution of unallocated insurance proceeds.

Intervenors seek the immediate refund of all insurance proceeds, net of litigation costs (net insurance proceeds),[145] while Staff seeks the refund of all amounts recovered by the Company in these proceedings.[146] OCC and OMAEG appear to have abandoned the arguments they asserted at hearing that *res judicata* or collateral estoppel require the immediate refund of all insurance proceeds,[147] although Kroger maintains this argument.[148] But both Intervenors and Staff continue to insist that there can be no allocation in the event of disallowances and that the Company cannot

[144] OCC Br. 19.
[145] OCC Br. 8-10; OMAEG Br. 16-17; Kroger Br. 17-18.
[146] Staff Br. 10 ("[I]nsurance proceeds should be credited against any recoveries authorized in this case.").
[147] Hearing Tr., pp. 572-574. OMAEG and Kroger supported OCC's motion to strike testimony regarding the insurance proceeds based on *res judicata*. Hearing Tr., pp. 574-75.
[148] Kroger Br. 10.

wait until remediation is complete to refund any insurance proceeds. As detailed below, they are mistaken on both points.

Before addressing substantive arguments, it may be helpful to clear up a few preliminary points of confusion. First, the current amount of net insurance proceeds is approximately $50 million,[149] not $55 or $56 million as other parties might believe.[150] No party disputes that the costs of obtaining the insurance proceeds must be deducted from any possible refund, thus only approximately $50 million is even potentially in dispute. Second, contrary to OMAEG's mistaken impression,[151] the Company does not seek to defer the refund because it is waiting for additional insurance proceeds to materialize. As explained below, complying with the Commission's directive to reimburse customers requires the Company only to understand which MGP costs customers will pay, in order to allocate insurance proceeds proportionally. The Company will learn this information only after remediation and cost recoveries are complete.

1. As Staff implicitly acknowledges, the insurance proceeds (or portions thereof) may not be netted against MGP costs recovered in the Gas Rate Case, but only against subsequent costs.

Before addressing the proper allocation and timing of any refund to customers of the insurance proceeds, Intervenors' briefs demonstrate that it is important to clarify a threshold issue: which ratepayer expenditures may be reimbursed via the insurance proceeds. Staff acknowledges that "ratepayers have already paid the full deferral authorized in the [Gas Rate Case]" and therefore asks only for insurance proceeds to "be credited against any recoveries authorized in this case."[152] But Intervenors appear to contend that the Company must use insurance proceeds to reimburse customers for the $55 million in MGP cost recovery awarded in the Gas Rate Case ***in addition to***

[149] Hearing Tr., p. 691
[150] *See* Staff Br. 9 (referring to the Company "obtaining approximately $55 million net of costs"); OMAEG Br. 16 (stating that the Company has "collected approximately $56.2 million in insurance proceeds . . ., net the cost to obtain the proceeds").
[151] OMAEG Br. 17.
[152] Staff Br. 10.

any recoveries authorized in this case.[153] Such a retroactive refund of rates already collected would be contrary to Ohio law and could not have been the Commission's intent in the Gas Rate Case.

Intervenors rely on the Commission's statement in the Gas Rate Case that insurance proceeds "should be used to reimburse the ratepayers,"[154] but this must be placed in the proper context and must be applied in a manner consistent with the Commission's authority. The Commission's directive to use not-yet-existent insurance proceeds to reimburse customers can only apply prospectively.

Although the Commission has the power to invalidate a rate schedule and fix new rates, this ratemaking power is prospective only.[155] Retroactive ratemaking would violate the filed-rate doctrine set forth in R.C. 4905.32 and contravene the Ohio Supreme Court's decision in *Keco Industries v. Cincinnati & Suburban Bell Telephone Company (Keco).*[156] R.C. 4905.32 provides:

> No public utility shall . . . collect a different rate. . . for any service rendered. . . than . . . as specified in its schedule . . . in effect at the time.
>
> No public utility shall refund . . . any rate, rental, toll, or charge so specified, or any part thereof, . . . except such as are specified in such schedule. . . . .[157]

The Commission's approval of the Rider MGP tariff, set at an initial level of $55.5 million, constituted a filed rate, approved by the Commission. It would have been contrary to Ohio law to later order refunds of that filed rate.

As the Court observed in *Keco*, an order of the Commission fixing rates is "on a different footing than the judgment or order of a court of law" and, as such, the common law right of restitution is not applicable.[158] Therefore, the Court concluded that "a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in

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[153] OCC Br. 9-10; OMAEG Br. 17; Kroger Br. 17.
[154] Gas Rate Case, Opinion and Order, p. 67; *see* OCC Br. 9; OMAEG Br. 16; Kroger Br. 15-17.
[155] *See Lucas County Commissioners v. Pub. Utils. Comm'n of Ohio*, 80 Ohio St. 3d 344, 348 (1997).
[156] 166 Ohio St. 254, 141 N.E. 2d 465 (1957).
[157] R.C. 4905.32.
[158] *Keco,* 166 Ohio St. at 259 (quoting and "wholehearted[ly] endors[ing]" trial court judge).

rates."[159] In *Lucas County*, the Court similarly rejected a request for a refund from a previously approved rate on the basis that the Commission was simply unauthorized by statute to order such a thing.[160]

Using the insurance proceeds as an offset to amounts already collected pursuant to the Commission's Opinion and Order in the Gas Rate Case would be retroactive ratemaking. Staff has recognized as much in these proceedings, not only in its Post-Hearing Brief, but also specifically recommending in the 2019 Staff Report that the Company's "recovery of ***ongoing*** MGP costs" (*i.e.*, ***not*** past MGP costs recovered in the Gas Rate Case) be "tied to or netted against insurance proceeds."[161] This position is both logical and further supported by the fact that the Commission's Opinion and Order in the Gas Rate Case created a mechanism for the Company to continue to defer and recover its ongoing prudent and reasonable MGP remediation and investigation costs through Rider MGP as part of an annual Rider true-up proceeding. Furthermore, maintaining consistency with *Keco* will not grant the Company any sort of windfall, as the Company's ultimate post-2013 MGP investigation and remediation costs (already over $45 million) will certainly exceed the amount of insurance proceeds before remediation is complete. For all of these reasons, the Company's insurance proceeds can only be tied to or netted against costs incurred in 2013 and later years.

2. If the Commission finds that only costs incurred in certain parcels are recoverable, then insurance proceeds must be correspondingly allocated, which can only occur after remediation is complete.

As explained in the Company's initial brief, the Company obtained its insurance proceeds by settling ***all*** claims pertaining to environmental investigation and/or remediation associated with the MGP sites, regardless of the location in which such work might have to be performed as

[159] *Id.*
[160] 80 Ohio St. 3d at 347-348.
[161] 2019 Staff Report, p. 6.

required by environmental laws.[162] Staff and Intervenors ignore this crucial point entirely in arguing that the Company must refund all amounts recovered to customers, even if the Company only recovers the costs of work performed (or believed to be performed, *see supra* Section II.E) in certain areas.

Staff purports to quote the Opinion and Order as saying that "[t]he insurance proceeds should not be allocated based on any disallowances."[163] This language ***does not appear anywhere*** in the Gas Rate Case Opinion and Order. The corrections below demonstrate the substantial changes necessary to conform Staff's misquote to the correct language in the Opinion and Order:

> ...any proceeds paid by insurers...for MGP investigation and remediation should be used to reimburse the ratepayers.... ~~[which]~~ any proceeds returned to ratepayers should be net of the costs ~~of litigation and attorney fees~~ to achieve those proceeds, *e.g.*, litigation costs. ~~should be reimbursed to customers. The insurance proceeds should not be allocated based on any disallowances.~~[164]

Among other things, the bracketed "[which]" in Staff's misquote erroneously turned "proceeds returned to ratepayers" into "proceeds paid by insurers," making a limitation on ratepayer refunds (that they be net of litigation costs) sound like a mandate for returning ***all*** net insurance proceeds. Given that Staff's argument against allocation rests on a clear misstatement of the Opinion and Order, Staff's position on allocation should carry no weight.

Although the Intervenors do not misquote the Opinion and Order, they do misinterpret it. The Commission's directives that "any proceeds paid by insurers . . . for MGP investigation and remediation should be used to reimburse the ratepayers," and that the Company could retain insurance proceeds only "to the extent the proceeds. . . exceed the amount recoverable"[165] were surely intended, among other things, to avoid the prospect of a double recovery by the Company

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[162] Duke Energy Ohio Br. 57-60.
[163] Staff Br. 9 (purporting to quote page 67 of the Opinion and Order).
[164] Staff Br. 9; Gas Rate Case, Opinion and Order, p. 67 (underlines reflect insertions and strikeouts reflect deletions necessary to conform Staff's quotation to the Commission's actual Opinion and Order).
[165] Gas Rate Case, Opinion and Order, p. 67.

(from both customers and insurers) for the same remediation efforts. Thus, as explained in the Company's initial brief,[166] this portion of the Opinion and Order implicitly assumed a congruence between the scope of the MGP liability covered by insurers and the scope of the MGP investigation and remediation covered by customers.

The required congruence will ***only*** exist if the Company recovers ***all*** of its prudently incurred MGP investigation and remediation costs from customers. If the customers pay for investigation and remediation of all impacts of the former MGP operations, the Company should be required to reimburse them all net insurance proceeds received in exchange for its MGP-related claims. However, if customers only pay for investigation and remediation of, for instance, certain parcels, then a proper allocation must be made to determine what proportion of the net insurance proceeds should reasonably be associated with those parcels.

If the Commission requires the Company to allocate costs geographically, then it must require it to allocate insurance proceeds geographically as well. Thus, even if the Commission holds—contrary to *Keco*—that the $55 million recovered in the Gas Rate Case counts towards the amounts to be reimbursed to taxpayers, this will not dictate a refund of all the net insurance proceeds, but only a refund of proceeds allocated to the areas in which the Commission authorized cost recovery. It will not be possible to perform this allocation until the essential variables are known: the total costs of the Company's investigation and remediation efforts and the total amounts recovered from customers. Thus, ***unless the Commission authorizes the Company to recover all prudently incurred MGP investigation and remediation costs, without geographic or temporal limitations***, there will be no grounds to order an immediate refund of all the insurance proceeds. If the Commission imposes such limitations, then a refund must await the completion of both work and cost recovery.

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[166] Duke Energy Ohio Br. 57-58.

Kroger argues that the collateral estoppel and *res judicata* require immediate distribution of the insurance proceeds because the Commission "already determined" the issue in the Gas Rate Case.[167] However, this is argument is merely redundant—it depends entirely on Kroger's self-serving reading of the Gas Rate Case Opinion and Order. For the reasons already given in the Company's initial brief and above, neither collateral estoppel nor *res judicata* precludes allocation of the insurance proceeds.[168]

3. Charging the Company carrying costs would violate the Gas Rate Case Opinion and Order, and would be highly inequitable.

OMAEG asks the Commission to contradict its own Opinion and Order in the Gas Rate Case when it argues that the Company should be charged carrying costs for any insurance proceeds that it does not immediately refund.[169] In the Gas Rate Case, the Commission stated outright: "In crediting any proceeds back to the ratepayers, the Commission finds that no interest rate should be added to the credit."[170] Adding carrying costs to any future credits would violate this directive.

Furthermore, OMAEG fundamentally misrepresents the balance of equities by suggesting that the Company is somehow exploiting the passage of time. OMAEG says that the Company "wants to . . . make customers wait" for their refunds while it seeks "to collect money from customers now."[171] But the Company's costs which it seeks to collect "now" were incurred two to seven years ago, and do ***not*** include any carrying costs or interest. Likewise, the Company received no carrying costs for the $55 million of MGP costs recovered in the Gas Rate Case (incurred from 2008 through 2012), even though it did not fully recover these costs until 2019 due to a five-year amortization period.[172] It is the Company here, not customers, that has borne the

[167] Kroger Br. 10.
[168] Duke Energy Ohio Br. 56-57.
[169] OMAEG Br. 17.
[170] Gas Rate Case, Opinion and Order, p. 67.
[171] OMAEG Br. 17.
[172] Gas Rate Case, Opinion and Order, pp. 22-23.

burden of the time value of money, with so many years passing between costs being incurred and being fully recovered. Adding to the Company's financial burden by piling on additional carrying costs associated with the insurance proceeds—in direct contravention of the Gas Rate Case Opinion and Order—would be extremely inequitable.

G. The Company's request for a deferral extension is not part of this proceeding and, in any event, is meritorious.

In Case No. 19-1085-GA-AAM, *et al.*, (Deferral Extension Case) the Company has applied for continued deferral authority, past December 31, 2019, for MGP costs associated with the East End site.[173] This proceeding has ***not*** been consolidated with the instant consolidated cases and thus the Company's application for continued deferral authority was not a subject of the hearing in these consolidated proceedings. Inexplicably, however, Kroger and OMAEG argue that the Company "failed to satisfy its burden of proof at the hearing" to demonstrate exigent circumstances justifying an extension of MGP cost deferral authority past December 31, 2019.[174] Their arguments are both procedurally barred and lacking in merit.

Not only have Kroger and OMAEG completely disregarded that the Company's request for continued deferral authority is pending in a separate proceeding to which neither is party, but their arguments are severely untimely. The procedural schedule in the Deferral Extension Case required all putative intervenors to file motions and initial comments by September 13, 2019, more than four months before Kroger and OMAEG filed their briefs.[175] The deadline for reply comments has likewise long passed.[176] Neither Kroger nor OMAEG bothered to intervene in that

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[173] *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 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).

[174] Kroger Br. 14; *see also* OMAEG Br. 18 ("Duke has failed to demonstrate that any exigent circumstances do in fact exist.").

[175] Deferral Extension Case, Entry, pp. 3-4 (August 13, 2019).

[176] *Id.*, p. 4 (deadline October 2, 2019).

proceeding, much less file comments. They should not be permitted, now, in this separate proceeding, to add their untimely two cents on the matter. The Commission should strike their arguments, or at least disregard them completely.

Even if Kroger and OMAEG had intervened in the Deferral Extension Case and filed timely comments, their conclusory arguments that the Company has "had more than enough time"[177] fail to address any of the specific exigent circumstances raised by the Company in its application and elaborated in its comments.[178] A thorough review of the Company's application and comments will demonstrate that the Company has met its burden of proof for continuing deferral authority associated with the East End site past December 31, 2019.

III. CONCLUSION

For all of the reasons above and in the Company's initial Post-Hearing Brief, 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,[179] 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, be netted only against current and future recoveries, and be allocated proportionally based on the

[177] *See* Kroger Br. 14; *see also* OMAEG Br. 18 ("By [the end of 2019], Duke will have had a reasonable amount of time . . . .").
[178] *See generally* Deferral Extension Case, 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); *id.*, Comments of Duke Energy Ohio, Inc. (August 12, 2019); *id.*, Reply Comments of Duke Energy Ohio, Inc. (October 2, 2019).
[179] 2018 Staff Report, p. 5; 2019 Staff Report, p. 5.

relative responsibility for the costs of the investigation and remediation, as between customers and the Company.

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 14th day of February, 2020.

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