

**OCC EXHIBIT NO. \_\_\_\_\_**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas 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
	)	

**DIRECT TESTIMONY  
OF  
BRUCE M. HAYES**

**ON BEHALF OF  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**  
*10 West Broad St., Suite 1800  
Columbus, Ohio 43215-3485*

***February 25, 2013***

## **TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
I. INTRODUCTION .....	1
II. PURPOSE OF TESTIMONY .....	5
III. DISCUSSION AND RECOMMENDATION: RIDER FRT .....	7
IV. DISCUSSION AND RECOMMENDATION: MANUFACTURED GAS PLANT INVESTIGATION AND REMEDIATION COST RECOVERY .....	17
V. CONCLUSION .....	40

## **ATTACHMENTS**

Attachment BMH-1: Map of FMGPs in Ohio

Attachment BMH-2: Duke Response to Interrogatory OCC-INT-03-124

Attachment BMH-3: Duke Response to Interrogatory OCC-INT-11-495

Attachment BMH-4: Duke Response to Interrogatory OCC-INT-11-496

**I. INTRODUCTION**

***Q1. PLEASE STATE YOUR NAME, ADDRESS AND POSITION.***

***A1.*** My name is Bruce M. Hayes. My business address is 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3485. I am employed by the Office of the Ohio Consumers' Counsel ("OCC") as a Principal Regulatory Analyst.

***Q2. PLEASE BRIEFLY SUMMARIZE YOUR EDUCATIONAL AND PROFESSIONAL EXPERIENCE.***

***A2.*** I graduated from the University of Kentucky in 1973 with a Bachelor of Science in Mechanical Engineering. I joined Aetna Life and Casualty in 1973 and held various positions related to Loss Control and Safety Engineering. In 1979, I joined Columbia Gas of Kentucky ("CKY") as an Industrial Sales Engineer. I transferred to Columbia Gas of Ohio ("Columbia") in 1986 and held a variety of positions in economic development, marketing and sales. During my time at the Columbia companies, I was actively involved in the development and implementation of the industrial and commercial gas transportation programs. In the early 1980s, I was involved in expanding CKY's transportation program from a single self-help customer to over fifty industrial and large commercial customers by initially establishing special contract interstate transportation programs like the Fuel Oil Displacement and Special Marketing Programs.

1 I was also involved in a customer issue regarding intrastate transportation and  
2 valuation of gas. Columbia modified its methodology so that valuation of gas  
3 occurred on British Thermal Units value rather than volume. This led to changes  
4 in transportation policies and billing in all the states in the Columbia Gas  
5 Distribution System.

6  
7 In the 1990s, I managed the Columbia rate flexing or rate discounting program for  
8 industrial customers. In that capacity, I arranged for long-term capacity release to  
9 large customers and arranged discounts on Columbia Gas Transmission interstate  
10 pipelines. I provided input to the transportation and gas supply departments on  
11 issues such as transportation contracts, curtailment, enhanced banking  
12 arrangements and electronic measurement for large volume customers.

13  
14 In 2002, I joined OCC as a Senior Regulatory Analyst and was promoted to  
15 Principal Regulatory Analyst in 2010. I represent OCC on the gas committee of  
16 The National Association of State Utility Consumer Advocates and have served  
17 as an Executive Committee member with the North American Energy Standards  
18 Board. I have participated in various Ohio Gas Cost Recovery Proceedings and  
19 Management/Performance Audits while at Columbia Gas of Ohio and as an  
20 analyst for the OCC. I have been involved in a number of rate cases and  
21 accelerated infrastructure replacement and recovery cases associated with the four  
22 largest investor owned gas companies in Ohio. I have also participated in number  
23 of external working groups related to gas transportation programs and external

1 working groups related to gas distribution companies moving toward exiting the  
2 merchant function or eliminating the standard offer.  
3

4 ***Q3. WHAT ARE YOUR RESPONSIBILITIES AS A PRINCIPAL REGULATORY***  
5 ***ANALYST?***

6 ***A3.*** My duties include research, investigation and analysis of gas and electric filings at  
7 the state and federal levels, participation in special projects, and assisting in  
8 policy development and implementation. I am also the assigned leader of the  
9 OCC gas team since June 1, 2008, and coordinate the activities of the members of  
10 the agency's gas team.  
11

12 ***Q4. HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY OR TESTIFIED***  
13 ***BEFORE THIS COMMISSION?***

14 ***A4.*** Yes. I have submitted testimony or testified in the following cases before the  
15 Public Utilities Commission of Ohio ("PUCO" or "Commission"):

- 16 1. *Dominion East Ohio Gas Company*, Case No. 05-219-GA-  
17 GCR;
- 18 2. *Columbia Gas of Ohio, Inc.*, Case Nos. 04-221-GA-GCR  
19 and 05-221-GA-GCR;
- 20 3. *Columbia Gas of Ohio, Inc.*, Case Nos. 07-478-GA-UNC  
21 and 07-237-GA-UNC;
- 22 4. *Columbia Gas of Ohio, Inc.*, Case No. 08-1344-GA-EXM;

- 1                   5.     *Dominion East Ohio Gas Company*, Case No. 12-1842-  
2                             GA-EXM;  
3                   6.     *Columbia Gas of Ohio, Inc.*, Case No. 12-2637-GA-EXM;  
4                   7.     *Duke Energy Ohio, Inc.*, Case Nos. 07-589-GA-AIR, 07-  
5                             590-GA-ALT and 07-591-GA-AAM (testimony filed);  
6                   8.     *Dominion East Ohio Gas Company*, Case No. 11-2401-  
7                             GA-ALT and 08-169-GA-ALT; and  
8                   9.     *Vectren Energy Delivery of Ohio, Inc.*, Case No. 07-1285-  
9                             GA-EXM (testimony filed).

10  
11   ***Q5.   HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY BEFORE ANY***  
12                   ***OTHER STATE REGULATORY COMMISSION?***

13   ***A5.***   Yes. I submitted testimony on behalf of CKY (Columbia Gas of Kentucky),  
14                   before the Kentucky Public Service Commission in CKY, Inc. Rate Case No.  
15                   8281.<sup>1</sup> My testimony related to a long-term decrease in the forecasted throughput  
16                   for CKY.

17  
18   ***Q6.   WHAT DOCUMENTS HAVE YOU REVIEWED IN THE PREPARATION OF***  
19                   ***YOUR TESTIMONY?***

20   ***A6.***   I have reviewed relevant parts of Duke Energy Ohio, Inc.'s ("Duke" or "Utility")  
21                   standard filing requirements and supporting work papers, alternative regulation  
22                   plan, pre-filed testimony, responses to OCC discovery, responses to data requests

---

<sup>1</sup> *In the Matter of An Adjustment of Rates of Columbia Gas of Kentucky, Inc.*, Case No. 8281, Order (December 30, 1981).

1 of the Staff of the Public Utilities Commission of Ohio (“Staff”), the Staff Report  
2 of Investigation (“The Staff Report”), and its supporting work papers. I have also  
3 reviewed relevant documents and Opinion and Orders from other proceedings.  
4

5 **II. PURPOSE OF TESTIMONY**

7 ***Q7. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS***  
8 ***PROCEEDING?***

9 **A7.** The purpose of my testimony is first to review Duke’s proposed Facilities  
10 Relocation - Mass Transportation Rider FRT (“Rider FRT”). I testify in support  
11 of OCC Objection No. 27, and recommend that the Commission reject Rider  
12 FRT. I also explain OCC’s concerns, which supplement the PUCO Staff’s  
13 position. The subject of my testimony is how utility ratemaking and regulatory  
14 principles are compromised under the proposed Rider FRT. In addition, it is my  
15 opinion that the proposed Rider FRT, to be used as a mechanism to collect/pay  
16 relocation costs owed by the governmental entity, would be bad public policy.  
17 Finally, to the extent Rider FRT could result in Duke’s residential customers  
18 paying more for a relocation project than through a tax scheme, that too should be  
19 deemed bad public policy, and another reason for the PUCO to deny Rider FRT. I  
20 take no position on whether any particular transportation project should be built.  
21

22 Second, I address Duke’s proposal to recover from customers more than \$65  
23 million in incurred and projected environmental remediation costs and carrying

1 charges that Duke says it has, or will, incur associated with remediation at two  
2 manufactured gas plant ("MGP") plant sites that closed their operations in the  
3 1960s.

4  
5 With regard to the collection of MGP-related investigation and remediation costs,  
6 I recommend:

- 7 1. Under the Commission's rate making formula<sup>2</sup>, the  
8 Commission should not allow recovery of MGP-related  
9 investigation and remediation costs from Duke's  
10 customers. Duke's shareholders should ultimately be  
11 responsible for these costs;
- 12 2. However, if the PUCO does allow certain MGP-related  
13 investigation and remediation costs to be collected from  
14 customers, then only necessary and prudently incurred  
15 costs as noted in the testimony of OCC witness Campbell  
16 should be so collected. Any such costs should then be  
17 allocated evenly between the Utility and customers. Any  
18 third-party liability recovery should be applied to reduce  
19 the MGP-related costs before they are split between the  
20 Utility and customers. Any insurance policy proceeds  
21 should be applied against the MGP-related costs allocated  
22 to customers only;

---

<sup>2</sup> R.C.4909.15.



3. In addition, if there is any MGP-related cost recovery from customers, then the costs should be amortized over a longer period of time than the three-years proposed by the PUCO Staff, as noted by OCC witness Effron; and
4. Any allocation of such costs to customer classes should be done under a different methodology than recommended by the PUCO Staff as noted by OCC witness Rubin.

### **III. DISCUSSION AND RECOMMENDATION: RIDER FRT**

#### ***Q8. PLEASE PROVIDE AN OVERVIEW OF DUKE'S PROPOSED RIDER FRT.***

**A8.** Duke's proposal for Rider FRT seems prompted by a facilities-relocation issue related to a streetcar project in Cincinnati, but the proposal is not limited to a particular transportation project. In this context, facilities include Duke's plant, such as gas mains and service lines that another party is requesting be relocated. The proposed Rider FRT would be applicable when Duke is requested or required to construct, remove, modify or relocate any facilities, equipment, mains or service piping related to the distribution or transmission of gas service in situations where Duke would not otherwise build, remove or relocate its facility, and is not otherwise compensated for the costs related to the required work. The request must be directly related to the construction or operation of "any mode of

1 mass transportation, including but not limited to, light rail, heavy rail, high-speed  
2 rail, street cars, subways, trolleys, trains, or buses.”<sup>3</sup>

3  
4 Rider FRT would apply to a request from a customer, a private party or a  
5 governmental entity, which includes any city, county, municipality, township or  
6 special district but excludes State or federal governmental entities.<sup>4</sup>

7  
8 A customer or a private party requesting the construction would have to pay all  
9 the cost of removing or relocating the facilities regardless of the reason for the  
10 action requested.<sup>5</sup>

11  
12 For government entities, however, the addition of Rider FRT would provide at  
13 least three options for collecting the costs.<sup>6</sup> According to Duke witness Wathen,  
14 the first option (“Option 1”) would be for the governmental body to pay Duke  
15 directly for all the cost of relocating facilities, either in a lump sum or over time.  
16 The second option (“Option 2”) would allow Duke to institute Rider FRT, which  
17 would cover all the costs of the project by placing a charge on the monthly utility  
18 bills of those customers residing within the governmental entity’s boundaries.  
19 The third option (“Option 3”) would be some combination of Option 1 and Option  
20 2. According to Mr. Wathen, the charge under Option 1, Option 2 or Option 3

---

<sup>3</sup> Proposed Rider FRT, Sheet No. 69 (July 20, 2012).

<sup>4</sup> Notice of Application at 49.

<sup>5</sup> Id.

<sup>6</sup> Direct Testimony of William Don Wathen at 12 (July 20, 2012).

1 would be sufficient to pay for the cost of relocating the facilities, plus a carrying  
2 charge at the weighted-average cost of capital established in these proceedings.<sup>7</sup>  
3

4 ***Q9. DOES THE PUCO STAFF SUPPORT DUKE'S PROPOSAL TO CREATE***  
5 ***RIDER FRT IN THIS PROCEEDING?***

6 ***A9.*** No. The PUCO Staff does not support Rider FRT because, as designed, it is not  
7 well-defined and too open-ended.<sup>8</sup> The Staff enumerated these five reasons for  
8 opposing the Rider FRT:

- 9 ♦ Duke's proposal fails to identify what type of public mass  
10 transportation projects would be eligible under Rider FRT.
- 11 ♦ The proposal does not distinguish between projects that  
12 should be funded solely by the governmental subdivision  
13 and projects funded solely by the utility in accordance with  
14 the home rule charter of the Ohio Constitution.
- 15 ♦ The proposal does not address the fact that many  
16 transportation projects provide various economic, social,  
17 and environmental benefits that are realized directly and  
18 indirectly. Also, it is unclear if the design of Rider FRT  
19 would ensure that the appropriate customers are being  
20 charged for the project in accordance with the principles of  
21 cost causation and recovery.

---

<sup>7</sup> Id.

<sup>8</sup> Staff Report at 20 (January 4, 2013).

- 1           ♦       Duke's proposal to have two options for funding mass  
2                   transportation projects presents confusion. It is not clear as  
3                   to what point in time, in conjunction with the project's  
4                   planning and construction stages, Duke would seek  
5                   Commission approval to utilize the tariff. And, it is not  
6                   clear how potential cost overruns would be reviewed and/or  
7                   approved by the Commission.
- 8           ♦       It is not clear if granting mass transportation projects, to be  
9                   funded through a charge on customer's bills, would result  
10                  in unintended liability and/or legal issues, such as who  
11                  bears the assessment of future remediation liability.<sup>9</sup>

12  
13   ***Q10. DO YOU AGREE WITH THE PUCO STAFF THAT RIDER FRT SHOULD***  
14   ***NOT BE APPROVED BY THE COMMISSION?***

15   ***A10.*** Yes, however, it is my opinion that there are three additional reasons, beyond  
16       those identified by the Staff, why Rider FRT should be rejected. The first reason  
17       is that the Commission should reject Rider FRT because it violates the regulatory  
18       principle of aligning cost causation with cost recovery. Second, it is bad public  
19       policy because a utility should not act as a revenue or tax collector for a local  
20       governmental entity. Third, to the extent Rider FRT could result in Duke's  
21       residential customers paying more for a relocation project than through the  
22       governmental entity's tax scheme, it should be deemed bad public policy.

---

<sup>9</sup> Id. at 20-21.

1

2 ***Q11. ON WHAT BASES DO YOU RECOMMEND THAT THE COMMISSION***  
3 ***NOT APPROVE RIDER FRT?***

4 ***A11.*** Rider FRT unfairly discriminates among customer classes. It gives members of  
5 one class -- governmental entities -- preferential treatment by providing the  
6 governmental entities with options for how Duke collects the costs associated  
7 with their requests for relocation of facilities, including the collection of those  
8 costs from other customer classes that are not the cost causers. As I previously  
9 stated, Rider FRT violates the regulatory principle of aligning cost recovery from  
10 the entity that causes the cost. In addition, it is bad public policy to use riders on  
11 utility bills as a means for governmental entities to help fund public works  
12 projects. Governmental bodies have other means of collecting/paying the costs  
13 for relocating facilities associated with public projects, including levying taxes or  
14 borrowing the necessary funds (or some combination of taxation and borrowing).  
15 Therefore, it is bad public policy for Duke's proposed Rider FRT to permit the  
16 Utility to act as a revenue or tax collector for local governmental bodies --  
17 Cincinnati in this instance -- regarding certain aspects of transportation projects.  
18 That should not be allowed.

19

1 **Q12. WILL DUKE'S PROPOSED RIDER FRT COLLECT COSTS FOR**  
2 **TRANSPORTATION PROJECTS FROM UTILITY CUSTOMERS AT THE**  
3 **SAME RATE AS A GOVERNMENTAL ENTITY'S TAXING SCHEME?**

4 **A12.** No. The Rider FRT tariff language fails to assure fairness for customers in the  
5 treatment of city/county taxes versus tariff riders for the relocation of utilities  
6 related to a governmental subdivision's project, such as the Cincinnati streetcar  
7 project discussed in Mr. Wathen's testimony. Under Rider FRT, some Utility  
8 customers will pay more and some will pay less than they otherwise would have  
9 paid as taxpayers. In his testimony, Mr. Wathen states: "[t]he Rider [FRT] is  
10 designed to give the governmental subdivision the option of paying the [Utility]  
11 directly for the cost of relocation or, alternatively, to charge only those customers  
12 residing within its governmental boundaries for the cost of the project."<sup>10</sup>  
13 However, there is no assurance that the relative cost to a Duke residential  
14 customer, through Rider FRT, would be equal to or the same as the cost to that  
15 same customer, under the City of Cincinnati's taxing authority. For example,  
16 Duke might collect the relocation costs, through Rider FRT, over a period of time  
17 not to exceed 24 months, placing a significant burden on the Utility's customers  
18 in comparison to collection through a more moderate multi-year taxing scheme.

19  
20 In addition, if the cost of relocating facilities for a project is collected through the  
21 governmental body's taxing authority, only the cost incurred by the governmental  
22 body is collected from taxpayers. However, if the cost of relocating facilities for

---

<sup>10</sup> Direct Testimony of William Don Wathen at 12 (July 20, 2012).

1 a project is collected by Duke through a charge on customers' bills, customers  
2 will also pay carrying charges at Duke's weighted-average cost of capital. Thus,  
3 customers would pay more for the project under utility billing than it actually  
4 costs the governmental body. To the extent Rider FRT could result in Duke's  
5 residential customers paying more for a relocation project than through a tax  
6 scheme, it should be deemed bad public policy and another reason for the PUCO  
7 to deny Rider FRT.

8  
9 ***Q13. DOES "OPTION 2" OF RIDER FRT GUARANTEE THAT THE COSTS OF***  
10 ***RELOCATING DUKE'S FACILITIES FOR A GOVERNMENTAL BODY'S***  
11 ***PROJECT WOULD ONLY BE PAID BY RESIDENTS WITHIN THE***  
12 ***GOVERNMENTAL BODY'S JURISDICTION?***

13 ***A13.*** No. Company witness Wathen states in his testimony: "[B]ut generally, the tariff  
14 [Rider FRT] seeks to ensure that the principles of cost causation are aligned with  
15 cost recovery."<sup>11</sup> However, the Utility is mistaken in its belief that the proposed  
16 Rider FRT tariff achieves these regulatory principles. In this instance the cost is  
17 caused by the City of Cincinnati requesting that Duke move its facilities. Thus  
18 Cincinnati should pay the relocation costs under the regulatory principle of cost  
19 causation. However, this regulatory principle would be violated if any Duke  
20 customer other than the City pays the costs.

---

<sup>11</sup> Direct Testimony of William Don Wathen at 11 (July 20, 2012); see also Direct Testimony of James E. Mehring at 27 (July 20, 2012) (in discussing the Rider FRT Tariff, the witness mistakenly states: **"Such an arrangement ensures that customers – including those outside of the jurisdiction at issue – do not pay for the non-traditional placement of facilities."**) (Emphasis added).

1 A second violation of the cost causation principle would occur if Duke's  
2 uncollectible expense rider would be used by Duke to collect the unpaid portion  
3 of Cincinnati residents' customers bills that include the Rider FRT charges from  
4 all other customers regardless where they live in the Duke service territory. It is  
5 possible that Duke's customers, outside the governmental body's jurisdiction,  
6 could end up paying Rider FRT costs on behalf of Duke's customers within the  
7 governmental body's jurisdiction who fail to pay their bills. Therefore, the PUCO  
8 should determine that the proposed Rider RFT tariff should be rejected because it  
9 violates the regulatory principle of aligning cost causation with cost recovery.

10

11 ***Q14. IS IT REASONABLE TO ENCOURAGE A UTILITY TO BECOME A***  
12 ***REVENUE OR TAX COLLECTOR FOR A GOVERNMENTAL ENTITY?***

13 ***A14.*** No, that is bad public policy. Company witness James E. Mehring in his direct  
14 testimony states: "Rider FRT thus **removes any delays** in a mass transportation  
15 project that could result **from protracted discussion of responsibility** for facility  
16 relocation and establishes an objective mechanism for recovery via the requesting  
17 entity or a surcharge on customers' utility bills."<sup>12</sup> (Emphasis added). It is  
18 troubling to think that Rider FRT could be used in a way that removes delays over  
19 determination as to the party with responsibility for facility relocations. If the  
20 governmental subdivision is responsible for relocation costs, then traditional  
21 taxing schemes or borrowing schemes should be the means of raising necessary  
22 funds to pay the relocation costs. The FRT Tariff should also not be used as an

---

<sup>12</sup> Direct Testimony of James E. Mehring at 29 (July 20, 2012). (Emphasis added).



1 incentive mechanism for a governmental subdivision to agree to pay relocation  
2 costs that it is not responsible for because it can be collected as a hidden tax from  
3 its constituents. From a public policy perspective, it is unreasonable to use a  
4 utility as a revenue or tax collector for a governmental entity.

5  
6 ***Q15. ARE UTILITIES CURRENTLY COLLECTING CERTAIN TAXES OR***  
7 ***REVENUES FOR GOVERNMENTAL ENTITIES?***

8 ***A15.*** Yes. There are currently circumstances where a utility serves as the tax or  
9 revenue collector for a governmental entity. For example, a utility may be  
10 required to collect State and/or Local Sales or Excise Taxes and Gross Receipts  
11 Taxes from its customers on behalf of the governmental entity. However, those  
12 instances are distinguishable from Rider FRT. The State Sales and Gross  
13 Receipts Taxes represent instances where the State Legislature has deemed it  
14 appropriate for the various utilities to pay the tax and in certain circumstances  
15 ordered the utility to collect the aforementioned tax from its customers.<sup>13</sup> The  
16 current Rider FRT proposal, where it is the Utility and not the State Legislature  
17 proposing the action, is highly distinguishable from a scenario where a  
18 governmental authority passes a law or ordinance requiring a utility to collect the  
19 tax.

20  

---

<sup>13</sup> See, for example, R.C. 5727.38 and R.C. 324.03.

1    ***Q16. IS YOUR RECOMMENDATION CONSISTENT WITH THE PUCO STAFF'S***  
2    ***RECOMMENDATION?***

3    ***A16.*** Yes. However, I also have additional reasons to the PUCO Staff's for denying the  
4    Rider FRT. Both OCC and the PUCO Staff oppose the Utility's proposal to  
5    create Rider FRT. The PUCO Staff does not support Rider FRT, stating that the  
6    proposal is not well-defined and too open-ended.<sup>14</sup> While OCC agrees with the  
7    Staff's assessment of Rider FRT, OCC also opposes the adoption of Rider FRT  
8    for additional reasons.

9  
10   ***Q17. WHY ELSE DO YOU RECOMMEND RIDER FRT BE DENIED?***

11   ***A17.*** Because Rider FRT violates the regulatory principle of aligning cost causation  
12   with cost recovery. In addition, Rider FRT is bad public policy because the  
13   Utility would be used as a tax collector for a governmental entity requesting that  
14   facilities be relocated. Finally, approval of Rider FRT, as proposed, is bad public  
15   policy because it could result in the unreasonable circumstance where Duke's  
16   residential customers would have to pay more for a relocation project than if the  
17   project were funded through another tax process.

18  

---

<sup>14</sup> Staff Report at 21 and 22 (January 4, 2013).

**IV. DISCUSSION AND RECOMMENDATION: MANUFACTURED GAS  
PLANT INVESTIGATION AND REMEDIATION COST RECOVERY**

***Q18. WHAT ARE MANUFACTURED GAS PLANTS?***

***A18.*** Manufactured gas plants began appearing in the United States in the early 1800s and continued to be used into the 1970s. As the name implies, these plants manufactured gas that could be used for illumination (gas lamps were common before electricity was introduced), and eventually for many of the same purposes that natural gas is used today, such as cooking, heating, and industrial processes. Gas manufacturing used various raw materials as the feedstock, including coal, oil, and in some cases blending with natural gas to assure a consistent quality. The earlier plants utilizing coal as feedstock also produced coke that was used by industry (i.e. cement and steel), tar used by the chemical industry and for road building, and ammonia used for refrigeration. The New York State Department of Environmental Conservation has published a concise history of gas manufacturing which provides useful background on the plants.<sup>15</sup>

According to a 1985 Report prepared by the Radian Corporation for the U.S. Environmental Protection Agency, there are at least 90 sites in Ohio that

---

<sup>15</sup>New York State Department of Environmental Conservation, 2008. *New York State's Approach to the Remediation of Former Manufactured Gas Plant Sites*, available at [http://www.dec.ny.gov/docs/remediation\\_hudson\\_pdf/nysmgpprogram.pdf](http://www.dec.ny.gov/docs/remediation_hudson_pdf/nysmgpprogram.pdf), last accessed, Jan. 16, 2013.

1 manufactured gas and by-products.<sup>16</sup> I included a map of the towns and cities in  
2 Ohio where these sites are located, based on The Radian Report, prepared by  
3 Briget C. Doyle and Allen W. Hatheway.<sup>17</sup> See Attachment BMH1.  
4

5 ***Q19. HAS THE PUCO GRANTED AUTHORITY FOR A UTILITY TO COLLECT***  
6 ***MGP-RELATED INVESTIGATION AND REMEDIATION COSTS FROM***  
7 ***CUSTOMERS?***

8 ***A19.*** No, to the best of my knowledge this case is a case of first impression in Ohio.  
9 Duke and Columbia Gas of Ohio<sup>18</sup> have sought authority to defer such costs, but  
10 up until now there has been no attempt to recover the MGP-related investigation  
11 and remediation costs from customers.  
12

13 ***A20. WHAT IS YOUR RECOMMENDATION REGARDING THE RECOVERY OF***  
14 ***MGP-RELATED COSTS FROM CUSTOMERS?***

15 ***Q20.*** My primary recommendation is that the PUCO should not authorize Duke to  
16 collect the MGP-related costs from customers. With regard to the collection of  
17 MGP-related investigation and remediation costs, I recommend:

---

<sup>16</sup> Survey of Town Gas and By-Product Production and Locations in the U.S. (1880 – 1950), by Robert Eng, Radian corporation, for the U.S. environmental Protection Agency, EPA Report No. EPA/600/7-85/004.

<sup>17</sup> [http://hatheway.net/state\\_site\\_pages/oh\\_epa.html](http://hatheway.net/state_site_pages/oh_epa.html).

<sup>18</sup> *Columbia Gas of Ohio MGP Deferral Case*, Case No. 08-606-GA-AAM, Application (May 19, 2008).  
*In the Matter of the Application of Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM, Application (August 10, 2009).

1. Under the Commission's rate making formula, the Commission should not allow recovery from Duke's customers.
2. However, if the PUCO does allow certain MGP-related investigation and remediation costs to be collected from customers, then only necessary and prudently incurred costs should be so collected as noted in the testimony of OCC witness Campbell. Any such costs prudently incurred should then be allocated evenly between the Utility and customers. Any third-party liability recovery should be applied to the MGP-related costs before they are split between the Utility and customers. Any insurance policy proceeds should be applied against the MGP-related costs allocated to customers only;
3. In addition, if there is any MGP-related cost recovery from customers, then the costs should be amortized over a longer period of time than the three-years proposed by the PUCO Staff, as noted by OCC witness Effron; and
4. Any allocation of such costs to customer classes should be done under a different methodology than recommended by the PUCO Staff as noted by OCC witness Rubin.

**Q21. WHAT IS THE STATUS OF DUKE'S REQUEST TO DEFER ITS  
INVESTIGATION AND REMEDIATION COSTS?**

**A21.** On August 10, 2009, Duke sought authority to defer the following environmental and remediation costs that it may incur relative to the former East End and West End MGP sites including:<sup>19</sup>

- a. Costs associated with a search of historical records to confirm whether Duke or one of its corporate predecessors has or had any corporate connection to the site. The search may include a chain of title investigation to identify prior and current owners and uses of the property;
- b. Costs associated with a review of the environmental history of the property to ascertain whether any activities may have occurred on the property that led to the release of hazardous substances;
- c. Costs associated with an evaluation of all known or suspected releases of hazardous substances, including a property inspection;
- d. Site investigation costs to determine if there are impacts due to the former MGP;
- e. Risk assessment costs to identify and prioritize those areas of the property that may contain unacceptable risks or

---

<sup>19</sup> *In the Matter of the Application of Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM, Application at 2 (August 10, 2009).

1 potential future risk associated with human and/or  
2 ecological health;

3 f. Feasibility study costs to review all data collected, to  
4 evaluate the available technologies that may be considered  
5 to create a remedial alternative and to evaluate these  
6 alternatives based on cost, technical merits and ability to  
7 implement;

8 g. Remedial work plan costs for the development of a plan  
9 that describes the remedy in detail;

10 h. Design and bid specification costs to develop design and  
11 bid specifications for the chosen remedy;

12 i. Remedial costs associated with the implementation of the  
13 chosen remedy;

14 j. Other costs.<sup>20</sup>

15  
16 ***Q22. DID THE PUCO AUTHORIZE DUKE TO COLLECT FROM CUSTOMERS***  
17 ***THE DEFERRED MGP-RELATED COST IN THE DEFERRAL CASE?***

18 ***A22.*** No. The PUCO allowed the deferral of these costs and the associated carrying  
19 charges in a Finding and Order filed in November 2009.<sup>21</sup> The carrying charge

---

<sup>20</sup> Application at 4 (July 20, 2012).

1 rate shall be determined annually based on Duke's embedded debt-only  
2 interest rate. The rate shall be exclusive of the equity component and there  
3 will be no compounding.<sup>22</sup> However, the PUCO also noted, “[B]y considering  
4 this application, the Commission is not determining what, if any, of these costs  
5 may be appropriate for recovery in Duke’s distribution rates.”<sup>23</sup>  
6

7 Finally, the PUCO stated:  
8

9 Since the requested authority to change Duke's accounting  
10 procedures does not result in any increase in rate or charge the  
11 Commission approves this application without a hearing. The 09-  
12 712-GA-AAM recovery of the deferred amounts will be addressed  
13 in a base rate case proceeding **should Duke ever seek to recover**  
14 **the deferrals.**<sup>24</sup>  
15

16 Through this language the PUCO approved only the deferral of MGP-related  
17 costs while reserving any actual cost recovery to a future distribution case, and

---

<sup>21</sup> *In the Matter of the Application of Duke Energy Ohio, Inc to Defer Certain MGP-Related Investigation and Remediation Costs* (“Deferral Case”), Case No. 09-712-GA-AAM, Finding and Order at 8 (Nov. 12, 2009).

<sup>22</sup> *In the Matter of the Application of Duke Energy Ohio, Inc to Defer Certain MGP-Related Investigation and Remediation Costs* (“Deferral Case”), Case No. 09-712-GA-AAM, Finding and Order at 8 (Nov. 12, 2009).

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.*



1           then only if requested by Duke. The PUCO Order did not presume that there  
2           would be a future case for recovery or any future remediation cost recovery.

3  
4   ***Q23. HAS DUKE REQUESTED AUTHORITY TO COLLECT MGP-RELATED***  
5   ***COSTS FROM CUSTOMERS IN THIS RATE CASE PROCEEDING?***

6   ***A23.*** Yes. In this case, Duke is seeking collection authority for the \$65.3 million in  
7           costs incurred investigating and remediating two former MGP sites, as well as,  
8           carrying charges.<sup>25</sup> The two former MGP sites are the West End Site, which is  
9           located to the west of downtown Cincinnati, and the East End Site, which is  
10          located approximately four miles east of downtown Cincinnati.<sup>26</sup>

11  
12   ***Q24. DID THE PUCO STAFF INVESTIGATE THE UTILITY'S MGP-RELATED***  
13   ***INVESTIGATION AND REMEDIATION COSTS, IN THIS PROCEEDING?***

14   ***A24.*** Yes.

15  
16   ***Q25. WHAT WERE THE PUCO STAFF'S STATED PURPOSES REGARDING***  
17   ***ITS INVESTIGATION OF DUKE'S MGP-RELATED COST COLLECTION***  
18   ***REQUEST?***

19   ***A25.*** The stated purposes of the Staff's investigation were to ascertain the  
20           reasonableness of the proposed expenses, **determine if the proposed expenses**  
21           **are recoverable in natural gas distribution rates under the Commission's**

---

<sup>25</sup> Application at ¶5, See also Direct Testimony of Jessica Bednarcik at 4 (July 20, 2012).

<sup>26</sup> [http://hatheway.net/state\\_site\\_pages/oh\\_epa.htm](http://hatheway.net/state_site_pages/oh_epa.htm)-at page 5.

1       **rate-making formula**, verify invoices and payments for remediation activities,  
2       and ensure that Duke's books and accounts are a reliable source of cost data.<sup>27</sup>

3  
4       ***Q26. WHAT DID THE PUCO STAFF RECOMMEND REGARDING DUKE'S***  
5       ***MGP-RELATED COST COLLECTION REQUEST?***

6       **A26.** The Staff recommended the following:

7       **East End MGP Site:**

8       **Eastern Parcel:** Based on the Staff's inspections and review of documents  
9       provided by Duke, the Staff concluded that the only areas of the parcel that are  
10      used and useful for providing natural gas distribution service are the areas that  
11      provide access to the underground natural gas pipelines and the pipelines  
12      themselves. Therefore, the Staff recommended that Duke should only be  
13      permitted to recover MGP remediation expenses incurred for land 25 feet on each  
14      side of the centerline of the gas pipelines, thus providing a total 50-foot buffer  
15      around the pipelines.<sup>28</sup>

16      **Western Parcel:** The Staff concluded that none of the remediation expenses at  
17      the Western Parcel were incurred to operate, maintain, or repair natural gas plant  
18      that was in-service and used and useful at the date certain except for expenses  
19      incurred in a small area in the northeast corner of the parcel. The Staff also  
20      recommends placing a buffer around the Vaporizer Building, which is shown on  
21      Attachment MGP-7 to the Staff Report. Given these findings, the Staff

---

<sup>27</sup> Staff Report at 40 (January 4, 2013) (emphasis added).

<sup>28</sup> Staff Report at 41 (January 4, 2013). See also Staff Report at Attachment MGP-5 (January 5, 2013).

1 recommended that none of the MGP remediation expenses incurred at the  
2 Western Parcel should be recoverable in natural gas distribution rates except for  
3 those incurred within the required 50-foot buffer around the existing Vaporizer  
4 Building.<sup>29</sup>

5 **West End MGP Site:**

6 **North of Mehring Way**

7 The Staff concluded that there were no facilities on this site that were used and  
8 useful for providing natural gas service to customers at the date certain. Hence,  
9 the Staff recommended that Duke should not be permitted to recover any  
10 operation and maintenance expenses incurred during remediation activities on the  
11 parcel.<sup>30</sup>

12  
13 **South of Mehring Way**

14 The Staff concluded that none of the remediation work was performed in the  
15 section of the parcel devoted to natural gas pipelines. Hence, the Staff  
16 recommended that these expenses not be recovered in natural gas distribution  
17 base rates because the expenses incurred were not related to the operation,  
18 maintenance or repair of natural gas distribution facilities.<sup>31</sup>

19  
20 As a result of its investigation, the Staff recommended that Duke should be  
21 permitted to collect a total of \$6,367,724 in MGP-related investigation and

---

<sup>29</sup> Staff Report at 42-43 (January 4, 2013) See also Staff Report at Attachment MGP-7 (January 5, 2013).

<sup>30</sup> Staff Report at 44 (January 4, 2012).

<sup>31</sup> Id.

1 remediation expenses from customers (compared to Duke's request to collect  
2 \$65.3 million from customers). This amount includes carrying costs totaling  
3 \$610,701.<sup>32</sup> In addition, the Staff recommended these costs be recovered from  
4 customers through a separate rider and not through distribution rates to be set in  
5 this case.

6

7 ***Q27. DO YOU AGREE WITH THE PUCO STAFF'S CONCLUSIONS AND***  
8 ***RECOMMENDATIONS IN THE STAFF REPORT WITH REGARD TO***  
9 ***DUKE'S MGP-RELATED COST COLLECTION REQUEST?***

10 ***A27.*** I agree with the Staff's findings and recommendations to disallow certain MGP  
11 investigation and remediation costs related to MGP sites that Staff found not to be  
12 "currently used and useful for natural gas distribution service and are thus not  
13 recoverable in natural gas rates."<sup>33</sup> However, I will explain below why the PUCO  
14 Staff should have conducted additional analysis regarding MGP-related costs.  
15 And I do not agree with the PUCO Staff's recommendations to allow Duke to  
16 collect any MGP-related costs from customers.

17

18 ***Q28 WHAT ARE YOUR DISAGREEMENTS WITH THE STAFF'S MGP-***  
19 ***RELATED RECOMMENDATIONS?***

20 ***A28.*** First, the Staff failed to investigate the reasonableness of the MGP-related costs  
21 related to the scope and necessity of the remediation activities. The Staff stated:

---

<sup>32</sup> Staff Report at 46 (January 4, 2013) (emphasis added); See also Staff Report at Attachment MGP-13 (January 5, 2013) (emphasis added).

<sup>33</sup> Staff Report at 45.

1 “{t]he Staff’s determination of the reasonableness of the MGP-  
2 related expenses was limited to verification **and eligibility of the**  
3 **expenses** for collection from natural gas distribution rates. **The**  
4 **Staff did not investigate or make any finding or**  
5 **recommendations regarding necessity or scope of the**  
6 **remediation work performed by Duke.** For example, the Staff  
7 offers no opinion as to whether in-situ solidification might have  
8 been adequate and less costly than excavation and soil replacement  
9 in a particular area. Nor did the Staff offer an opinion as to  
10 whether excavation to a depth of 35 feet was sufficient to address  
11 MGP impacts as opposed to the 40 feet that Duke determined.”<sup>34</sup>

12  
13 For the PUCO Staff not to address the scope and necessity of the remediation  
14 activities resulted in the Staff not addressing the prudence of the MGP-related  
15 spending. Inasmuch as this is a case of first impression in Ohio, it is all the more  
16 imperative for the Commission to scrutinize the scope and necessity of the  
17 remediation activities in light of the obligations under the applicable  
18 environmental clean-up standards<sup>35</sup>, in order to address the issue of prudence.  
19 The Staff did not do this as part of its investigation.

20 Such a prudence review is not foreign to the Staff or the PUCO. In this regard,  
21 the PUCO reviews the prudence of Duke’s natural gas purchases in the bi-annual

---

<sup>34</sup> Staff Report at 40 (January 4, 2013) (emphasis added).

<sup>35</sup> Federal Comprehensive Environmental Response Cost and Liability Act 42 U.S.C. §9601 et seq. (“CERCLA”) See also Ohio Voluntary Action Program (“VAP”) Rules” Ohio Adm. Code 3745-300, et seq.

1 Gas Cost Recovery Management/Performance Audit cases. For example, Duke  
2 can contract for gas supply in a manner that guarantees a reliable supply.  
3 However, in doing so, Duke would be obligated to consider the cost implications  
4 of its decisions. If the costs of guaranteeing a reliable gas supply were deemed,  
5 by the PUCO, to be imprudent, the Commission would have the authority to order  
6 a disallowance. In this case, it appears that Duke spent a significant amount of  
7 money to remediate the MGP sites to a level that far exceeded the requirements  
8 under the applicable environmental clean-up program. OCC witness James  
9 Campbell will address the issue of the prudence of the scope of the remediation  
10 work as noted in OCC Objection to the Staff Report No. 26.

11  
12 Second, it is my opinion that the Staff inappropriately determined that certain of  
13 Duke's proposed expenses were eligible to be recovered in natural gas  
14 distribution rates under the Commission's rate-making formula. It is my opinion  
15 that, under the Commission's rate making formula, none of the remediation costs  
16 are recoverable because none of the underlining facilities that gave rise to the  
17 cleanup costs are used and useful in the provision of utility service during the test  
18 year as I explain below. Therefore, Duke should not be allowed to collect, from  
19 customers, any costs related to the investigation and remediation of the former  
20 MGP sites.

21 My third concern with the Staff recommendation is that Duke has not exhausted  
22 all of its possible insurance claims and third-party liability claims. The Utility

1 should be required to exhaust all of these claims--with the potential for the Utility  
2 to receive funds--before there is any MGP-related cost recovery from customers.

3  
4 If the PUCO were to require customers to pay Duke for any MGP-related costs,  
5 the costs that are prudently incurred should be allocated evenly between the  
6 Company and customers after the prudence standard<sup>36</sup> has been applied and after  
7 any money recovered from third-party liability claims is applied. I base this on  
8 the fact that shareholders benefited from the existence of the MGP at least as  
9 much as customers did in the past when the MGP's actually produced gas.

10 Without the MGP, there would have been no gas or there would have been less  
11 gas to sell; thus the benefit to shareholders came from having the commodity to  
12 sell to past customers from the 1840s to the 1960s. In addition to the benefit from  
13 the sale of any gas produced by the MGP, shareholders also benefited from the  
14 sale of other by-products from the production of gas such as coke, tar and  
15 ammonia.

16  
17 Once the remaining eligible MGP-related costs have been split between the  
18 Company and customers, then any proceeds from insurance policies should be  
19 applied to customers' share of MGP-related costs. Customers paid the costs of  
20 policies as part of rates in the past, so any proceeds from those policies should be  
21 applied to customers' share of MGP-related costs.

22  

---

<sup>36</sup> See Attachment BMH-2, Duke Response to OCC-INT-03-124.

1 Fourth, Staff recommended only a 3-year amortization period.<sup>37</sup> If the  
2 Commission were to grant Duke any MGP cost collection in this case, after the  
3 prudence standard is applied, and remaining costs are evenly allocated between  
4 the Utility and customers, and insurance and third party liability claims are  
5 applied, then OCC objects to this Staff recommendation for the short three-year  
6 amortization period. OCC objects to the 3-year amortization period for reasons  
7 set forth in the testimony of OCC witness David Effron who supports OCC  
8 Objection No. 27. The customers' share of MGP-related costs should be  
9 amortized over the longer period of time as recommended by Mr. Effron.

10  
11 Fifth, if the Commission were to grant Duke any MGP cost collection in this case,  
12 OCC objects to the PUCO Staff's implicit acceptance of Duke's proposed  
13 allocation of MGP remediation costs by customer class.<sup>38</sup> Duke's proposed  
14 allocation is inappropriate for the reasons set forth in the testimony of OCC  
15 witness Scott Rubin who supports OCC Objection No. 29. OCC recommends that  
16 the allocation methodology recommended by Mr. Rubin be applied to MGP-  
17 related costs—after the prudence standard is applied, after remaining costs are  
18 evenly allocated between the Utility and customers, after insurance and third-  
19 party liability claims are applied, and after the amortization period issues have  
20 been addressed.

21  

---

<sup>37</sup> Staff Report at 52 (January 4, 2013).

<sup>38</sup> Staff fully accepted Duke's cost-of-service study without proposing any changes. Staff Report at 23 (January 4, 2013).



1 **Q29. CAN YOU EXPLAIN YOUR OBJECTIONS TO THE PUCO STAFF'S**  
2 **RECOMMENDATION FOR COLLECTION OF CERTAIN MGP-RELATED**  
3 **COSTS FROM CUSTOMERS IN THIS CASE?**

4 **A29.** Yes. I do not agree with the Staff's interpretation of the Commission's rate  
5 making formula that resulted in a recommendation for partial collection of the  
6 MGP-related investigation and remediation costs.

7  
8 **Q30. WHAT IS YOUR UNDERSTANDING OF THE PUCO STAFF'S**  
9 **INTERPRETATION OF THE PUCO'S RATE MAKING FORMULA?**

10 **A30.** It is my understanding that the PUCO Staff, relying on the PUCO's rate making  
11 formula, determined that at various locations on the MGP sites, Duke owns  
12 natural gas facilities that are currently used and useful, and determined that the  
13 investigation and remediation activities at or near those facilities could be charged  
14 to customers.<sup>39</sup>

15

---

<sup>39</sup> Staff Report at 41-43 (January 4, 2013).

1   ***Q31. WHY DO YOU DISAGREE WITH THE PUCO STAFF'S***

2           ***INTERPRETATION OF THE USED AND USEFUL STANDARD IN THIS***

3           ***CASE?***

4   ***A31.*** There are several reasons why I take exception to the Staff's recommendation.

5           First, the MGP sites have not been used for MGP production since 1963 (East  
6           End) and since 1967 (West End).<sup>40</sup> It is my understanding, based on my  
7           knowledge of the rate making formula in O.R.C. 4909.15 and on advice of  
8           counsel, that R.C. 4909.15(A)(1) requires the valuation as of the date certain of  
9           the property of the public utility used and useful or, with respect to a natural gas  
10          company, projected to be used and useful as of the date certain, in rendering the  
11          public utility service for which rates are to be fixed and determined. However, no  
12          MGP-related investment could be considered used and useful in rendering the  
13          public utility service to customers as of the date certain, under the Commission's  
14          rate-making formula. Second, the facilities that the PUCO Staff determined to be  
15          used and useful on the MGP sites (the areas that provide access to the  
16          underground natural gas pipelines and the pipelines themselves,<sup>41</sup> the buffer  
17          around the Vaporizer Building,<sup>42</sup> etc.) did not cause the contamination being  
18          remediated nor were these facilities the reason that Duke undertook the  
19          remediation activities at these MGP sites. The need for remediation was

---

<sup>40</sup> Direct Testimony of Jessica L. Bednarcik) at 5, lines 21-22 (July 20, 2012).

<sup>41</sup> Staff Report at 41 East End MGP Site Eastern Parcel.

<sup>42</sup> Staff Report at 42 East End MGP Site Western Parcel.

1       precipitated by construction projects near each of the sites that would potentially  
2       result in increased exposure to impacted material.<sup>43</sup>

3

4       **A32. DOES THE COMMISSION'S RATE-MAKING FORMULA PROVIDE**  
5       **OTHER BASES AGAINST ALLOWING COLLECTION OF MGP-RELATED**  
6       **INVESTIGATION AND REMEDIATION COSTS FROM CUSTOMERS?**

7       **A32.** Yes. It is my understanding, based on my knowledge of the rate making formula  
8       in O.R.C. 4909.15 and on advice of counsel, that R.C. 4909.15(A)(4) requires  
9       setting rates based on the “cost to the utility of rendering the public utility service  
10      for the test period.”

11

12      **Q33. SHOULD THE MGP-RELATED INVESTIGATION AND REMEDIATION**  
13      **COSTS BE CONSIDERED COSTS OF RENDERING UTILITY SERVICE?**

14      **A33.** No. The MGP-related costs are not for used and useful plant for rendering utility  
15      service as of the date certain. And the costs are not for rendering utility service  
16      during the test period.

17

18      **Q34. PLEASE EXPLAIN WHY THE MGP-RELATED INVESTIGATION AND**  
19      **REMEDATION COSTS ARE NOT COSTS OF RENDERING UTILITY**  
20      **SERVICE?**

21      **A34.** The costs that Duke is seeking to collect from customers in this case cannot be  
22      tied to rendering any current service for Duke's customers. Instead, the costs

---

<sup>43</sup> Direct Testimony of Jessica L. Bednarcik at 8, lines 7-23 (July 20, 2012).

1 Duke is seeking to collect are related to the environmental investigation and  
2 remediation of former manufactured gas plant sites that produced gas that was  
3 used to render utility service over 50 years ago. For costs to be eligible for  
4 recovery from customers under the rate making formula in the law, the costs must  
5 be incurred for property that is used and useful, as of the date certain, in rendering  
6 utility service or for rendering service during the test period.<sup>44</sup> As explained  
7 above, MGP-related costs are neither. The requirements of R.C. 4909.15,  
8 therefore, have not been satisfied.

9

10 ***Q35. DOES THE COMMISSION'S RATE-MAKING FORMULA PROVIDE ANY***  
11 ***OTHER BASES FOR PROHIBITING DUKE FROM COLLECT THE MGP-***  
12 ***RELATED INVESTIGATION AND REMEDIATION COSTS FROM***  
13 ***CUSTOMERS?***

14 ***A35.*** Yes. Counsel advises (and I am aware) that a rate making standard is that  
15 expenses to be considered as a basis for setting rates should be normal and  
16 recurring. An example of such normal and recurring expenses incurred typically  
17 by utilities would be expenditures for company operations, maintenance,  
18 personnel related costs, administrative expenses, taxes and depreciation. Thus,  
19 under the Ohio rate making formula (per R.C. 4909.15(A)(4)), in order for the  
20 MGP-related investigation and remediation costs to be collected from customers,  
21 the costs must be normal and recurring in the course of rendering utility service.  
22 There has been no showing or even a claim that the investigation and remediation

---

<sup>44</sup> R.C. 4909.15.

costs were normal or recurring, or that they were incurred in the course of Duke providing utility service. In fact, the Staff recognized the non-recurring nature of these costs in the Staff report by stating: “except for certain ongoing environmental monitoring costs, the MGP costs **are one-time nonrecurring expenses \* \* \***.” The very nature of the MGP-related costs for investigation and remediation, which Duke proposes for recovery from customers, is that these costs are not normal or recurring.

***Q36. IN YOUR OPINION SHOULD DUKE LOOK TO ITS SHAREHOLDERS  
INSTEAD OF COLLECTION OF THE MGP-RELATED INVESTIGATION  
AND REMEDIATION COSTS FROM CUSTOMERS?***

**A36.** Yes. Duke’s collection of environmental investigation and remediation costs of its two former MGP sites from current customers is improper because the costs associated with the MGP’s were previously recovered from customers in past rates. In my opinion, Duke’s shareholders have been aware of the risks associated with the MGP-related remediation concerns.<sup>45</sup> However, despite of the known risks associated with MGP’s, the Utility did not address these concerns and instead shareholders have benefited from the utility’s rate of return, which Duke’s customers have previously and continuously paid. If the remediation costs are passed on to Duke’s current and future customers, then the Utility will have shifted the risk of MGP remediation from its shareholders, where it belongs, to its

---

<sup>45</sup> See Attachment BMH-3, Duke Response to OCC Interrogatory No. 11-495 (“Yes multiple Form 10 Qs and 10 Ks going back to 1997 have referred to the MGP remediation issue in the Commitments and Contingencies note to the consolidated financial statements.” See also Attachment BMH-4, Duke Response to OCC Interrogatory No. 11-496.

1 customers who have previously and continuously paid the business risk  
2 component.

3  
4 Collecting MGP costs from customers in this case would be an unreasonable  
5 outcome because it would permit the Utility's shareholders to profit from the use  
6 of the MGP in the past while avoiding any of the business risk associated with its  
7 past use of the plants. The Commission should therefore disallow Duke's request  
8 to collect from its customers the MGP-related investigation and remediation costs.  
9 The costs should instead be borne by Duke's shareholders.

10  
11 **37. BEFORE SEEKING TO COLLECT CERTAIN INVESTIGATION AND**  
12 **REMEDATION EXPENSES FROM CUSTOMERS, DOES DUKE HAVE AN**  
13 **OBLIGATION TO SEEK CONTRIBUTIONS FROM OTHER SOURCES?**

14 **A37.** Yes. Before seeking to collect MGP-related investigation and remediation costs  
15 from customers, Duke has an obligation to offset such costs by the proceeds from  
16 appropriate insurance policies and from any pertinent third-party liability  
17 contribution.

**Q38. DID DUKE, OR ITS PREDECESSORS, CARRY EXCESS LIABILITY  
INSURANCE?**

**A38.** It is my understanding that Duke, or its predecessors, had excess liability insurance policies<sup>46</sup> that may cover some or all of the contamination risk from the MGP plant operations. In fact, it would have been imprudent for Duke not to carry some excess liability insurance policy. The Staff Report, stated: “In discussions with the Staff, Duke indicated that it is still in the early stages of investigating what, if any, coverage might be available. The Company stated that the issue of insurance coverage for environmental clean-up of the sites is “complex.”<sup>47</sup>

**Q39. IS DUKE SEEKING INSURANCE PROCEEDS TO COVER ANY OF ITS  
MGP-RELATED COSTS?**

**A39.** It appears that Duke is not aggressively seeking insurance proceeds to cover some or all of the MGP-related investigation or remediation costs. In the Staff Report, the Staff notes that Duke pointed to complicating factors including changes in ownership of policy-holders and imprecise language in very old policies.<sup>48</sup> Another complication, according to Duke, is that, given the age of the policies, it is difficult to determine in some cases if some policy holders are still in

---

<sup>46</sup> Excess liability insurance or commercial umbrella insurance, provides additional protection when your business risk exceeds insurance limits on an underlying policy.

<sup>47</sup> Staff Report at 47 (January 3, 2013).

<sup>48</sup> Id.

1 business.<sup>49</sup> Despite the difficulties Duke may encounter in collecting MGP  
2 investigation and remediation costs from insurers, the Staff recommends that the  
3 Commission direct that **Duke should use its utmost efforts to collect all**  
4 **remediation costs available under its insurance policies.**<sup>50</sup> Further, the Staff  
5 recommends that the Commission direct that any proceeds paid by insurers for  
6 MGP investigation and remediation costs should be split between shareholders  
7 and ratepayers, commensurate with the proportion of MGP costs paid by the  
8 ratepayers, until customers are fully reimbursed (including any applicable  
9 carrying costs set at the long term debt rate approved by the Commission in this  
10 case) for MGP expenses that were charged to them.<sup>51</sup>

11

12 ***Q40. IS DUKE INVESTIGATING THIRD PARTIES WHO MAY HAVE***  
13 ***LIABILITY FOR MGP-RELATED COSTS?***

14 ***A40.*** Yes. Duke responded to OCC discovery that it is investigating whether Columbia  
15 Gas of Ohio, Inc. is liable for MGP-related investigation and remediation  
16 expenses on the property at issue.<sup>52</sup> Duke should be required by the PUCO to use  
17 and document its utmost efforts to collect all remediation costs for which any  
18 third party is liable or for which any insurance carrier is responsible under the  
19 law.

20

---

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id. at 47.

<sup>52</sup> Duke Response to OCC Interrogatory No. 15-576.



1   ***Q41. WHAT EXPLANATION IS THERE FOR DUKE NOT AGGRESSIVELY***  
2                   ***SEEKING CONTRIBUTION TO ITS MGP-RELATED INVESTIGATION***  
3                   ***AND REMEDIATION COSTS FROM INSURANCE PROCEEDS OR THIRD-***  
4                   ***PARTY CONTRIBUTORS?***

5   ***A41.*** In this case, despite the fact that Duke has insurance policies covering excess  
6           liability, as well as potential liable third parties, the Utility appears to be taking  
7           the easier path by seeking collection of the remediation costs from captive  
8           customers instead of following through on its insurance policies or other third-  
9           party liability. Duke's apparent indifference to following through on the  
10          insurance and third-party liability begs the question of how diligent the Utility  
11          would be in following through on these insurance policies and third party claims  
12          if it did not have the option to seek cost recovery from captive customers. Mr.  
13          Campbell described the different approaches taken by private sector companies  
14          that do not have the option of simply attempting to automatically pass remediation  
15          costs on to customers, compared to those of Utilities like Duke.<sup>53</sup>

16  
17   ***Q42. WHAT IS YOUR RECOMMENDATION WITH REGARD TO INSURANCE***  
18                   ***PROCEEDS AND THIRD-PARTY LIABILITY TO ADDRESS DUKE'S***  
19                   ***COST RESPONSIBILITY FOR MGP-RELATED COSTS?***

20   ***A42.*** OCC supports the PUCO Staff's position on the need for the Utility to pursue  
21          recovery of insurance policy proceeds and third-party liability. Duke should be  
22          required to document its efforts to collect MGP-related investigation and

---

<sup>53</sup> See Direct Testimony of OCC Witness Dr. James R. Campbell at 7, 10-11.

1 remediation costs under insurance policies or from predecessor owners such as  
2 Columbia, and its collection efforts should be subject to review in a future  
3 proceeding in which its remediation costs are reconciled with its recoveries.  
4 Duke should be required to offset remediation costs that the PUCO determines to  
5 be prudent (if any) with insurance proceeds and collections from third-parties,  
6 before there are any attempts to collect any residual costs from customers.  
7

8 **V. CONCLUSION**

9  
10 ***Q43. WHAT IS YOUR RECOMMENDATION?***

11 ***A43.*** The Commission should reject Rider FRT. With regard to the collection of  
12 MGP-related investigation and remediation costs, I recommend:

- 13 1. Under the Commission's rate making formula, the  
14 Commission should not allow recovery from Duke's  
15 customers. Duke's shareholders (or insurers and liable  
16 third parties with any liability) should ultimately be  
17 responsible for these costs;
- 18 2. However, if the PUCO does allow certain MGP-related  
19 investigation and remediation costs to be collected from  
20 customers, then only necessary and prudently incurred  
21 costs should be so collected as noted in the testimony of  
22 OCC witness Campbell. Any such costs should then be  
23 allocated evenly between the Utility and customers. Any

1                   third-party liability recovery should be applied to the MGP-  
2                   related costs before they are split between the Utility and  
3                   customers. Any insurance policy proceeds should be  
4                   dedicated specifically to reduce the MGP-related costs that  
5                   are allocated to customers;

6                   3.     In addition, if there is any MGP-related cost recovery from  
7                   customers, then the costs should be amortized over a longer  
8                   period of time than the three years proposed by the PUCO  
9                   Staff, as noted by OCC witness Effron.

10                  4.     Any allocation of such costs to customer classes should be  
11                  done under a different methodology than recommended by  
12                  the PUCO Staff, as noted by OCC witness Rubin.

13  
14     ***Q44. DOES THIS CONCLUDE YOUR TESTIMONY AT THIS TIME?***

15     ***A44.***   Yes it does. However, I reserve the right to incorporate new information that may  
16                  subsequently become available.

## **CERTIFICATE OF SERVICE**

I hereby certified that a true copy of the foregoing *Direct Testimony of Bruce M. Hayes, on behalf of the Office of the Ohio Consumers' Counsel*, was served by electronic service to the persons listed below, on this 25th day of February, 2013.

/s/ Larry S. Sauer

Larry S. Sauer  
Assistant Consumers' Counsel

### **PARTIES OF RECORD**

Samuel C. Randazzo  
Frank P. Darr  
Joseph E. Olikar  
Matthew R. Pritchard  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17TH Floor  
Columbus, Ohio 43215

Amy B. Spiller  
Rocco O. D'Ascenzo  
Jeanne W. Kingery  
Elizabeth H. Watts  
Duke Energy Business Services, LLC  
139 East Fourth Street 1303 Main  
P.O. Box 961  
Cincinnati, Ohio 45201-0960

Thomas McNamee  
Devin Parram  
Attorneys General  
Public Utilities Commission of Ohio  
180 East Broad Street 6<sup>th</sup> Floor  
Columbus, Ohio 43215

A. Brian McIntosh  
McIntosh & McIntosh  
1136 Saint Gregory Street, Suite 100  
Cincinnati, Ohio 45202

Douglas E. Hart  
441 Vine Street, Suite 4192  
Cincinnati, Ohio 45202

Colleen L. Mooney  
Ohio Partners for Affordable Energy  
231 West Lima Street  
Findlay, Ohio 45840

Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215-4291

Mark S. Yurick  
Zachary D. Kravitz  
Taft Stettinius & Hollister LLP  
65 East State Street Suite 1000  
Columbus, Ohio 43215

Kimberly W. Bojko  
Mallory M. Mohler  
Carpenter Lipps & Leland LLP  
280 North High Street

Vincent Parisi  
Matthew White  
Interstate Gas Supply Inc.

Suite 1300  
Columbus, Ohio 43215

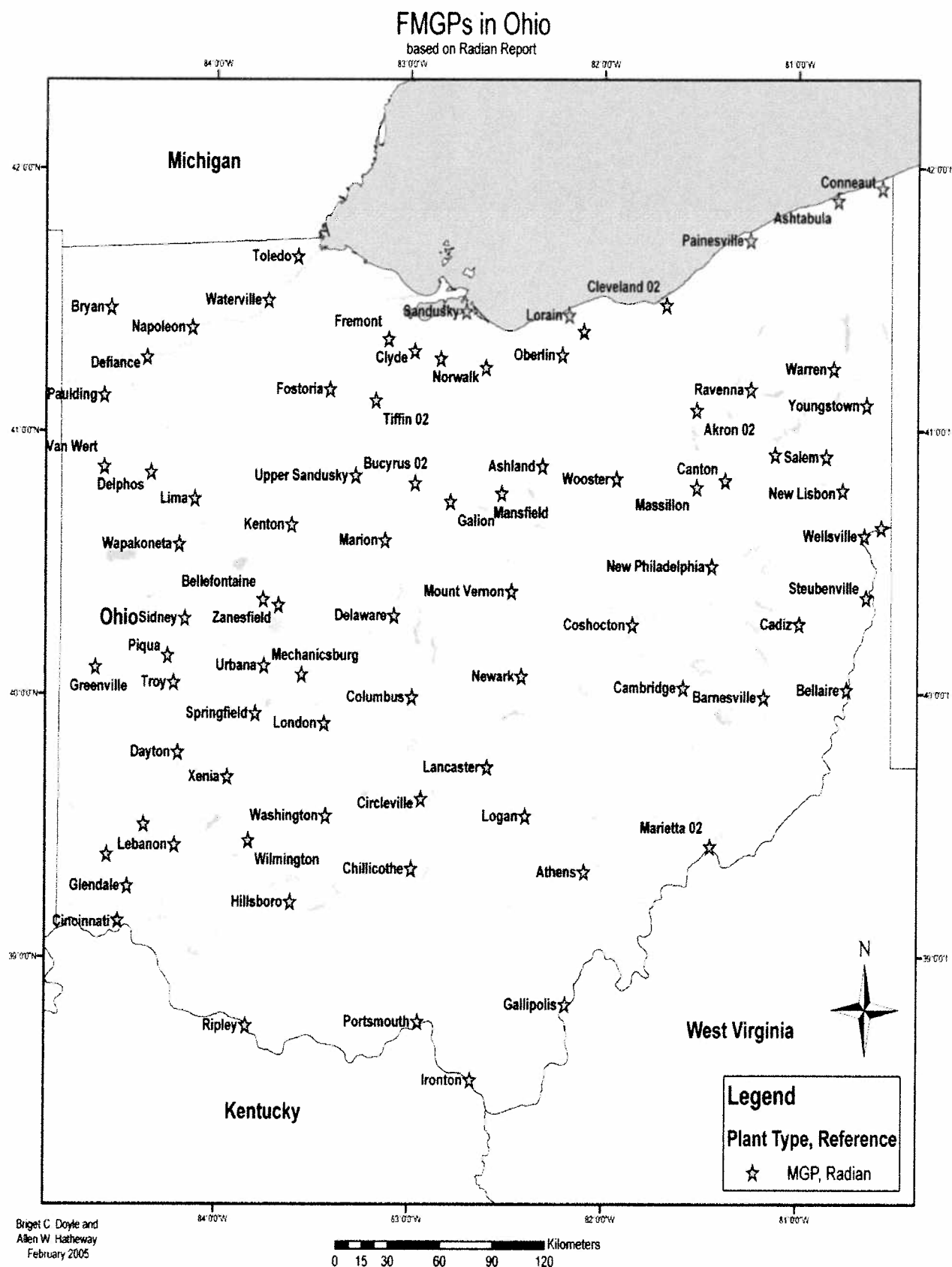
M. Howard Petricoff  
Stephen M. Howard  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
PO Box 1008  
Columbus, Ohio 43216-1008

Andrew J. Sonderman  
Kegler, Brown, Hill & Ritter LPA  
Capitol Square, suite 1800  
65 East State Street  
Columbus, Ohio 43215

6100 Emerald Parkway  
Dublin, Ohio 43016

[Amy.spiller@duke-energy.com](mailto:Amy.spiller@duke-energy.com)  
[Elizabeth.watts@duke-energy.com](mailto:Elizabeth.watts@duke-energy.com)  
[Jeanne.kingery@duke-energy.com](mailto:Jeanne.kingery@duke-energy.com)  
[Rocco.dascenzo@duke-energy.com](mailto:Rocco.dascenzo@duke-energy.com)  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  
[joliker@mwncmh.com](mailto:joliker@mwncmh.com)  
[mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)  
[Thomas.mcnamee@puc.state.oh.us](mailto:Thomas.mcnamee@puc.state.oh.us)  
[Devin.parram@puc.state.oh.us](mailto:Devin.parram@puc.state.oh.us)  
[brian@mcintoshlaw.com](mailto:brian@mcintoshlaw.com)  
[dhart@douglasshart.com](mailto:dhart@douglasshart.com)  
[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)  
[tobrien@bricker.com](mailto:tobrien@bricker.com)  
[myurick@taftlaw.com](mailto:myurick@taftlaw.com)  
[zkravitz@taftlaw.com](mailto:zkravitz@taftlaw.com)  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[mohler@carpenterlipps.com](mailto:mohler@carpenterlipps.com)  
[vparisi@igsenergy.com](mailto:vparisi@igsenergy.com)  
[mswhite@igsenergy.com](mailto:mswhite@igsenergy.com)  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)  
[smhoward@vorys.com](mailto:smhoward@vorys.com)  
[asonderman@keglerbrown.com](mailto:asonderman@keglerbrown.com)

OH EPA



**Duke Energy Ohio  
Case No. 12-1685-GA-AIR  
OCC Third Set of Interrogatories  
Date Received: September 4, 2012**

**OCC-INT-03-124**

**REQUEST:**

If the Company's response to OCC Interrogatory No. 123 is negative, please explain why shareholders will not absorb any of the remediation costs for the two MGP sites.

**RESPONSE:**

The cost of remediating the two MGP sites is similar to any other direct costs incurred by the Company to provide utility service to its ratepayers. Traditional utility regulation allows utilities to pass along all direct costs to ratepayers to the extent such costs are deemed prudent and necessary to provide safe, reliable utility service. Environmental investigation and remediation costs are prudent and necessary business costs incurred by Duke Energy Ohio in compliance with the Ohio EPA regulations and federal laws. Although the remediation costs are being incurred some time after the related service was rendered, the costs are no less legitimate and should be passed on to customers. See the testimony of Jessica L. Bednarcik, P.E., for a detailed description of the former use of those sites.

**PERSON RESPONSIBLE:** Peggy Laub

**Duke Energy Ohio  
Case No. 12-1685-GA-AIR  
OCC Eleventh Set of Interrogatories  
Date Received: November 21, 2012**

**OCC-INT-11-495**

**REQUEST:**

Has Duke or its predecessors (i.e. Cinergy, Cincinnati Gas and Electric Company, etc) included in filings (quarterly and/or annual) with the Securities and Exchange Commission ("SEC") information pertaining to the MGP remediation issue to provide shareholders notice of this risk?

**RESPONSE:**

Yes, multiple Form 10-Qs and 10-Ks going back to 1997 have referred to the MGP remediation issue in the "Commitments and Contingencies" note to the consolidated financial statements.

**PERSON RESPONSIBLE:** Michael Covington



**Duke Energy Ohio  
Case No. 12-1685-GA-AIR  
OCC Eleventh Set of Interrogatories  
Date Received: November 21, 2012**

**OCC-INT-11-496**

**REQUEST:**

If the Company's response to OCC Interrogatory is affirmative, please provide the date and SEC filing(s) that contained a notice to shareholders pertaining to the MGP remediation issue, and the risk associated with the remediation.

**RESPONSE:**

Objection. This Interrogatory is vague, ambiguous, and unduly burdensome, as the question is susceptible to different interpretations and Duke Energy Ohio would have to engage in speculation or conjecture to ascertain the intended meaning of this request. Without waiving said objection, to the extent discoverable, and in the spirit of discovery, references have been made to the MGP remediation issue and the associated risks in quarterly and annual SEC filings, as far back as 1994.

See attachment A for all such references to the MGP issue.

**PERSON RESPONSIBLE:** Michael Covington

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**2/25/2013 5:08:14 PM**

**in**

**Case No(s). 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, 12-1688-GA-AAM**

Summary: Testimony Direct Testimony of Bruce M. Hayes on Behalf of the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.