

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates.	)	Case No. 12-1685-GA-AIR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 12-1686-GA-ATA
	)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	)	Case No. 12-1687-GA-ALT
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 12-1688-GA-AAM
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**INITIAL POST HEARING BRIEF OF DUKE ENERGY OHIO, INC.**

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## **I. Introduction**

### **A. Procedural background.**

On July 9, 2012, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) submitted an application for, among other things, an increase in rates for providing natural gas service to customers in southwest Ohio. The following parties were granted intervention in these proceedings: Stand Energy Corporation, Interstate Gas Supply, Inc., the City of Cincinnati, Ohio Partners for Affordable Energy, Wausau Paper Towel & Tissue, LLC,<sup>1</sup> the Office of the Ohio Consumers' Counsel, (OCC), Cincinnati Bell Telephone Company LLC, Greater Cincinnati Health Council, The Kroger Co., Direct Energy Services, LLC and Direct Energy Business, LLC, Ohio Manufacturers' Association, and People Working Cooperatively, Inc. The Staff of the Public Utilities Commission of Ohio (Staff) filed its Staff Report of Investigation on February 4, 2013 (Staff Report). Objections to the Staff Report were filed by Duke Energy Ohio and a number of the intervening parties. Thereafter, Duke Energy Ohio, Staff and the intervening parties met on numerous occasions to discuss and attempt to resolve issues raised in the objections. As a result of those meetings, many of the parties submitted a Stipulation and Recommendation (Stipulation) to the Public Utilities Commission of Ohio (Commission) for its approval on April 2, 2013.<sup>2</sup> The Stipulation resolved all of the rate related elements of the Company's application, with the exception of issues raised by the parties with respect to Duke Energy Ohio's ability to recover, from customers, expenses incurred as a result of environmental remediation of former Manufactured Gas Plants (MGPs) that were owned and operated by the Company's predecessors in name.

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<sup>1</sup> Wausau Paper Towel & Tissue, LLC, withdrew its motion to intervene on August 22, 2012.

<sup>2</sup> No Intervening Party opposed the Stipulation and Recommendation.

In 2009, the Commission authorized the Company to defer costs for environmental remediation of MGP sites.<sup>3</sup> The Commission further directed Duke Energy Ohio to seek such recovery in a base rate case. In its rate application, therefore, the Company submitted a request for recovery of the costs incurred between the accrual date previously approved by the Commission and December 31, 2012 (the end of the test year) for the clean-up activities completed at the MGP sites. Staff and intervening parties to the Stipulation reserved the right in the Stipulation to contest Duke Energy Ohio's entitlement to full recovery of these expenses. A hearing was held on April 29, 30 and May 1 and 2, 2013.

**B. The Stipulation and Recommendation should be adopted by the Commission.**

The Stipulation was supported with the testimony of Staff witness William Ross Willis, OCC witness Beth E. Hixon and Duke Energy Ohio witness William Don Wathen Jr. The Stipulation meets the Commission's requirements in that it is the product of serious bargaining among capable and knowledgeable parties, it does not violate any important regulatory principles or practice, and it benefits the public interest.<sup>4</sup> For the reasons set forth by the parties in their respective testimonies, the Stipulation should be adopted and approved by the Commission.

**C. The Commission should authorize the Company to recover its reasonably incurred costs for MGP remediation, and confirm authorization to continue deferral of ongoing MGP remediation costs.**

As stated above, in its application for rate recovery, Duke Energy Ohio included a request for recovery of expenses for environmental remediation of MGP sites that are presently owned by Duke Energy Ohio and were owned and operated by the Company's predecessors in name. The Commission, in its Finding and Order allowing the deferral, specifically noted that "these

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<sup>3</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Remediation Costs*, Entry (November 12, 2009).

<sup>4</sup> *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994).

environmental investigation and remediation costs are business costs incurred by Duke in compliance with Ohio regulations and federal statutes.” The Commission further determined in its Entry on Rehearing that “the recovery of any deferred amounts would be addressed in a base rate proceeding... .”<sup>5</sup> These proceedings represent the first opportunity for the Company to seek recovery of the deferred costs in a base rate proceeding. Thus, the application in these proceedings included a request for such recovery along with testimony supporting the expenses and the Company’s due diligence in ensuring that the expenses were reasonably incurred, consistent with the Commission’s approval of the Company’s deferral requested in Case No. 09-712-GA-AAM.

Pursuant to R.C. 4909.15(A)(4), the Commission has an obligation, when fixing and determining just and reasonable rates, to determine the costs to the utility of rendering the public utility service. The MGP remediation costs represent exactly such costs as are contemplated in the normal rate-making formula. These are necessary and usual expenses of doing business as a corporation and should be recovered in full, as explained more fully below.

Additionally, the Company has reiterated its intent to continue deferring its remaining MGP remediation costs pursuant to the Commission's November 2009 deferral order, and has requested that the Commission allow it to also continue accruing carrying costs on such deferred amounts.<sup>6</sup> The Commission should confirm its continued authorization for the Company to defer its MGP remediation costs, with carrying costs, as requested. Significantly, neither Staff nor any intervening party objected to the ongoing deferral of such expenses, including carrying costs.

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<sup>5</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Remediation Costs*, Case No. 09-712-GA-AAM, Finding and Order, at p. 4 (November 12, 2009).

<sup>6</sup> *See* Wathen Direct Testimony, at pp. 15-16; *see also* Wathen Third Supplemental Testimony, at p. 4.

**II. As a Matter of Law and Policy, Reasonably Incurred MGP Expenses Should be Recoverable through Utility Rates**

**A. Companies should be permitted to fully recover remediation costs.**

R.C. 4909.15, which is applicable to traditional rate applications such as that at issue in these proceedings, sets forth a mandatory ratemaking formula. Pursuant to such formula, the Commission is to establish just and reasonable rates and charges for jurisdictional services rendered. And these rates and charges are derived from a specific series of determinations – the valuation of the utility’s property in service as of a date certain, a fair and reasonable rate of return on that investment, and the expenses incurred during the test year.<sup>7</sup> These are separate and distinct determinations. And in the context of a traditional rate proceeding, the final determination – the expenses incurred by the public utility – concerns the costs to the utility of rendering the public utility service.<sup>8</sup>

R.C. 4909.154 further instructs the Commission that, in fixing just, reasonable, and compensatory rates, it is to consider the management policies, practices, and organization of the public utility. Additionally, the Commission may disallow operating and maintenance expenses where such expenses were incurred pursuant to management policies or administrative practices the Commission considers imprudent.

As the Ohio Supreme Court has confirmed, a prudent decision is:

‘One which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made.’ The standard contemplates a retrospective, factual inquiry, without the use of hindsight judgment, into the decisionmaking process of the utility’s management.<sup>9</sup>

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<sup>7</sup> See generally, *Columbus Southern Power*, 67 Ohio St. 3d 535, 537, (November 1993), 1993 Ohio LEXIS 2265.

<sup>8</sup> R.C. 4904.15(A)

<sup>9</sup> *The Cincinnati Gas and Electric Company*, (1999), 86 Ohio St. 3d 53, 58, 1999 Ohio LEXIS 1887.

As will be demonstrated herein, Duke Energy Ohio undertook to comply with applicable environmental regulation by remediating its former MGP sites pursuant to a well-reasoned and efficient process. And as a result, it incurred expenses for which it is entitled to full recovery consistent with the deferral order and R.C. 4909.15(A)(4).

**B. MGP costs are a normal and ordinary cost of doing business.**

Environmental cleanup expenses, such as the MGP remediation expenses at issue in these proceedings, are a normal and necessary cost of doing business in today's world. Since at least the early 1980s, we as a nation have learned that certain previously accepted manufacturing processes, such as those involved in manufactured gas operations, resulted in environmental contamination.<sup>10</sup> Both federal and state governments have passed laws and regulations requiring cleanup or "remediation" of such properties for the protection of public health and the environment.<sup>11</sup> These laws and regulations, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), impose retroactive and strict liability.<sup>12</sup> CERCLA imposes liability on several categories of responsible parties for remediating contaminated sites, and potential liability is broad. In particular, CERCLA imposes liability on current and past owners or operators of a site from which there has been or is a substantial threat of a release of a hazardous substance.<sup>13</sup> The state of Ohio also imposes liability on parties that own or operate contaminated properties.<sup>14</sup> Ohio has also enacted laws and regulations to encourage "voluntary" cleanup activities by responsible parties, as a more proactive, flexible and cost-effective substitute for a sanction-based enforcement or "command and control" strict

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<sup>10</sup> See generally, Middleton Direct Testimony.

<sup>11</sup> *Id.* See also, Margolis Direct Testimony.

<sup>12</sup> 42 U.S.C.S. § 9601 *et seq.*

<sup>13</sup> 42 U.S.C.S. §9607(a).

<sup>14</sup> See *e.g.*, R.C Chapter 3734 and R.C. Chapter 6111.



liability approach. The Ohio Voluntary Action Program (VAP), under which Duke Energy Ohio is undertaking its investigation and remediation of its MGP sites, is one such proactive program. Although the program is labeled voluntary, based upon the liability imposed by CERCLA there is really nothing voluntary about it other than the flexibility with respect to accomplishing the remediation in a timely fashion.

As a result of these environmental liabilities and requirements, costs of investigating and remediating MGP sites are current and necessary costs of resolving liability, complying with the law, and protecting public health and the environment. These expenses are necessary in order for companies like Duke Energy Ohio, to remain in business and to comply with current environmental laws and regulations, and are thus part of providing current service to customers. Like other costs of providing current service, they are properly recoverable in rates.

Notably, this Commission, in authorizing the Company to defer these costs more than three years ago, previously found that “these environmental investigation and remediation costs are business costs incurred by Duke in compliance with Ohio regulations and federal statutes.”<sup>15</sup> Other state regulatory commissions have likewise recognized that MGP site investigation and remediation costs constitute current costs of providing service.

For example, in a Michigan case,<sup>16</sup> the Michigan Supreme Court emphasized that remediation expenses are a present business expense:

The fact that the contamination arose from a different utility service provided to different customers in past years or that some of the environmental expense is associated with contamination which leached into property not owned by

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<sup>15</sup>*In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, PUCO Case No. 09-712-GA-AAM; 2009 Ohio PUC LEXIS 969 (Ohio PUC 2009), at p. 3 (Nov. 12, 2009). See also, *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 08-606-GA-AAM, at p.2 (September 24, 2008).

<sup>16</sup>*Attorney General v. Michigan PSC and Peninsular Gas Co.*, 463 Mich. 912, 618 N.W.2d 904, 2000 Mich. LEXIS 2303 (MI Sup. Ct.; Nov. 22, 2000).

Peninsular and which never provided utility service, ***does not change the fact that Peninsular is incurring a significant expense in the course of its business in the present. The costs involved are necessary costs for Peninsular to operate,*** and the costs are actually related to Peninsular's current property because that property is the source of the contamination.<sup>17</sup>

Similarly, in a New Jersey case,<sup>18</sup> the New Jersey Board of Public Utilities concluded that environmental cleanup costs are "viewed as being ***a necessary and ongoing cost of doing business.***"<sup>19</sup> And in 1985, the New Jersey Board held that site testing expenses related to clean-up programs for coal gas plants owned by the utility should be allowed because they relate to an ongoing program instituted by the company to assist in safeguarding the health and welfare of the state's citizens.<sup>20</sup>

The Illinois Supreme Court has likewise affirmed that ***"the cost of delivering utility service reasonably encompasses current costs of doing business, including necessary costs of complying with legally mandated environmental remediation."***<sup>21</sup> Accordingly, the Illinois Supreme Court rejected an intervenor's claim that coal-tar costs are not recoverable because they are not directly related to providing current service.<sup>22</sup>

The Wisconsin Public Service Commission reached a similar conclusion. In a case addressing estimated cleanup costs in excess of \$80 million projected over 35 years,<sup>23</sup> the Wisconsin Commission concluded that "[u]nder current law, applicant is required to investigate and clean up its MGP sites. From that perspective, ***MGP cleanup costs are current and***

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<sup>17</sup> 463 Mich. at 913 (emphasis added).

<sup>18</sup> *In Re Public Service Electric & Gas Company*, BRC Docket No. ER91111698J, 1993 WL 505443 (N.J. Bd. Reg. Comm'rs, Sept. 15, 1993), *reh'g denied*, (Jan. 21, 1994).

<sup>19</sup> *Id.* at 13 (emphasis added).

<sup>20</sup> *In Re Jersey Central Power and Light Co.*, 65 PUR4th 175 (1985).

<sup>21</sup> *Citizens Util. Bd. v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 651 N.E.2d 1089, at 1098 (Ill. 1995) (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> *In Re Wisconsin Power & Light Company*, No. 6680-UR-108, 1993 Wisc. PUC LEXIS 64 (Wisc. PSC; Sept. 30, 1993).

*legitimate expenses* reasonably incurred and therefore are subject to recovery from ratepayers. *They are no different from costs incurred to make existing plant comply with new, more stringent health or safety requirements, such as the addition of new air pollution control equipment to comply with tighter air pollution standards.*<sup>24</sup>

Other state commissions have reached similar results. *See, for example, Midwest Gas*, 133 PUR4th 380 (Iowa Util. Bd. 1992) (accepting cleanup costs as current and legitimate costs of doing business); *Yankee Gas Services Co.*, Docket No. 92-02-19, 1992 WL 333210 (Conn. Dept. Pub. Util. Control, Aug. 26, 1992) (prudently incurred MGP cleanup costs allowed as proper operating expenses); *In the Matter of California Edison Co.*, Decision No. 91-12-076, 1991 Cal. PUC LEXIS 911, 130 P.U.R.4th 97 (CA PUC; Dec. 1991) (“[W]e note that hazardous waste cleanup costs are liabilities associated with ownership of utility property, and the costs are recovered entirely from ratepayers.”)

As this Commission and other state commissions have recognized, cleanup costs for environmental remediation are normal and necessary costs of doing business. Although MGP cleanup is a more recently incurred expense for utilities in Ohio, by nature, it is no different than any other expense that is included in a rate case for recovery. Accordingly, so long as they are reasonably incurred, Duke Energy Ohio must be permitted to fully recover these costs.

C. **The used and useful standard is not applicable to a determination of whether legally mandated remediation costs are recoverable.**

In an attempt to deny Duke Energy Ohio recovery of its reasonably incurred MGP remediation expenses, Staff makes two arguments based on the “used and useful” ratemaking standard.<sup>25</sup> First, Staff argued that the MGP remediation expenses relate to property that is no

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<sup>24</sup> *Id.* at 8 (emphasis added).

<sup>25</sup> See Staff Report of Investigation, January 4, 2013, p. 30-64.

longer used and useful in providing service to customers, and as a result, such costs should not be recoverable through rates. Second, Staff carved out portions of the MGP sites and argued that while the sites are currently owned and operated by the Company, these carved out portions are not sufficiently used and useful today to qualify for recovery of cleanup costs – in essence illogically requiring that current used and useful operations sit on top of MGP residuals in order for cost recovery to obtain. But these arguments are misplaced.

As discussed above, R.C. 4909.15 contains the ratemaking formula that is to be used to calculate utility rates in Ohio. With regard to the recoverability of capital investments (that is, rate base), R.C. 4909.15(A)(1) requires that property be “used and useful” in order to be reflected in the valuation of rate base for establishing rates. But costs, or operating expense, to the utility of rendering service are addressed in R.C. 4909.15(A)(4), which contains no limitation on the basis of used and useful property. Rather, costs to be recovered in rate are those costs related to the provision of the jurisdictional utility service at issue. The Commission has already settled this issue in its order allowing the deferral, in finding that the MGP remediation costs represent necessary costs of doing business. Accordingly, the “used and useful” standard contained in R.C. 4909.15(A)(1), which applies to the valuation of rate base or utility plant in service, is not applicable to an operating expense such as MGP remediation costs. And the argument advanced by Staff fails as a matter of law. Assuming, *arguendo*, that the Commission erroneously adopts a used and useful standard (which is opposed by Duke Energy Ohio), it still follows that full recovery is appropriate as all of the properties where Duke Energy Ohio’s former MGP operations were conducted, which are the properties requiring remediation under state and federal law are, in fact, currently used and useful in the provision of utility service.

Finally, the evidence of record demonstrates that Duke Energy Ohio's MGP remediation costs have been, and continue to be, prudently incurred.

**D. Many other states have furthered environmental policy by permitting recovery of MGP remediation.**

In finding that MGP cleanup expenses are a current cost of providing service, other state commissions have explicitly rejected the argument put forth by the Commission Staff that MGP remediation expenses relate to property that is no longer used and useful, and, therefore, those cleanup costs should not be recoverable through rates.

For example, the Minnesota Public Utilities Commission thoroughly analyzed this very issue in a 1996 proceeding.<sup>26</sup> In that case, Interstate Power Company (Interstate) had two MGP sites that required environmental remediation, Rochester and Albert Lea. Interstate proposed full rate recovery of its deferred investigation and cleanup costs for the Rochester and Albert Lea MGP sites. According to Interstate, the Minnesota commission had previously allowed recovery of MGP cleanup costs<sup>27</sup> based on the following factors: (1) the expenses are legally required; (2) the expenses are reasonable and prudent; and (3) the land was used and useful for the normal provision of utility service at the time of pollution, *or* was later used and useful for other utility purposes. Interstate argued that the Rochester property was used and useful for the normal provision of utility service because manufactured gas was the normal gas service at the time and Interstate was the service provider. In the case of the Albert Lea site, the property was used by Interstate for a vehicle maintenance facility and warehouse after natural gas superseded manufactured gas. Ultimately, the Minnesota commission found that “[t]he operative phrase for

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<sup>26</sup> *In the Matter of the Request of Interstate Power Company*, 1996 Minn. PUC LEXIS 27 (Minn. PUC 1996).

<sup>27</sup> At the time of this Minnesota filing three Minnesota gas utilities requested and were granted recovery of MGP remediation costs. *Northern States Power Company*, Docket No. G-002/GR-85-108 (December 30, 1985); *Minnegasco*, Docket No. G-008/GR-92-400 (May 3, 1993), and Docket No. G-008/GR-93-1090 (October 24, 1994); and *Peoples Natural Gas Company*, Docket No. G-011/GR-92-132 (June 11, 1993).

recovery in rates is 'used and useful' in the provision of utility service.”<sup>28</sup> The commission noted that in previous cases, it had found the standard met when the property was owned and used by the utility at the time of pollution *or* when the property was owned and used by the utility at the time of rate recovery. Thus, it concluded, even though the property might not then be presently used to provide utility service, the fact that the contamination occurred at a time when the property was used and useful justified recovery of currently incurred remediation expense. The commission applied its previous rulings to the facts of the *Interstate* case and determined that the sites were used and useful, specifically noting that “[t]he Commission's used and useful standard allows the Commission to examine the utility's ongoing provision of utility service to determine ***if the property was used and useful at the time of pollution or is used and useful in the current provision of service.***”<sup>29</sup>

In another Minnesota case that the *Interstate* case referenced,<sup>30</sup> the commission denied reconsideration, and upheld its earlier rate case order allowing Peoples Natural Gas Co. to record its share of MGP remediation costs in a deferred debit account for future rate case recovery pending a *reasonableness* and *prudence* review. The consumer advocate sought reconsideration of the MGP cost recovery for several reasons. Among other things, the consumer advocate argued that the present use of the contaminated property as a parking and storage facility was unrelated to the past pollution of the property when it was an MGP facility and, thus, Peoples' liability was a risk of land ownership that should be borne by shareholders, not ratepayers. The Minnesota commission rejected this argument, stating: “The operative phrase for recovery in rates is ‘used and useful in the provision of utility service.’ ***Neither logic nor precedent requires***

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<sup>28</sup> 1996 Minn. PUC LEXIS at 49.

<sup>29</sup> *Id.* at 60 (emphasis added).

<sup>30</sup> *In Re Peoples Natural Gas Co.*, 144 PUR4th 333 (Minn. PUC 6/11/93).

*a direct link between the exact use of the property which caused the pollution and the present use of the property which renders it used and useful to the Company.*”<sup>31</sup> The commission also rejected the argument that MGP cost recovery depended upon a finding that the property was used and useful at the time of the contamination, explaining as follows:

The ALJ found, and the record shows, that the land at issue has been used and useful for utility purposes since it went into rate base in 1948. Normally, the inquiry would end there; there would be no doubt that expenses arising from ownership of the land . . . are recoverable in rates. Because remediation expenses are so extraordinary, however, and so clearly linked to earlier land uses, it is at least initially attractive to apply the “used and useful” test to the land at the time the need for remediation was created. At that time, the land was not used and useful for Peoples’ ratepayers. In the absence of negligence on the part of the utility, however, this is fundamentally unfair. There are valid state and federal statutes placing clean-up responsibilities on current landowners, whether or not they owned the land when the pollution requiring remediation occurred. These responsibilities flow from land ownership alone. To treat remediation costs differently from other costs related to current land ownership would be result-driven and contrary to general ratemaking principles.<sup>32</sup>

In another example, a recent case out of New York,<sup>33</sup> the New York Public Service Commission opened a review of regulated utilities’ MGP site remediation efforts. Intervenors argued that full rate recovery for MGP-related expenses was inappropriate because the manufactured gas plants benefited only prior generations of ratepayers, not today’s ratepayers. The intervenors also suggested that the MGP site is no longer used and useful – and has not been for roughly 70 years – and therefore ratepayers have no obligation to pay the related costs of remediation. The intervenors proposed the imposition of a cost sharing mechanism allocating 10% of costs to shareholders and 90% to ratepayers. Commission staff, however, expressed

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<sup>31</sup> *Id.* at 13 (emphasis added).

<sup>32</sup> *Id.* at 7-8.

<sup>33</sup> *Proceeding on Motion of the Commission to Commence a Review and Evaluation of the Treatment of the State’s Regulated Utilities’ Site Investigation and Remediation (SIR) Costs*, NY PSC CASE 11-M-0034, 2012 N.Y. PUC LEXIS 442 (NY PSC; Nov. 2012).

concern that the disallowance might result in a credit downgrade, resulting in a higher cost of capital. The New York commission noted that the customers who are paying for the remediation are not those who benefited from the plants themselves, creating an "intergenerational equity problem." However, the Commission refused to adopt a standard "sharing" policy in which to allocate a percentage to the shareholders and a percentage to ratepayers across the board:

We decline to adopt a generic policy requiring allocation of SIR expenses between ratepayers and shareholders. In the course of this investigation, the real possibility was adduced that instituting a generic sharing policy could lead to adverse credit action against utilities on the part of rating agencies. While we cannot be certain of such a result, the risk of such action is not remote. If utilities are perceived as shouldering greater risk as a result of a change in a policy, their financing costs could increase, reducing or even eliminating any ratepayer benefits.<sup>34</sup>

The Michigan Public Service Commission likewise rejected a used and useful argument against MGP cost recovery,<sup>35</sup> concluding:

The Commission agrees with the Staff and Consumers that reasonable and prudent MGP remediation costs are recoverable through rates. The Commission approved a deferred accounting approach for MGP cleanup costs in Case Nos. U-10149 and U-10150, and the same approach was applied to Consumers' MGP recovery costs in Case No. U-10755. Subsequently, the Court of Appeals affirmed the Commission's authority to include environmental remediation costs as part of current operating expenses. *See, Charter Twp of Calumet, supra*, slip op at 3.<sup>36</sup>

Similarly, the Illinois Commerce Commission (ICC) has permitted full recovery of all prudently incurred MGP remediation costs, including carrying charges.<sup>37</sup> This decision came on remand from the Illinois Supreme Court, which had affirmed in part and reversed in part a generic investigation into MGP cost recovery initiated by the ICC in 1992.<sup>38</sup> In the 1992 generic

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<sup>34</sup> 2012 N.Y. PUC LEXIS 442, at 3.

<sup>35</sup> *In the Matter of Consumers Energy Company*, Case No. U-14547, 2006 Mich. PSC LEXIS 353, 253 P.U.R.4th 477 (MI PSC; Nov. 2006).

<sup>36</sup> *Id.* at 18-19 (footnotes omitted).

<sup>37</sup> *ICC v. Illinois Power Company*, 1996 Ill. PUC LEXIS 53 (1996).

<sup>38</sup> *See Citizens Util. Bd. v. Illinois Commerce Comm'n*, 651 N.E.2d 1089 (Ill. 1995), *reh'g denied* (May 30, 1995).



inquiry, the ICC had initially allocated MGP cleanup expenses between ratepayers and shareholders through a five-year recovery period, with no carrying charges on the unamortized balance.<sup>39</sup> The Illinois Supreme Court reversed the ICC with respect to the cost-sharing issue, finding that the ICC had failed to articulate a reasoned basis for its departure from its longstanding position that all mandatory operational expenses are recoverable.<sup>40</sup>

Significantly, in the 1992 generic inquiry, the ICC had determined that MGP cleanup expenses would be afforded a rebuttable presumption of prudence in future rate cases. In reaching this conclusion, the ICC rejected arguments that utilities had acted imprudently in their past operation of MGP facilities and that the recovery of MGP remediation expenses bore no relationship to the provision of current service. With regard to the latter conclusion, the Illinois Supreme Court affirmed that "*the cost of delivering utility service reasonably encompasses current costs of doing business, including necessary costs of complying with legally mandated environmental remediation.*"<sup>41</sup>

In finding that MGP cleanup expenses are a current cost of providing service, other state commissions have explicitly rejected the argument put forth by the Staff that MGP remediation expenses relate to property that is no longer used and useful, and therefore, those cleanup costs should not be recoverable through rates. As this argument raises an issue of first impression in Ohio, the Commission can and should consider guidance from other states on this precise issue and reject the illogical concept that the cleanup expenses must relate to plant in service.

**E. Even if the Commission were to erroneously adopt a used and useful**

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<sup>39</sup> This decision departed from the ICC's earlier position in two utility-specific proceedings, in which it had permitted full cost recovery. See *Central Illinois Light Co.*, 124 PUR4th 498 (Ill. Comm. Comm'n 1991); *North Shore Gas Co.*, 1991 Ill. PUC LEXIS 636 (Ill. Comm. Comm'n 1991).

<sup>40</sup> 651 N.E. 2d 1089 at p. 1096.

<sup>41</sup> *Id.* at 1096 (emphasis added).

**standard in this Case, Duke Energy Ohio's cleanup costs are recoverable because they are directly related to property that is, in fact, used and useful.**

In the first instance, the properties being remediated by the Company were used to provide manufactured gas service to gas customers in southwest Ohio. These plants were indisputably used and useful during their years of operation. The history of the plants was covered in detail the testimonies of Duke Energy Ohio witnesses Dr. Andrew Middleton and Jessica Bednarcik. Moreover, no party to the proceeding raised any questions about this fact.

Additionally however, unlike the situation in a number of MGP cases in other states, the sites being remediated by Duke Energy Ohio and for which recovery is sought in these proceedings have been continuously owned and operated by the Company (including predecessors in name) in connection with its utility operations, and are both used and useful even today. Thus, even if the Commission were to (erroneously) adopt the OCC's and Staff's proposed "used and useful" standard and require demonstration that the cleanup sites are currently used and useful, the Company's MGP cleanup costs should be recoverable because they do in fact relate to property that is currently used and useful in connection with utility operations.

Company witness Gary Hebbeler explained in detail how both the "East End" and the "West End" MGP remediation sites are currently "used and useful" in the provision of utility service.<sup>42</sup> The sites are used to house underground gas lines,<sup>43</sup> a propane peak shaving plant, a flaring station, sensitive utility infrastructure, pipelines, an operations center, a district office building, gas transmission pipelines, a gas measurement station, and a portion of the Company's Supervisory Control and Data Acquisition (SCADA) system, all of which are used to provide

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<sup>42</sup> See generally, Hebbeler Second Supplemental Testimony.

<sup>43</sup> Id. at p.3.

current gas utility service to customers.<sup>44</sup> Further, they are used for field operations, parking, storage of materials, and as a clean fill area (up until the time remediation began) – also legitimate utility service purposes. Finally, Duke Energy Ohio electric facilities are also located on one of the sites (the West End site), used to provide current electric service to Duke Energy Ohio electric customers.

More specifically, Mr. Hebbeler testified in detail with respect to the currently used and useful nature of the Company’s facilities where both the East End and West End MGP operations were conducted and where the remediation is being performed. As both Mr. Hebbeler and Duke Energy Ohio witness Jessica Bednarcik testified, the designations of “East Parcel,” “Middle Parcel,” and “West Parcel” at the East End Gas Works site were developed solely for the purpose of structuring the environmental investigation and cleanup activities and do not relate to the Company’s natural gas operations at the facility.<sup>45</sup> Nevertheless, with regard to the East Parcel on the “East End” site, Mr. Hebbeler testified that currently there are three underground gas lines that provide service to gas customers of Duke Energy Ohio.<sup>46</sup> These gas mains traverse the parcel and serve as feeds into the system and the propane injection facility that is also located on the East End site.<sup>47</sup> One of the lines that traverse the parcel splits into two 16-inch transmission lines on the south side of the parcel and crosses the Ohio River.<sup>48</sup> In response

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<sup>44</sup> *Id.* at p.8.

<sup>45</sup> Although the Staff attempts to arbitrarily divide the MGP remediation sites into sub-sections so as to designate certain sub-sections of the sites as unnecessary for current operations – and therefore not used and useful – the evidence does not support these artificial divisions from an operational perspective. As Mr. Hebbeler testified: “The land is broken into zones or Identified Areas (IAs), unrelated to function, in order to aid in clean up under the Ohio Environmental Protection Agency (OEPA) Voluntary Action Program (VAP). The Staff opted to analyze the sites for purposes of its review in this case by using the same convention for delineating the sites. For clarity and consistency, Duke Energy Ohio will continue to discuss these sites with reference to the same geographic delineations as used by the Ohio EPA and Staff. However, Duke Energy Ohio views the two sites as single operating facilities used to provide utility services to customers.” *Id.* at p. 2.

<sup>46</sup> *Id.* at pp. 3-4.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at p. 4.

to the Staff's position that not all of this property is needed, Mr. Hebbeler explained that, additional working space contiguous to the permanent easement is commonly utilized for construction for these types of pipelines, which generally requires the repeated acquisition and use of easements from adjacent landowners.<sup>49</sup> However, because Duke Energy Ohio owns the East Parcel, the Company will not need to acquire such temporary easements for pipeline replacement.<sup>50</sup> Further, Mr. Hebbeler explained that the Staff did not recognize the necessity of the working area requirements on the East Parcel of the East End site, to install the existing two sixteen-inch transmission pipeline across the river, nor the requirements for maintaining these pipelines.<sup>51</sup> For example, while the Staff recognizes the need for ongoing maintenance of pipelines traversing the land, it failed to consider certain work necessary when dealing with pipelines that cross a major body of water.<sup>52</sup> When significant maintenance is necessary, the two 16-inch lines would be replaced today using the horizontal directional boring technique.<sup>53</sup> Considering the terrain on either side, it is assumed that the East Parcel, located on the Ohio side, would be the site for the boring operations and the Kentucky side would be the site used for the pipe stringing and welding operations.<sup>54</sup> Using this concept, once the bore was completed, the pipe would be pulled from the Kentucky side to the East Parcel site.<sup>55</sup> The bore rig operations, located on the East Parcel, would consist of a large bore rig, control trailer, large hydraulic pumps, mud separator, pit for bentonite overflow, bore rod staging area, large lifting equipment to aid the operations and miscellaneous material and equipment.<sup>56</sup> The area required for such an

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at pp. 4-5.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

operation normally takes approximately 200' X 200'. In addition, Mr. Hebbeler noted that the Staff did not allow for access and equipment necessary to maintain this boring operation above the 200 feet x 200 feet area.<sup>57</sup> Mr. Hebbeler also explained that, prior to the remediation activities, the East Parcel of the East End site was used by Duke Ohio natural gas field operations personnel as a clean fill site.<sup>58</sup>

With regard to the Middle Parcel of the East End site, Mr. Hebbeler explained that natural gas operations that occupy the entire area.<sup>59</sup> The operations within the Middle Parcel are the propane peak shaving plant, sensitive utility infrastructure, pipelines and field operations.<sup>60</sup> Two of the permanent buildings, which were constructed during the operations lifetime of the MGP, are used in the process for mixing propane with natural gas.<sup>61</sup> There is a significant development of sensitive utility infrastructure located in this Middle Parcel.<sup>62</sup> Also, there are three designated mainlines that support the plant operations and a measurement station.<sup>63</sup> Finally, an operations center is mostly confined to the Middle Parcel.<sup>64</sup> In addition to holding the compressors for the propane plant, the building on the eastern side of the Middle Parcel is a district office.<sup>65</sup> The center of this parcel is used for parking equipment and employees vehicles and the southern part of the parcel is used for storing materials and equipment.<sup>66</sup> Notably, the Staff agrees with the Company that all of this Middle Parcel is used and useful in the current provision of gas service to Duke Energy Ohio's gas customers.

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at p. 7.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at pp. 7-8.

<sup>61</sup> *Id.* at p. 8.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Mr. Hebbeler explained that, on the West Parcel of the East End site, Duke Energy Ohio has constructed new vaporizers for its propane facility, a new entrance road and a new flaring station. A flaring station is used to burn off propane that is released into the atmosphere when these facilities require maintenance. When maintenance is performed, the propane pipes must be purged and propane must be burned in order to avoid an unintentional hazard. The old flaring operations took place on the south side of the West Parcel.<sup>67</sup> Such flaring operations require use of the entire parcel as a buffer between the operations and the public.<sup>68</sup>

Mr. Hebbeler testified that Staff neglected to recognize the limits of the sensitive utility infrastructure on the West Parcel and the use for the balance of the West Parcel as a necessary buffer for the sensitive utility infrastructure limits.<sup>69</sup> This buffer around the infrastructure itself is to avoid a breach due to any type of operations that may pose a hazard.<sup>70</sup> Work around such a structure is understandably very sensitive and an adequate buffer zone is essential to maintain safety.<sup>71</sup> Finally, Mr. Hebbeler explained that part of the maintenance process requires the propane pumps to be removed occasionally. As part of the procedure, municipal water is used to fill the shaft to overcome the vapor pressure of the propane. Once maintenance is complete, the pumps are reset and the water is pumped from the shaft and dispersed on the West Parcel.<sup>72</sup> Mr. Hebbeler testified that these facilities and procedures were not in operation at the time when Staff was on site for inspection of these facilities and therefore Staff did not recognize the full extent of the operations.<sup>73</sup> Staff incorrectly concluded that none of the remediation expenses in this West Parcel were incurred to operate, maintain or repair natural gas plant that is used and

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at p. 9.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

useful, except for one small area.

With regard to the West End remediation site, Mr. Hebbeler explained that the site is divided into two main areas of interest, the North of Mehring Way area, and the South of Mehring Way area. As with the East End facility, these designations were made for the purpose of structuring the environmental investigation and cleanup. He explained that the West End remediation site, in its entirety is also presently used to serve gas and electric customers and is therefore currently used and useful in the provision of utility service to Duke Energy Ohio customers.<sup>74</sup>

More specifically, the North of Mehring Way parcel was used as a parking lot for Duke Energy Ohio employees right up until it was necessary to vacate the property to allow for the remediation. It is not possible to continue using the property while it is undergoing remediation. When the remediation is complete, the Company plans to continue to use this property.<sup>75</sup> South of Mehring Way, the Company currently owns and operates two 12-inch diameter gas transmission pipelines that enter Ohio at the West End site. At the valve pit on the riverbank, the two lines combine into one 20-inch pipeline. There is also a gas measurement station at this location. This building also houses the Remote Terminal Units (RTU) equipment, which is part of the SCADA system that monitors and controls the natural gas distribution system. This line supplies approximately 20,000 customers in a peak hour. Duke Energy Ohio is also planning to install a new gas transmission line at this property.<sup>76</sup> While the Staff recognized the working area needed on the East Parcel at East End to maintain the pipeline corridors for the gas lines

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<sup>74</sup> *Id.* at p. 11.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

traversing the land,<sup>77</sup> the Staff did not recognize the necessity of the working area requirements on the parcel South of Mehring Way to install the existing river crossing with two 12-inch transmission pipelines, nor the requirements for maintaining these pipelines.<sup>78</sup> While the Staff recognizes the need for ongoing maintenance of pipelines traversing land, it failed to consider certain work necessary when dealing with pipelines that cross a major body of water.<sup>79</sup> If significant maintenance is necessary, the most probable solution is to replace this facility. The two 12-inch lines are planned to be replaced using the horizontal directional boring technique. Considering the terrain on either side, the Ohio side is the site for the boring operations and the Kentucky side will be the site used for the pipe stringing and welding operations. Using this concept, once the bore is completed, the pipe would be pulled from the Kentucky side to the Ohio side. The bore rig operations, located on the West End side, would consist of a large bore rig, control trailer, large hydraulic pumps, mud separator, pit for bentonite overflow, bore rod staging area, large lifting equipment to aid the operations and miscellaneous material and equipment. The area required for such an operation normally takes approximately 200 feet by 200 feet. In addition, Staff did not allow for access and equipment necessary to maintain this boring operation above the 200 feet by 200 feet area.<sup>80</sup>

The evidence thus makes clear that the East End and West End sites are currently both used and useful to customers in connection with the provision of gas utility service.

### **III. Recovery of MGP Expenses is in the Public Interest**

In addition to being consistent with the law, recovery of MGP remediation expenses is consistent with the public interest, by encouraging the utility to conduct prompt and thorough

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<sup>77</sup> Staff Report of Investigation at p. 41.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at pp. 12-13.

<sup>80</sup> *Id.*



investigations and cleanups of environmental conditions at MGP sites to resolve liability and to protect public health and the environment. In the *Interstate* case, as discussed above, the Minnesota commission emphasized that there are strong policy reasons for finding the utility's MGP costs to be recoverable. Specifically, the Minnesota commission noted that remediation of MGP environmental contamination is a generally accepted societal good, and it would be poor public policy to discourage environmental cleanup by disallowing the prudent and reasonable costs of the process.<sup>81</sup> Similarly, in deciding that the issue of gas plant remediation costs warranted full recovery, the New Jersey Board of Public Utilities concluded that "while remediation does not improve utility service as such, *it does provide a societal benefit, a cleaner environment*, that increasingly is viewed as being a necessary and ongoing cost of doing business."<sup>82</sup>

The state of Ohio has expressed strong public policy encouraging cleanup of contaminated sites by, among other things, enacting the VAP and providing incentives for use of the VAP as compared to other "command and control" cleanup approaches overseen the Ohio EPA. As indicated in the testimony of Company witness Kevin Margolis, "the existence of the VAP, enacted into law by the state of Ohio as an alternative to environmental cleanups conducted as a part of governmental enforcement activity, is evidence of a clear expression of public policy in favor of private voluntary response action in connection with historic industrial contamination."<sup>83</sup> In furtherance of this state policy and consistent with the similar public policy views advanced by other commissions that have assessed MGP remediation expenses, Duke

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<sup>81</sup> *In the Matter of the Request of Interstate Power Company for Authority to Change Its Rates for Gas Service in Minnesota*; Minn. PUC DOCKET NO. G-001/GR-95-406, 1996 Minn. PUC LEXIS 27, 167 P.U.R.4th 409 (Feb. 29, 1996).

<sup>82</sup> *In the Matter of the Petition of Public Service Electric and Gas Co.*, 94 N.J.A.R.2d (BRC) 1, 1993 WL 557635 (N.J. Adm.), at p. 13 (Sept. 15, 1993)(emphasis added).

<sup>83</sup> Margolis Direct Testimony, at p. 13.

Energy Ohio should be allowed to fully recover its remediation costs.

#### **IV. A Commission Decision Denying Recovery of Reasonably Incurred MGP Remediation Expenses would have Far-Reaching Adverse Consequences**

Not only is recovery of prudently incurred MGP remediation costs consistent with law and policy, but a Commission decision denying such cost recovery would likely have significant adverse consequences. First, a decision denying recovery could result in adverse credit quality implications for Duke Energy Ohio, which in turn could have adverse financing cost and rate implications for Duke Energy Ohio's customers.<sup>84</sup> Second, such a decision could call into question the Ohio Commission's previous decisions granting deferral authority for costs. And finally, such a decision would put Ohio in a distinct minority of states on this issue, and could place Ohio's reputation for constructive regulation at risk.

With regard to the first two points, as Company witness Wathen explained in prefiled testimony and on cross-examination, in order for a utility to defer expenses, financial accounting rules require that the utility must conclude that recovery of such costs is probable.<sup>85</sup> A Commission order authorizing deferral of a certain category of expenses does not guarantee recovery of such expenses, because the Commission may, at a later date, examine the prudence of the actual costs incurred. But a deferral order from the Commission has, and should, mean that the type of costs at issue are indeed recoverable, and will be recovered upon the requisite showing. In contrast, if the Commission were to grant deferral authority, then subsequently

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<sup>84</sup> See Wathen Third Supplemental testimony, at p. 10 ("For Duke Energy Ohio there will be a significant write-off impacting earnings for 2013 . . . and for future years. . . .") See also Financial Accounting Standard No. 71, which allows creation of a regulatory asset for accounting and financial reporting purposes based on deferred incurred costs, if the utility concludes that future recovery of such deferred incurred costs is *probable*. The determination of "*probable*" is a matter of professional judgment, based on facts such as the existence of a rate order specifying such rate treatment, existence of an accounting order from a regulator, prior precedent from the same regulator, a legal opinion, *etc.*  
[http://www.eei.org/meetings/Meeting%20Documents/2010\\_11\\_14\\_AccountingCommitteesFallMeeting\\_Corp\\_KAL\\_onbom\\_Topics\\_%20That\\_Keep\\_Coming\\_Up.pdf](http://www.eei.org/meetings/Meeting%20Documents/2010_11_14_AccountingCommitteesFallMeeting_Corp_KAL_onbom_Topics_%20That_Keep_Coming_Up.pdf)

<sup>85</sup> *Id.* at pp. 10-12.

decide that such type of costs should be categorically denied on pure legal or policy grounds, a utility could rarely, if ever rationally, conclude that recovery is probable. Such actions would cast doubt on the Company's ability to rely on such orders and deferral orders would thus become meaningless exercises, and utilities would be forced to expense costs and adversely impact earnings in situations where deferral is both appropriate and beneficial.

This risk is very real in this case. The Commission has issued two deferral orders with respect to MGP remediation costs – one for Duke Energy Ohio, involving property currently owned by the utility, and one for Columbia Gas of Ohio, Inc. (Columbia Gas) involving property no longer owned by the utility. As mentioned previously, in the Duke Energy Ohio deferral order, the Commission found that “these environmental investigation and remediation costs are business costs incurred by Duke Energy Ohio in compliance with Ohio regulations and federal statutes.”<sup>86</sup>

In the *Columbia Gas* deferral order, the Commission similarly recognized the MGP remediation costs as necessary business costs and authorized Columbia Gas to defer costs associated with “environmental investigation and remediation costs in those situations where Columbia no longer owns the site in question, or where the site is owned by Columbia **but is no longer used and useful in the rendition of gas service to customers.**”<sup>87</sup> Thus, despite the fact that some of the property being remediated was no longer owned by Columbia Gas and, consequently, could not be “currently used and useful,” the Commission approved deferral for

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<sup>86</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, PUCO Case No. 09-712-GA-AAM; 2009 Ohio PUC LEXIS969 (Ohio PUC 2009); Nov. 12, 2009).

<sup>87</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 08-606-GA-AAM Entry (September 24, 2008) (emphasis added).

consideration of recovery in a future rate proceeding.”<sup>88</sup> Significantly, the Commission approved the deferral authority requested by Columbia Gas even though Columbia Gas and the Commission acknowledged that some of the property at issue is no longer owned by Columbia Gas and is not currently used and useful.

Generally Accepted Accounting Principles (GAAP) are the accounting rules used to prepare and report financial statements for publicly held companies in the United States. The primary rulemaking body for the accounting rules that public companies comply with is the Financial Accounting Standards Board (FASB). The FASB’s Accounting Standards Codification (ASC) 980, *Regulated Operations*, applies to an entity that has regulated operations that meet all of the following criteria, from ASC 980-10-15-2, formerly Financial Accounting Standards No. 71 or FAS 71:

- a. The entity's rates for regulated services or products provided to its customers are established by or are subject to approval by an independent, third-party regulator or by its own governing board empowered by statute or contract to establish rates that bind customers.
- b. The regulated rates are designed to recover the specific entity's costs of providing the regulated services or products. This criterion is intended to be applied to the substance of the regulation, rather than its form. If an entity's regulated rates are based on the costs of a group of entities and the entity is so large in relation to the group of entities that its costs are, in essence, the group's costs, the regulation would meet this criterion for that entity.
- c. In view of the demand for the regulated services or products and the level of competition, direct and indirect, it is reasonable to assume that rates set at levels that will recover the entity's costs can be charged to and collected from customers.

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<sup>88</sup> *Id.* at 2.

ASC 980 further clarifies that entities subject to the rules included in ASC 980 should apply ASC 980-10-15-2 rather than any conflicting provisions of other parts of the Accounting Standards Codification.

ASC 980-340-25-1 describes when a regulatory asset should be recognized, as follows:

**25-1** Rate actions of a regulator can provide reasonable assurance of the existence of an asset. An entity shall capitalize all or part of an incurred cost that would otherwise be charged to expense if both of the following criteria are met:

- a. It is probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes.
- b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs.

A cost that does not meet these asset recognition criteria at the date the cost is incurred shall be recognized as a regulatory asset when it does meet those criteria at a later date.

Deferral orders must and should mean something. The Commission should not overturn this historical and constructive use of deferred accounting orders by denying recovery based on new interpretation of legal or policy grounds in this case.

**V. The Evidence Overwhelmingly Demonstrates that Duke Energy Ohio's MGP Remediation Activities have been Undertaken in Accordance with Prudent Management Practices**

"Prudence" in the context of utility ratemaking is defined as what a reasonable person would have done in light of the conditions and circumstances that were known or reasonably should have been known at the time the decision was made. As the Ohio Supreme Court has stated:

We adopt the commission's definition of a prudent decision, which is in accord with that used in other jurisdictions, as "one which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made."

*In the Matter of the Investigation into the Perry Nuclear Power Station* (Jan. 12, 1988), PUCO No. 85-521-EL-COI, at 10-11. The standard contemplates a retrospective, factual inquiry, without the use of hindsight judgment, into the decision making process of the utility's management. See *Re Syracuse Home Util. Co.* (Dec. 30, 1986), PUCO No. 86-12-GA-GCR; *Re Toledo Edison Co.* (July 16, 1987), PUCO No. 86-05-EL-EFC.<sup>89</sup>

Duke Energy Ohio's decisions with respect to its MGP sites should be judged in accordance with this standard.

Duke Energy Ohio's management practices, decisions and activities related to investigation and remediation of its MGP sites have been reasonable and prudent in all respects. More specifically, the evidence in this case shows that Duke Energy Ohio: (1) made the prudent decision to embark upon investigation and remediation activities at the former MGP sites only after establishing that it had legal liability and that activities occurring and planned in and around the properties warranted the performance of investigative and remedial action; (2) reasonably decided to utilize the Ohio VAP program due to its flexibility and opportunity for cost savings, as compared to more traditional "command and control" approach; (3) decided to employ a VAP Certified Professional (as required by the VAP program) and other environmental consulting firms experienced in MGP investigations and cleanups to help guide it through the investigation, remediation and VAP procedures; (4) gave consideration to appropriate factors, such as compliance with environmental regulations, best practices, feasibility, constructability, safety, prior experience, and cost; (5) considered feasible remediation alternatives and made remediation choices that meet applicable environmental standards in a cost-effective and risk-reducing manner over the long-term; and (6) reasonably utilized a number of processes and procedures to control investigation and remediation costs, including but not limited to the use of competitive bidding.

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<sup>89</sup> *City of Cincinnati v. Public Utils. Comm'n*, (1993) 67 Ohio St. 3d 523.

**A. The record provides background information on MGPs and remediation generally, and Duke Energy Ohio MGP sites in particular.**

As described in detail in the testimony of Duke Energy Ohio witness Middleton,<sup>90</sup> the "MGP Era" consisted of the 150-year period from 1816 until the mid-1960s. During the MGP Era, the U.S. manufactured gas industry began, matured, and ended, and throughout the Era, various gas-making processes, gas storage vessels, and gas purification equipment were developed and modified. It is estimated that during the 1800s and early 1900s, there were over 1500 MGP locations in the United States, including approximately 90 such locations in the state of Ohio. By 1970, utility-owned or operated MGPs were almost non-existent, with manufactured gas being replaced by natural gas across the United States. The MGP Era ended when MGPs were taken out of service for a variety of reasons: some plants reached the end of their useful lives and were not replaced; some were closed when gas could be more economically provided by other larger plants on a regional basis; and many were closed when the introduction of natural gas delivered via pipeline made them obsolete. The procedures for dismantling and demolishing the MGP plants were, at that time, much less rigorous than they would be today and environmental regulations were largely non-existent. As a result, much of the equipment and contents were left in place, and much of the solid wastes were used as fill or disposed of as wastes.

Three types of gas-making processes dominated the manufacture of gas in the U.S. during the MGP Era: coal gas, carburetted water gas, and oil gas, with water gas and coal gas plants predominating in the early 20<sup>th</sup> century.

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<sup>90</sup> See generally, Middleton Direct Testimony.

The manufacture, purification, and storage of manufactured gas resulted in certain residuals being generated, such as tar, sulfur, ammonia, naphthalene, wastewater, coke, lampblack, clinker, and ash. These residuals were dealt with as both byproducts and waste, with disposition generally occurring through sale or use as byproducts as feasible, use as fuel, or disposal. Accidental leaks of liquid byproducts, such as tar, occurred during the manufacturing process, as well as during the dismantling and demolition processes.

The typical operating, disposal and dismantling/demolition practices of the MGP Era resulted in environmental contamination of soil and groundwater, necessitating current remediation activities. MGPs operations, waste disposal, and demolition/dismantlement practices were consistent with the practices of other industries, governments and individuals throughout the United States during that time period. In view of the circumstances and information available at the time, Dr. Middleton testified that the practices for MGP residuals handling and disposition, and for demolition and dismantling, were fully consistent with those of other industries and municipalities across the United States. Notably, it was not until the 1970s and later that analytical technologies began to become commercially available to measure low concentrations of chemical constituents in the environment, thus providing a basis to begin assessing impacts that are currently understood.

As Dr. Middleton explained, beginning in 1970, our nation began revolutionizing our approach to environmental regulation and management. This revolution in thinking was manifested in various historic federal environmental laws beginning in 1970 (for example, the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, etc.), and including in the 1980s, CERCLA or the "Superfund" Act. Laws, regulation and guidance issued under CERCLA or Superfund and its state counterparts formed the foundation of the



environmental field of site remediation, a new field of practice in the 1980s. Application of site remediation processes to MGP sites generally began in the 1980s and continues through the present.

Construction of Duke Energy Ohio's<sup>91</sup> first MGP began in 1841, and the first commercial lighting by manufactured gas in the city of Cincinnati occurred in January 1843, with manufactured gas from the West End plant located to the west of downtown Cincinnati. Construction of the East End Gas Works, located just east of downtown Cincinnati, began in 1882, with operations beginning in 1884. Modifications were made at both locations throughout their operating lifetimes. Manufactured gas production stopped in 1909, after natural gas arrived in Cincinnati, but was reinstated in 1918 because the amount of natural gas delivered to the city could not adequately supply the residents. According to annual reports of the Company, MGP operations ended at East End in 1963 and at West End in 1928.<sup>92</sup>

**B. Duke Energy Ohio has legal liability for MGP remediation.**

The property that the Company has remediated and that is the subject of the dispute in these proceedings has been providing service to utility customers continuously since approximately 1843 at West End and 1884 at East End.<sup>93</sup> As is discussed above, subsequent to operating these plants as MGP facilities, they have been and continue to be used to provide gas service and other utility service to customers up until the present time. The Company's ownership of these properties that contain waste products and contaminants from the operations of the MGP facilities creates liability pursuant to CERCLA; Duke Energy Ohio witness

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<sup>91</sup> Duke Energy Ohio was, at that time, The Cincinnati Gas, Light and Coke Company.

<sup>92</sup> See generally, Middleton Supplemental Testimony and Bednarcik Direct Testimony; see also, Transcript at p. 183.

<sup>93</sup> Bednarcik Direct Testimony, at p.5; see also Bednarcik Supplemental Testimony, at p. 2, and Middleton Supplemental Testimony, at p. 2.

Bednarcik testified that legal counsel has advised the Company that Duke Energy Ohio is liable, under state and federal laws, for the environmental conditions existing at its former MGP sites.<sup>94</sup> As explained by Duke Energy Ohio witness Mr. Kevin Margolis, liability under CERCLA is strict, regardless of fault, joint and several, retroactive, and extends to a number of types of responsible parties, including current owners and operators of real property where such contamination exists.<sup>95</sup> Thus the liability of the Company for remediation of these properties is not in dispute. Indeed, no one has questioned that the Company has liability or that remediation was necessary.<sup>96</sup> The Company, in addressing its liability through the VAP that is set forth in R.C. Chapter 3746, is taking a proactive and prudent approach to most effectively resolve its liability and to protect human health and the environment in a reasonable and cost effective manner.

**C. It was reasonable for Duke Energy Ohio to undertake MGP remediation efforts when it did.**

As Duke Energy Ohio witness Bednarcik testified, the Company began its MGP remediation investigations at the East End and West End sites in 2006 and 2009, respectively, due to changes in site conditions and potential exposure pathways in and around the properties.<sup>97</sup> At East End, the planned residential development of adjoining properties (to both the west and east of the facility) and a related easement across a western portion of the property would have altered the exposure controls on the site that limited accessibility to the site and the potentially impacted material.<sup>98</sup> The expected site use and potential exposure pathways at the West End site changed once the Ohio Department of Transportation and the Kentucky Department of

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<sup>94</sup> See Bednarcik Direct Testimony, at pp. 6-7.

<sup>95</sup> Margolis Direct at p.6.

<sup>96</sup> Tr. Vol. IV at p. 884 and 962 and 1000.

<sup>97</sup> Bednarcik Direct Testimony, at pp. 8-9; Bednarcik Supplemental Testimony, at pp. 17-20.

<sup>98</sup> Bednarcik Direct Testimony, at pp. 8-9; Bednarcik Supplemental Testimony, at pp. 17-18.

Highways finalized the preferred location of the new Brent Spence Bridge Corridor Project such that the new bridge would directly cross the West End site.<sup>99</sup> Duke Energy Ohio witness Bednarcik explained that, as part of the Brent Spence Bridge Project, the Company must relocate a large substation, a number of transformer bays, and an underground transmission line, and must replace a transmission tower, as the locations of these current structures are in conflict with the planned route of the new bridge and associated approaches.<sup>100</sup> Surface caps over the MGP site would be disturbed during construction activities for both the new electrical equipment and the new bridge, thereby increasing the probability of contact with potentially impacted soil.<sup>101</sup> Moreover, environmental remediation was needed to ensure the long term suitability of the relocated structures for providing utility service.<sup>102</sup>

Mr. Margolis' testimony confirmed Ms. Bednarcik's testimony on this point. On cross-examination and redirect examination, Mr. Margolis reiterated that, while Duke Energy Ohio had legal liability with respect to its MGP sites, as owner of the properties and pursuant to federal and state laws, it was the proposed change in use and exposure pathways that triggered the investigation and remediation of the sites: "the change in use triggered their need for performing the investigation and remediation."<sup>103</sup> Mr. Margolis explained generally that, if an entity has CERCLA liability, the following types of actions will result in a need to actually investigate and remediate a site:

One could be an enforcement order from a federal or governmental agency or another could be a change in circumstances of the site or the use of the site which

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<sup>99</sup> Bednarcik Direct Testimony, at pp. 8-9; Bednarcik Supplemental Testimony, at pp. 19-20.

<sup>100</sup> Bednarcik Supplemental Testimony, at pp. 19-20.

<sup>100</sup> *Id.*

<sup>101</sup> Bednarcik Direct Testimony, at pp. 8-9.

<sup>102</sup> Bednarcik Supplemental Testimony, at p. 19.

<sup>103</sup> *See* Transcript, at p. 150; *see generally* Transcript, at pp. 150-153; 160.

would change the risk profile of the site and create a duty to resolve the environmental issues and risks by the site.<sup>104</sup>

According to Mr. Margolis, the changes in use that constituted the triggers for investigation and remediation activities were the proposed residential development around the East End site, and the proposed Brent Spence Bridge project and resulting work at the West End site:<sup>105</sup>

At the East End site the change in the use of the site and the neighboring properties on both sides of the site to residential uses would have changed the risk profile of the site and in my opinion changed the duty of the company to address the environment -- the historic environmental contamination at the site because now they had potential residential development on either side of the property. [At the West End,] [t]he change in circumstances at that site as they relate to the bridge construction and the expected and planned new bridge going across and through and directly into the existing site and all of the excavation work and activity that would likely -- not would likely but will be occurring at that site changed the risk profile of the site.<sup>106</sup>

**D. Duke Energy Ohio's participation in the Ohio VAP and retention of a VAP Certified Professional were reasonable.**

The Ohio EPA VAP sets forth a process by which contaminated sites may be investigated and remediated consistent with OEPA standards. This program allows responsible parties to proceed with cleanup of contaminated sites to meet OEPA standards in a more timely, efficient and less costly manner. As explained by Duke Energy Ohio witness Shawn Fiore, himself a VAP Certified Professional, the VAP began in 1994 to provide parties with an appropriate process to limit liability for property contamination.<sup>107</sup> The goal of the VAP is to allow the remediation and beneficial re-use of properties. The VAP limits and minimizes OEPA direct involvement and maximizes the environmental remediation expertise in the private sector. OEPA regulates the activities through development of its rules and policies, and by certifying

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<sup>104</sup> See Transcript, at p. 160.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Fiore Direct Testimony, at p.5.

environmental professionals (known as VAP Certified Professionals or CPs) to make determinations whether applicable VAP standards have been met.

The VAP allows a remediating party to proceed with some flexibility since the VAP itself does not specify or prescribe remedial options.<sup>108</sup> Rather, the VAP specifies applicable standards that must be achieved.<sup>109</sup> The VAP allows a remediating entity to consider alternatives for remediation so long as they meet the VAP requirements. Further, after meeting said applicable standards, as described by Mr. Fiore, a remediating party may instruct its Certified Professional to prepare a No Further Action (NFA) Letter and to seek a Covenant Not to Sue (CNS) from the OEPA.<sup>110</sup>

As described in the testimony of Kevin Margolis and Shawn Fiore, it is required that the remediating entity retain the expert assistance of a VAP CP to guide the process and to determine whether all VAP applicable standards have been met. A VAP CP is licensed and highly regulated by the OEPA and is required to adhere to rigorous standards and ethics.<sup>111</sup> As witness Margolis explained, "to my knowledge, the highest standard for environmental cleanup professionals in Ohio is the standard required to become and remain a CP pursuant to the [VAP statute] and the rules promulgated thereunder."<sup>112</sup> The VAP CP is highly qualified as determined by the OEPA and can determine when and if a remediation project will meet the exacting requirements that are detailed by the VAP standards. Duke Energy Ohio retained Mr. Fiore as its VAP CP for the remediation at the East End site.<sup>113</sup> Mr. Fiore's qualifications with regard to VAP, environmental investigations and cleanups, and MGP cleanups in particular need not be

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<sup>108</sup> Transcript Vol. II at p. 554.

<sup>109</sup> Fiore Transcript Vol. II at p. 554.

<sup>110</sup> Fiore Direct Testimony, at pp. 11-12.

<sup>111</sup> Fiore Direct Testimony, at pp. 9-10.

<sup>112</sup> Margolis Direct Testimony, at p. 5.

<sup>113</sup> Duke Energy Ohio has retained a different environmental consulting firm and CP to oversee the work at the West End site as part of its competitive bidding process.

restated here as they are set forth in his vitae and are well established. Mr. Fiore has many years of experience with environmental remediation in general, and with VAP standards in particular. Duke Energy Ohio's decision to perform work in accordance with the VAP, including the retention of a consultant with a VAP CP, is a reasonable, prudent and cost effective way of addressing the conditions at the sites, resolving liability and protecting human health and the environment.

**E. Duke Energy Ohio's MGP investigation and remediation activities have been appropriate and cost-effective.**

In light of its legal liability, the changing uses of the properties, and the procedures and standards of the Ohio VAP program, the evidence makes clear that Duke Energy Ohio's MGP remediation activities and costs are reasonable and prudent. More specifically, given the technologies available, the short-term and long-term costs and benefits associated with such alternative technologies, and the overall necessity to meet Ohio VAP standards and protect human health and the environment, the evidence demonstrates that the Company's MGP remediation choices are reasonable and consistent with such standards. Moreover, the processes and personnel employed by the Company in implementing its investigation and remediation activities are designed to achieve the desired results in a cost-effective manner.

**1. Technologies Typically Considered for MGP Remediation**

As explained in the testimony of Duke Energy Ohio witness Bednarcik, Duke Energy Ohio considered various approaches to remediating the East End and West End sites to meet the applicable VAP standards and to ensure protection of human health and the environment. Ms. Bednarcik explained that technologies typically considered for MGP remediation include (but are not limited to): monitored natural attenuation, excavation, solidification, in-situ chemical oxidation, thermal heating, containment, engineering controls, and institutional controls.

Combinations of technologies are also considered.<sup>114</sup> ***However, as both Ms. Bednarcik and Mr. Fiore emphasized, it is paramount in making decisions on the selected remedial approach(es) that the remediation alternatives chosen meet all applicable VAP standards.***<sup>115</sup>

Ms. Bednarcik explained that Duke Energy Ohio makes its remediation decisions through a collaborative approach involving its in-house environmental professionals, its environmental consultants (including CPs) who have extensive experience related to the remediation of MGP sites, its legal advisers, and Company environmental and operations management.<sup>116</sup> In making decisions on the recommended approach, in addition to complying with applicable VAP standards, they also consider factors such as protection of human health and the environment, effectiveness (both short-term and long-term), ability to implement, and cost.<sup>117</sup> Also taken into consideration are the current and anticipated future uses of the site, the short term and long term liability of the site based upon the chosen remedial action, various risk assessments, and the specifics of the VAP and other relevant Ohio environmental regulatory programs.<sup>118</sup> As an example of this approach and with regard to this latter factor, Ms. Bednarcik emphasized that, based upon discussions with the OEPA VAP CP, the Company proceeded with removal and/or *in-situ* treatment of source material (such as tar-like material (TLM) and oil-like material (OLM) in the subsurface), because the Ohio VAP requires removal or treatment of such source material to the extent it is technically feasible to remove or treat it.<sup>119</sup>

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<sup>114</sup> Bednarcik Supplemental Testimony, at p. 24.

<sup>115</sup> Fiore Direct Testimony at pp.2,9, 12-14, 19-24, Bednarcik Direct Testimony, at p. 7, Bednarcik Supplemental Testimony at p. 21; Transcript Vol.III at p. 589, 590, 603-604, 614, 615, 616, 618, 622, 628.

<sup>116</sup> Bednarcik Supplemental Testimony, at p. 24.

<sup>117</sup> *Id.* at pp. 24-25.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at pp. 24-25. Note that while other parties have argued that the Company should choose short-term least costly alternatives, such as capping and institutional controls, the Company's expert, the VAP CP, consistently opined that such short-term measures – often referred to colloquially as "pave and wave" or "pave and pray" – by themselves will simply not meet the applicable VAP standards and will not be sufficiently protective of human

As set forth in Mr. Fiore's direct testimony, "(t)hese activities were reasonable and prudent to mitigate site risks and to meet all applicable standards under the VAP. These activities are also consistent with approaches taken at other similarly contaminated properties."<sup>120</sup>

## **2. East End Site**

### **a. Investigation and Remediation Activities**

With regard to the East End site, Ms. Bednarcik explained that in 2006, the Company was contacted by a developer who had recently purchased a number of parcels of land located adjacent to the East End site.<sup>121</sup> The developer indicated that he planned a large residential development on his newly acquired property. The developer also had easements across a portion of the Duke Energy Ohio property for ingress and egress and for utilities, and had a landscape easement on a part of the property, as well, to provide a buffer between the residential development and the Duke Energy Ohio property and operations. In addition, residential development was commencing on property adjacent to the east side of the East End site.<sup>122</sup> As explained above, in light of the easements and subsequent land disturbances anticipated with the residential development projects surrounding the East End site, the Company decided to commence environmental investigations on the site. Accordingly, on-site soil and groundwater investigations of the western portion of the site began in June 2007.<sup>123</sup> By the end of 2007, the decision was made to extend the investigation to include the eastern portion of the site, in light of

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health and the environment. Transcript Vol.II at p.294, Transcript Vol. III at p. 645. Nor does Duke Energy Ohio believe that such an approach, even if it did meet VAP standards (which it would not) would be the most prudent and cost effective approach to addressing the conditions at the sites considering short term and long term risks and cost. Transcript Vol. I at p.192.

<sup>120</sup> Fiore Direct Testimony, at p. 24.

<sup>121</sup> Bednarcik Direct Testimony, at pp. 9-10; Bednarcik Supplemental Testimony, at pp. 17-18.

<sup>122</sup> Bednarcik Direct Testimony, at pp. 9-10; Bednarcik Supplemental Testimony, at pp. 17-18.

<sup>123</sup> Bednarcik Direct Testimony, at pp. 10-11.



residential development beginning on adjacent property to the east of the site (Corbin Park housing development).<sup>124</sup>

Soil and groundwater investigations occurred between 2007 and 2009.<sup>125</sup> In addition, risk assessments were conducted to evaluate the potential risk to human health due to impacts in the surface soil and subsurface soil.<sup>126</sup> In 2009, a Remedial Action Plan was developed to address potential environmental and human health impacts in the top 15 feet of the site, and to address potential environmental impacts in the form of OLM and TLM present at depths below 15 feet.<sup>127</sup> Analytical results were compared to calculated, site-specific, remedial goals, and a communications plan was developed and executed.<sup>128</sup> The Company's communications activities included a community open house, development of a website and fact sheets, and meetings with various stakeholders.<sup>129</sup> Permits were obtained from OEPA and the city of Cincinnati to perform the work set forth in the Remedial Action Plan.<sup>130</sup>

Following completion of the investigation activities, excavation and *in-situ* solidification of OLM and TLM were performed on the East and West Parcels, with excavated material transported to a lined landfill that is permitted to accept impacted soils.<sup>131</sup> Additionally, due to the presence of sensitive underground facilities, vibration monitors have been utilized and activities have been modified to minimize vibrations. Some of these modified activities to minimize vibrations include use of a drilled soldier pile and lagging system, and the use of various corner braces in connection with certain of the excavations to eliminate impacts to

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<sup>124</sup> Bednarcik Direct Testimony, at pp. 9-10.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at pp. 10-11.

<sup>127</sup> *Id.* at p. 11.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at pp. 10-11.

<sup>131</sup> *Id.* at pp. 11-12

subsurface casings.<sup>132</sup> A system was also installed and operated to monitor air emissions from the project to ensure protection of human health in and around the site.<sup>133</sup>

On some portions of the site, *in-situ* solidification has been used to solidify impacted material on-site. Solidification is performed in order to bind up the OLM and TLM, minimizing future leaching and dermal contact. However, on other portions, solidification has not been used, due to the presence of subsurface obstructions, including limestone boulders, which would have made *in-situ* solidification impractical and ineffective.<sup>134</sup>

During the remedial activities, the Company hired an independent environmental consulting firm to monitor the ambient air at the perimeter of the Duke Energy Ohio property, to ensure that chemicals of concern and/or fugitive dust were not leaving the property boundaries at levels that could potentially have adverse impacts on the surrounding residents.<sup>135</sup> An air monitoring model was developed to evaluate air quality and ensure there would be no adverse impact on personnel at the site or in the operations center or on the closest neighbors.<sup>136</sup> A dust action level was also established, and a plan that describes how dust, odors, and vapors would be managed at the site was provided to the Hamilton County Department of Environmental Services and the OEPA.<sup>137</sup>

In 2010, the Remedial Action Plan for the site was finalized, permits from the OEPA and others were obtained, and remediation began on the West Parcel.<sup>138</sup> Activities related to the

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<sup>132</sup> *Id.* at pp. 12-13.

<sup>133</sup> *Id.* at p. 14.

<sup>134</sup> *Id.* at pp. 13-14.

<sup>135</sup> *Id.* at p. 14.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at pp. 15-16.

excavation were finalized on the West Parcel in 2011. Excavation and solidification on the East Parcel occurred between 2011 and 2012.<sup>139</sup>

In 2011, to address claims by its neighbor and to allow for potential impacts to be investigated and remediated, if present, the Company purchased approximately nine acres of property adjacent to the East End site.<sup>140</sup> Recent studies had shown prior to the purchase that impacts were present at the western property border, making it highly likely that impacts were also present on the adjacent property.<sup>141</sup> An investigation in 2012 on a portion of the acquired property did, in fact, indicate the presence of MGP impacts.<sup>142</sup>

Environmental work at the East End site has not been completed. The Company's continuing investigation and remediation actions at the East End site include: soil and groundwater investigations on portions of the site not yet sampled as well as remediation, if required; groundwater monitoring and potential groundwater remediation on the East and West Parcels; and evaluation of potential off-site impacts.<sup>143</sup> Based on the results of the soil and groundwater samples to be obtained in the future, a decision will be made as to whether additional remedial actions are necessary.<sup>144</sup> If groundwater monitoring reveals applicable standards are not met, additional groundwater measures may be required. A comprehensive investigation across the acquired property is also planned.<sup>145</sup>

#### **b. Remediation Decision-Making**

Ms. Bednarcik explained that the factors considered in making remediation decisions at the East End site included: the fact that the site would be retained by the Company; the fact that,

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<sup>139</sup> *Id.* at p. 14.

<sup>140</sup> *Id.* at pp. 14-15.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at pp. 14-15.

<sup>143</sup> *Id.* at pp. 17-18.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at pp. 15; 17-19.

on certain portions of the site, there would continue to be extensive utility service operations; the fact that there were high pressure gas mains traversing portions of the site that would need maintenance and eventual replacement; the fact that TLM and OLM were present in substantial amounts at various depths throughout the property; and the likelihood or probability of impacted groundwater migrating outside of the property boundaries.<sup>146</sup> The available options included excavation with off-site disposal, *in-situ* solidification, and capping.<sup>147</sup> Capping was the least cost option in the short term, and the easiest to implement, but it would not meet VAP standards, and it would not reduce long-term liability on the site, as mobile TLM and OLM would still be present.<sup>148</sup> Also, capping would result in higher ongoing operation and maintenance costs, as well increased exposure risks, because specially certified crews would have to be utilized to perform maintenance on current or new gas lines on the site.<sup>149</sup> Last, but not least, as explained previously, Ohio's VAP requires removal and/or treatment of source material (OLM and TLM) in the subsurface if it can feasibly be removed or treated.<sup>150</sup> *In situ* solidification, in combination with the creation of a "clean gas corridor" for future new gas lines, was chosen as the primary preferred option for the East Parcel, due to its cost-effectiveness and ability to meet applicable standards.<sup>151</sup> Excavation was chosen as the preferred option for the West Parcel, due in part to the presence of sensitive underground utilities and the presence of subsurface obstructions that would have made *in situ* solidification impractical.<sup>152</sup> In addition, the Company expects to implement institutional controls, such as land use restrictions and/or groundwater restrictions as

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<sup>146</sup> Bednarcik Supplemental Testimony, at pp. 25-26.

<sup>147</sup> *Id.* at p. 24.

<sup>148</sup> *Id.* at p. 26.

<sup>149</sup> Transcript Vol. II at p. 233-234, 270.

<sup>150</sup> Bednarcik Supplemental Testimony at p. 26, Fiore Direct Testimony at p. 17, 19, 23.

<sup>151</sup> *Id.* at pp. 25-28.

<sup>152</sup> *Id.*

part of its final remedy.<sup>153</sup> Although he did not participate in the development of the preferred remedial alternatives at the East End site, Mr. Fiore testified that these are presumptive remedies for MGP cleanups and they are consistent with approaches taken at other similarly contaminated properties.<sup>154</sup>

### **3. West End Site**

#### **a. Investigation and Remediation Activities**

As mentioned previously, in 2009 Duke Energy Ohio was notified that the Ohio and Kentucky transportation agencies had chosen a preferred route for the new Brent Spence Bridge Corridor Project that would traverse a portion of the West End site. As a result, construction activities related to the bridge project would occur at the site and the bridge would necessitate the relocation of power delivery equipment, including an electrical substation and transmission towers. Based on these planned activities, the Company decided to engage in a phased investigation at the site and remediation as necessary based on the results of the investigation.<sup>155</sup>

Under this phased approach, background data was collected in 2009, and bids were solicited for the investigation work. The majority of the soil and groundwater investigation for the first two phases of the work occurred in the first half of 2010. Throughout the remainder of the year, the remedial design was developed and consultants were contracted, through a competitive bid process, for the detailed design, construction management, and ambient/perimeter air monitoring. A communications plan was developed, including a website and fact sheets, and permits were obtained from Ohio EPA and other permitting agencies.<sup>156</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> Transcript Vol. III at p. 642.

<sup>155</sup> *Id.* at pp. 15-17.

<sup>156</sup> *Id.*

Remedial action started in 2011, and included excavation with off-site disposal, *in-situ* solidification, and air monitoring. The remedial action chosen included excavation of soil to a depth of approximately 20 feet and *in-situ* solidification of deeper material impacted by OLM or TLM.<sup>157</sup>

Similar to the work on the East End site, an independent consultant was retained to perform perimeter air monitoring during the remedial work at West End, to make sure that fugitive dust and/or chemicals of concern leaving the property borders would not have an adverse impact on adjacent businesses or persons.<sup>158</sup>

Remediation is continuing and is expected to be completed on portions of the site in 2013. Once the new electrical substation and tower relocation work is completed, environmental work will recommence on those portions of the site. The amount of remedial activity that will be required on those sections of the site, and the time required for such remediation, is unknown at this time. Additionally, off-site impacts will be evaluated and remediated, if necessary.<sup>159</sup>

#### **b. Remediation Decision-Making**

Ms. Bednarcik explained that the factors considered in making remediation decisions at the West End site included: the fact that the majority of the site would be retained by the Company for extensive utility operations; the fact that TLM and OLM were present in the subsurface; and the nature and extent of anticipated construction work in connection with the bridge project and associated electrical utility relocation work.<sup>160</sup> Given the fact that the new electric equipment would restrict future access to the site, substantially increasing the feasibility

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at pp. 28-29.

and cost of any future environmental work in the area, the Company desired a long-term solution which would be implemented while the site was still more readily accessible.<sup>161</sup>

Excavation, solidification, and containment were all evaluated. However, containment was eliminated as a viable option because of cost and the difficulty keying the containment wall into bedrock present at the site. The hydraulic effect of the Ohio River on a containment wall was also a concern. Excavation and solidification were chosen as the preferred options for the West End site.<sup>162</sup>

**4. Duke Energy Ohio's Investigation and Remediation Activities were Reasonable.**

The costs that the Company has deferred and seeks to recover in this proceeding include costs primarily relating to: environmental consultants used for the investigation of the soil and groundwater impacts; environmental consultants used to perform perimeter air monitoring during remedial actions; site security while remedial actions were ongoing to minimize the potential for thefts; analytical laboratories that analyzed soil, groundwater, and ambient air samples; an environmental contractor who was employed to assist in the management and review of reports on the two sites; the environmental consulting firm that provided detailed remedial design, oversight, and construction management, and who also subcontracted construction firms to carry out the remedial actions; an engineering consulting firm that provided the required vibration monitoring; fuel for on-site construction equipment; landfill disposal costs; and internal costs relating to employee travel expenses, oversight by the Duke Energy analytical laboratory, which performed audits of the analytical laboratories and performed quality control and review of analytical data, oversight and coordination by Duke Energy power delivery and gas operations

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<sup>161</sup> *Id.* at p. 29.

<sup>162</sup> *Id.* at pp. 28-30.

personnel while working in close proximity to sensitive electrical and/or gas utilities, survey support, and project management oversight.<sup>163</sup>

The prudence and reasonableness of these costs is evidenced by a number of facts. First and foremost, as discussed previously, the Company has liability under state and federal law for the environmental conditions present at the two sites. Changes in use of the properties and adjacent properties triggered a current obligation to investigate and remediate the sites, as the measures employed on an interim to previously manage potential impacts would no longer remain protective of human health and the environment due to the new uses and disturbances. Second, as also mentioned previously, the Company has availed itself of the Ohio VAP, which provides OEPA established standards for addressing environmental conditions at the sites, and provides more flexibility and therefore more opportunity for efficiencies than does a “command and control” enforcement action by OEPA or US EPA. Non-VAP “command and control” enforcement processes, in contrast, can be inefficient, generate redundant activities, have inflexible and/or lengthy timelines, and require dealing with multiple agencies.<sup>164</sup> Related to this is the fact that the Company has retained a CP under the Ohio VAP to guide the Company through the VAP requirements and assist the Company in meeting the applicable VAP standards. Importantly, however, while the VAP program is not prescriptive as to how applicable standards will be met; the VAP does have very precise and specific requirements for the phased environmental investigation and evaluation of different environmental media (*e.g.*, soil, air, water, groundwater, etc.), environmental and ecological risk assessments, and environmental

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<sup>163</sup> Bednarcik Direct Testimony, at pp. 19-20. Miscellaneous costs include: electricity, communications support, manning of a community hotline, utility clearing services, street flaggers, purchase of personal protective equipment, and rental of personal air monitoring equipment.

<sup>164</sup> Margolis Direct Testimony at p.8.



cleanups.<sup>165</sup> And the VAP requires strict achievement of applicable standards, in order to protect human health and the environment. The evidence also indicates that that the Company has a very knowledgeable and responsible internal team in place to address MGP issues, led by Ms. Bednarcik, as well as highly qualified outside consulting firms who have extensive experience related to the remediation of MGP sites, and environmental legal counsel.

In addition, the Company's evidence demonstrates that its actions and the resulting costs are prudent by virtue of its consideration of remediation alternatives and its various cost control measures. For example, Ms. Bednarcik testified that Duke Energy employs a number of procedures to ensure that the scope of cleanup work is appropriate and the cost to perform that work is reasonable.<sup>166</sup> When deciding upon the most prudent and reasonable course of action for investigation and remedial action scopes of work, the Company worked with the OEPA CPs and environmental consultants to evaluate different options based upon various criteria, including but not limited to safety, compliance with environmental regulations, best practices, feasibility, constructability, prior experience, and cost.<sup>167</sup>

Ms. Bednarcik explained that these considerations are built into Requests for Proposal (RFPs), and that RFPs are generated, typically, prior to an investigation and for the detailed design and construction management of the larger remedial actions.<sup>168</sup> Competitive bids were and will continue to be solicited and reviewed for all major phases of work at both sites.<sup>169</sup> In some instances, Ms. Bednarcik explained, additional scopes of work may be awarded to a contractor already working on the site based on the factors such as the historical site knowledge

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<sup>165</sup> Margolis Direct Testimony, at p. 5.

<sup>166</sup> Bednarcik Direct Testimony, at p. 20.

<sup>167</sup> *Id.* at pp. 20-21; *see also* Bednarcik Supplemental Testimony, at pp. 24-25.

<sup>168</sup> Bednarcik Direct Testimony, at p. 21.

<sup>169</sup> *Id.*

of the contractor, the fact that equipment is already mobilized to the site, the timing of when additional information is needed, and/or if the contractor agrees to substantially maintain its rates and mark-ups negotiated through a competitive bid process.<sup>170</sup> Moreover, Duke Energy Ohio generally requires the environmental consultant to obtain competitive bids for the work that will be subcontracted, which is typically the largest portion of the consultant's invoices.<sup>171</sup>

When an RFP is issued, Duke Energy Ohio solicits bids from environmental consultants who have a proven history of working successfully on MGP sites. Although the minimum number of bidders for Duke Energy RFPs is typically three, Duke Energy Ohio solicited bids from more than that number of consultants on these projects, except for instances where unique skill sets were required. Information requested in the bid documents includes but is not limited to: a summary of similar work; the experience of personnel assigned to the project; MGP experience; Ohio experience; Ohio VAP CP or subcontracted CP experience (in the case of environmental consultants); safety statistics; summary of work requested to be performed on the site, including any best practices or proposed changes to the scope of work; rate sheets and expected hours for each personnel level; and rate sheets from any subcontractors.<sup>172</sup> Due to the complexity and technical nature of the required work, bids are initially evaluated on their technical merits, without looking at the cost to perform the work.<sup>173</sup> After the technical screening and associated interviews with bidders, costs are evaluated.<sup>174</sup> Although the scope documents are written with the best available information at the time of their drafting, the nature of environmental investigation and remediation requires flexibility. Changes occur in the field

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at p. 21.

<sup>173</sup> *Id.* at p. 22.

<sup>174</sup> *Id.*

during the execution of work due to weather, the discovery of unknown utilities and/or subsurface obstructions, and the discovery of additional impacted material, just to name a few. When issues arise, changes to the scope of work are again evaluated using the same criteria stated earlier. To ensure that these changes to scope do not become opportunities through which contractors and subcontractors can inflate costs, during the RFP process Duke Energy Ohio requests rate sheets that clearly state costs for additional scope items that typically occur on MGP sites.<sup>175</sup> For example, instead of asking for a lump-sum price for an investigation scope of work, Duke Energy Ohio requests a cost to take a sample on a per-foot basis. If it is necessary to go deeper in the ground for a sample than was originally anticipated or if additional locations are added to the scope based upon results obtained real-time, it is thereby predetermined how much that additional work will cost. Therefore, during the initial review of bids, the evaluation considers the cost-per-hour for the different levels of professionals who would be working on the project, the anticipated breakdown in hours between junior and senior personnel, mark-ups on subcontractors, and the per-unit rate for individual items (*i.e.*, per diems, construction trailers, etc.).<sup>176</sup> Any changes to the initial scope of work require approval by Duke Energy Ohio; therefore, Duke Energy Ohio representatives are actively involved in all aspects of the work to make sure any additional scopes of work are justified.<sup>177</sup>

Among other things, Duke Energy Ohio employed an on-site remediation construction manager familiar with MGP remediation projects for the majority of the excavation and solidification work. By having a clear understanding of the site, the issues that are being

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at p. 23.

encountered, and the expected end results, the Company is able to weigh options and changes to the scopes to ensure that the best decision is made, based on available information.<sup>178</sup>

The majority of the subcontractors on the site are managed through the environmental consultant. For those subcontractors with larger scopes of work, the environmental consultant is required to solicit multiple bids and to include Duke Energy Ohio in the decision-making process. There are a number of subcontractors that Duke Energy Ohio directly contracts with due to the nature of the work or preferred pricing agreements.<sup>179</sup>

With regard specifically to the East End site, Ms. Bednarcik explained that the work performed prior to 2008 was performed by an environmental consultant that was used by Duke Energy on other MGP sites.<sup>180</sup> As this was the first time that work was being conducted on any of the Ohio MGP sites, the project manager at that time brought in a contractor that he had worked with in the past on other MGP sites to help him initiate the investigation. Based on the initial investigation results, in 2008 proposals were solicited from five environmental consultants to obtain additional soil and groundwater samples, complete a human health risk assessment, and develop the conceptual remedial action plan. The firm that was awarded the contract had an acceptable technical approach and was also the lowest bidder.<sup>181</sup>

In August 2009, two separate RFPs were issued for East End to five environmental consultants, using the Duke Energy purchasing platform; four were the same contractors as the 2008 RFP for the investigation and one was a new consultant. One RFP was for the detailed design of the remediation on the eastern portion and the western portion of the East End site, as well as the construction management. The second RFP was for ambient air monitoring during

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at pp. 23-24.

<sup>181</sup> *Id.*

the remedial activities. The decision was made to separate the ambient/perimeter air monitoring from the detailed design and construction management, in order to allow for an independent, third party to monitor air emissions.<sup>182</sup>

The detailed design and construction management proposals were evaluated first. Bidders were evaluated from a technical standpoint; then pricing was added to the evaluation. The successful bidders' technical approach to the project, especially with respect to the design and execution of a significant and complicated earth retention system, was ranked very high in the technical evaluation. The winning bidder was the second lowest bidder, but won the contract on the basis of the proposed design and execution of the earth retention system. For the air monitoring contract, the successful detailed design/construction management contractor was excluded from the bid evaluation as Duke Energy Ohio wanted an independent air monitoring contractor. Of the remaining bidders, they all submitted technically equivalent proposals; therefore, the bid was awarded to the lowest bidder. During contract negotiations, Duke Energy Ohio's purchasing agent was able to negotiate reduced rates and reduced subcontractor markups for some items in the bids.<sup>183</sup>

In January 2010, a Request for Information (RFI) was sent out to eleven subcontractors to gather information for the technical and construction capabilities for the excavation and solidification contracts at East End. Although these subcontracts would be held by the environmental consulting firm that was awarded the detailed design/construction management contract, they used the Duke Energy purchasing platform to solicit the information from the potential subcontractors. Based on the results of the response to the RFI, in March 2010, bids were solicited from five environmental construction companies for the work to be conducted on

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<sup>182</sup> *Id.* at p. 24.

<sup>183</sup> *Id.* at pp. 24-25.

the West Parcel. Again, the bids were evaluated by both Duke Energy Ohio and the environmental consultant who would hold the subcontracts, with regard to both the proposed execution of the work and the price. The bid was awarded to the second lowest bidder. The probability of significant change orders from the lowest bidder based on its approach to the remediation was the main reason the contract was not awarded to the lowest bidder. In January 2011, bids were solicited from five environmental construction companies for the work to be conducted on the East Parcel. Only two bidders submitted a proposal, with the contract being awarded to the lowest bidder. The environmental consultant who was awarded the detailed design and construction management contract for the East and West Parcels has also been contracted to conduct out-of-scope work, including the initial investigation on the Middle Parcel and the property purchased in 2011. It is anticipated that RFPs will be issued, if remediation is required, on the property purchased in 2011 and/or the property purchased in 2011.<sup>184</sup>

The contract with the landfill, relating to the disposal of impacted soil, was held directly by Duke Energy Ohio. The landfill has been audited by Duke Energy Ohio in the past and is one of the Company's approved landfills in the Midwest service territory. Prices from another landfill were also solicited for a cost comparison, and the cost for disposal at the chosen landfill was competitive.<sup>185</sup> Contracts that were issued as sole-source contracts included those addressing fuel, security, the analytical laboratory, and vibration monitoring. With regard to fuel, Duke Energy Ohio has a negotiated rate with a fueling company. Although fuel costs were initially included in the subcontractor's scope of work, the Duke Energy Ohio purchasing agent determined that it was more cost effective to pay for fuel directly.<sup>186</sup>

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<sup>184</sup> *Id.* at pp. 25-26.

<sup>185</sup> *Id.* at p. 26.

<sup>186</sup> *Id.* at pp. 26-27.

Duke Energy Ohio has a negotiated contract with a security contractor for all of the Midwest facilities, which was extended for the MGP sites. An Ohio EPA-certified analytical laboratory is required to be used for the work at both sites. Duke Energy has a corporate-wide negotiated rate for analytical services with a certified lab, based on historic competitive bids; therefore, the lab contact for soil and groundwater samples was also single-sourced. For the analysis of the air monitoring samples, the lab used was recommended by the air monitoring contractor. The vibration monitoring at East End was awarded to a company that had a proven history of performing this specific type of work. In 2012, a contract for surveying support was issued to a local surveying crew that had been audited by the internal Duke Energy surveying group in the past and was under contract for other surveying needs within Duke Energy Ohio.<sup>187</sup>

With regard to the West End site specifically, Ms. Bednarcik testified that, in 2009, an RFP was issued to six environmental consultants to perform the initial investigation at West End.<sup>188</sup> The initial investigation plan was developed initially and refined as part of the RFP process. Therefore, as part of the bid process, Duke Energy Ohio entertained revisions to the proposed scope of work, but required costs for both the original scope of work and the revised scope, if proposed, be provided to aid in the evaluation. Bids were evaluated on both a technical basis and a cost basis. All bids were technically acceptable, although the approaches, for a few of the bidders, varied. At the end of the evaluation, the firm with the lowest bid was awarded the contract. In 2010, two separate RFPs were issued for West End, to six environmental consultants, using the Duke Energy purchasing platform; four were the same contractors as the 2009 RFP for the investigation and two were new consultants; one of the new consultants

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<sup>187</sup> *Id.* at pp. 26-27.

<sup>188</sup> *Id.* at pp. 27-28.

declined to bid. Similar to East End, one RFP was for the detailed design and construction management of the remediation in Phase 1 and Phase 2 of West End, and one was for the ambient/perimeter air monitoring. The detailed design and construction management proposals were evaluated first. Bidders were evaluated from a technical standpoint; then pricing was added to the evaluation. All proposals offered technically acceptable approaches; therefore, the bid was awarded to the contractor with the lowest bid, which also had the lowest subcontractor markup. For the air monitoring contract, the successful detailed design/construction management contractor was excluded from the bid evaluation, as Duke Energy Ohio wanted an independent air monitoring contractor. Of the remaining bids, all submitted technically equivalent proposals. Therefore, the contract was awarded to the lowest bidder.<sup>189</sup>

Ms. Bednarcik also testified that the work being performed at the East and West End sites is consistent with general industry practices in this area.<sup>190</sup> She explained that Duke Energy is part of a number of utility groups that share best practices and remedial strategies. It also participates in national conferences on the investigation and remediation of MGP sites. The MGP Consortium is a group of utilities that meets three times a year to discuss case studies on the investigation and remediation of MGP sites across the country. The other Ohio utilities that participate in this group include the Columbia Gas and the FirstEnergy utilities. Duke Energy Ohio, as well as the FirstEnergy operating companies, AEP Ohio, and Columbia Gas are also members of the EPRI Program 50: Manufactured Gas Plants, where the members regularly share information on the investigation and remediation of MGP sites. The environmental consultants hired to perform the work on the Duke Energy Ohio MGP sites are industry leaders in the investigation and remediation of MGP sites; they are employed by several utilities across the

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at p. 28.



country, have presented in national and international MGP conferences, and participate in research projects related to MGP sites. Based on her participation in the industry groups and national conferences, Ms. Bednarcik testified that it was her understanding that the work being conducted at the Duke Energy Ohio MGP sites is consistent with the practices being undertaken by other utilities.<sup>191</sup> Mr. Fiore, in his direct testimony, also stated that “(t)hese activities are also consistent with approaches taken at other similarly contaminated properties.”<sup>192</sup>

The evidence of prudent business practices, as established by Duke Energy Ohio witness Bednarcik is abundant. Although OCC has argued mistakenly that another method of remediation might have been chosen, Ms. Bednarcik, in collaboration with others within and without the Company has executed a flawless remediation process to date. The remediation of the two sites in question in these proceedings was necessary and is in compliance with Ohio’s VAP policy. The Commission must allow the Company to fully recover these costs.

## **VI. Other Issues**

### **A. Potential recovery from third parties.**

Ms. Bednarcik testified that Duke Energy Ohio is pursuing other means of funding the costs of the MGP remediation. Specifically, the Company is pursuing recovery under historic insurance policies and is investigating the viability of other potentially responsible parties. The Company also explored the possibility of obtaining state or federal funding, but determined that it was not eligible for such governmental funding programs.<sup>193</sup>

In its Staff Report, Staff recommended that the Commission direct the Company to use its utmost efforts to collect any possible proceeds from insurance policies and that any insurance

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<sup>191</sup> *Id.*

<sup>192</sup> Shawn Fiore Direct Testimony at p. 24.

<sup>193</sup> Bednarcik Supplemental Direct Testimony, at p. 32.

proceeds collected be split between shareholders and ratepayers commensurate with the proportion of MGP costs paid by each. None of the Intervenors objected to this recommendation. However, based upon questions raised by the parties related to the availability of insurance proceeds to cover the costs of remediation, it is clear that it is the expectation of the parties that the Company pursue these possible sources of revenue and credit costs incurred to the extent any third-party recovery results. The Company is completely in agreement with this view. The Company is actively evaluating the potential for recovery of costs from third parties and has so stated in testimony. It is the Company's intention to continue to pursue these options. However, the pursuit of other proceeds should not delay the Company's recovery of its incurred costs for complying with existing environmental mandates.

**B. Amortization periods for recovery.**

Duke Energy Ohio's application in these proceedings requested that recovery of deferred MGP remediation expense be amortized and collected over a three-year period. The Staff recommended that any collection be accomplished through a rider mechanism and agreed with the Company that such expenses should be recovered over a three-year period (unless the Commission allowed additional recovery of costs). The OCC recommended that MGP expenses be recovered over a longer time period. However, OCC witness David Efron noted that, if three years was the actual expected period between rate cases, then three years was a reasonable time frame.<sup>194</sup> At hearing, OCC witness Kathy L. Hagans adopted and supported Mr. Efron's testimony.<sup>195</sup> Ms. Hagans agreed that, in determining an appropriate amortization period, it is reasonable to consider the amount of the deferral, the age of the deferral, the anticipation of

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<sup>194</sup> Efron Direct Testimony, at p.11.

<sup>195</sup> Transcript Vol. III at p. 822.

additional deferrals being approved, and the proximity of the next rate cases.<sup>196</sup> Ms. Hagans also admitted that she had not done any research into other state commissions in formulating her recommendation.<sup>197</sup> Further, Ms. Hagans did no analysis of the rate impacts of the recommended amortization period proposed by the Company and the Staff and did not address any consideration of rate shock despite agreeing that one of the factors that should be considered is the impact on rates.<sup>198</sup> The testimony of Mr. Effron and Ms. Hagans makes clear that neither witness did any analysis or research into this issue. Thus, neither is able to back up their arguments with any credible data or logic. Likewise, Kroger witness Neal Townsend admitted that he had done no analysis to consider rate impacts of various amortization periods.<sup>199</sup> The Company's recommendation for a three-year amortization period should be adopted in these proceedings.

OCC and Kroger's recommendation that the Company not accrue carrying charges should not be supported for the same reasons. Neither Mr. Effron nor Ms. Hagans, nor Mr. Townsend performed any analysis of the impact of their recommendation on rates, nor did they explain the impact on the Company's earnings if the OCC recommendation were accepted by the Commission. The Commission should permit the Company to defer and accrue carrying charges for MGP expenses. If the Commission does choose to extend the recovery and amortization periods beyond three years, it must allow the Company to accrue carrying costs on the unrecovered balance. Extending the recovery period without recognizing the time-value of money undermines the ability of the Company to fully recover the present value of its actual expenditures.

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<sup>196</sup> Transcript Vol. III at p. 825.

<sup>197</sup> Transcript Vol. III at p. 826.

<sup>198</sup> Transcript Vol. III at p. 827.

<sup>199</sup> Transcript Vol. III at p.814-815.

**C. Recovery of all remediation expenses through the rider mechanism.**

The Staff recommended in the Staff Report that any costs allowed by the Commission for recovery for MGP remediation should be recovered from customers in a rider mechanism and allocated to customers pursuant to the same rate allocation adopted in these proceedings.<sup>200</sup> The Company agrees with Staff that a rider mechanism is acceptable and appropriate for recovery of MGP costs. Duke Energy Ohio witness Wathen acknowledged this agreement in his testimony and provided an explanation as to why and how the Company proposes that the costs be included in such a rider. The Company proposes to begin recovery of Rider MGP costs based on actual expenditures and associated carrying costs as of December 31, 2012. The Company proposes to amortize the costs over a three-year period and to allocate the revenue requirement between residential and non-residential customers. Further, the Company proposes to update the Rider MGP costs in each subsequent year, beginning with the calendar year 2013 balance.

**VII. Conclusion**

For the foregoing reasons, Duke Energy Ohio respectfully requests that the Commission:

1. Approve the Stipulation in its entirety;
2. Confirm the Company's continued authorization to defer MGP remediation costs, for subsequent recovery in future cases;
3. Authorize the Company to accrue and defer carrying costs on such deferred amounts;
4. Approve full recovery of the Company's deferred MGP investigation and remediation costs at issue in these proceedings; and

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<sup>200</sup> *A Report by the Staff of the Public Utilities Commission of Ohio*, January 4, 2013 at p. 47.

5. Establish a timeline for the Company's initial application to set rates for proposed Rider MGP based on the balance of the deferral at December 12, 2012.

Respectfully submitted,

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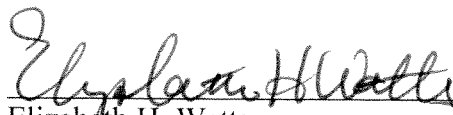
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 6<sup>th</sup> day of June, 2013, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.

  
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