

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application :
of Duke Energy Ohio, Inc., for : Case No
an Increase in Gas Rates. : 12-1685-GA-AIR

In the Matter of the Application :
of Duke Energy Ohio, Inc., for : Case No.
Tariff Approval. : 12-1686-GA-ATA

In the Matter of the Application :
of Duke Energy Ohio, Inc., for : Case No.
Approval of an Alternative Rate : 12-1687-GA-ATA
Plan for Gas Distribution :
Service. :

In the Matter of the Application :
of Duke Energy Ohio, Inc., for : Case No.
Approval to Change Accounting : 12-1688-GA-AAM
Methods. :

- - -

PROCEEDINGS

before Ms. Christine M. T. Pirik and Ms. Katie
Stenman, Attorney Examiners, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-A,
Columbus, Ohio, called at 10:00 a.m. on Monday, April
29, 2013.

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VOLUME I

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11 and

12 Duke Energy Business Services, LLC
13 By Ms. Elizabeth Watts
14 Ms. Amy B. Spiller
15 139 East Fourth Street
16 Cincinnati, Ohio 45202

17 On behalf of Applicant Duke Energy
18 Ohio, Inc.

19 Carpenter, Lipps & Leland, LLP
20 By Ms. Kimberly W. Bojko
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25 On behalf of the Kroger Company.

Ohio Partners for Affordable Energy
By Ms. Colleen Mooney
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On behalf of Ohio Partners for
Affordable Energy.

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1 APPEARANCES: (Continued)

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7 On behalf of Interstate Gas Supply.

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12 On behalf of the City of Cincinnati.

13 Direct Energy
14 By Mr. Joseph Mr. Clark
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17 On behalf of Direct Energy Services, LLC,
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19 Bruce J. Weston, Ohio Consumers' Counsel
20 By Mr. Joseph P. Serio
21 Mr. Larry S. Sauer
22 Mr. Edmund "Tad" Berger
23 10 West Broad Street, Suite 1800
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25 On behalf of the Residential
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Mike DeWine, Ohio Attorney General
William L. Wright, Section Chief
Public Utilities Section
Mr. Devin D. Parram
Mr. Thomas W. McNamee
Mr. Stephen A. Reilly
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793

On behalf of the Staff of the Public
Utilities Commission.

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Monday Morning Session,
April 29, 2013.

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EXAMINER STENMAN: Let's go on the
record.

At this time the Public Utilities
Commission of Ohio calls for hearing Case Nos.
12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALA, and
12-1688-GA-AAM, captioned In the Matter of the
Application of Duke Energy Ohio for an Increase in
its Natural Gas Distribution Rates, for Tariff
Approval, for Approval of an Alternative Rate Plan
For Gas Distribution Service, and for Approval to
Change Accounting Methods.

My name is Katie Stenman and with me is
Christine Pirik and we are the attorney examiners
assigned by the Commission to hear this case.

At this time let's start with appearances
starting with the company and then we will go around
the table.

MS. WATTS: Thank you, your Honor. On
behalf of Duke Energy Ohio, the applicant in these
proceedings, Amy B. Spiller who has just arrived, I
believe.

MS. SPILLER: Good morning, your Honors.

1 EXAMINER STENMAN: Good morning.

2 MS. WATTS: Elizabeth Watts and Duke
3 Energy Ohio's offices at 139 East Fourth Street,
4 Cincinnati, Ohio 45201, and also with me today and
5 co-counsel in these proceedings we have Kay Pashos
6 from the firm of Ice Miller, which has offices in
7 Indianapolis and Columbus, and Kevin McMurray from
8 the firm Frost, Brown & Todd, which also has offices
9 in Cincinnati and Columbus.

10 EXAMINER STENMAN: Thank you.

11 MS. WATTS: Thank you.

12 MR. SAUER: Thank you, your Honor. On
13 behalf of the residential customers of Duke Energy
14 Ohio, the Office of the Ohio Consumers' Counsel,
15 Bruce J. Weston, Consumers' Counsel, Larry S. Sauer,
16 Joseph P. Serio, Edward Berger, Assistant Consumers'
17 Counsel, 10 West Broad Street, Suite 1800, Columbus,
18 Ohio 43215. Thank you.

19 EXAMINER STENMAN: Thank you.

20 MS. MOONEY: Yes, on behalf of Ohio
21 Partners for Affordable Energy, I'm Colleen Mooney,
22 231 West Lima Street, Findlay, Ohio.

23 MR. CLARK: On behalf of the Direct
24 Energy Services, LLC, and Direct Energy, Joseph M.
25 Clark, 21 East State Street, 19th Floor, Columbus,

1 Ohio 43215.

2 EXAMINER STENMAN: Thank you.

3 MS. PETRUCCI: Good morning. On behalf
4 of the Interstate Gas Supply, Inc., the law firm of
5 Vorys, Sater, Seymour and Pease, M. Howard Petricoff,
6 and I am Gretchen Petrucci, 52 East Gay Street,
7 Columbus, Ohio.

8 MR. O'BRIEN: On behalf of the City of
9 Cincinnati, Bricker & Eckler, LLP, by Thomas O'Brien,
10 100 South Third Street, Columbus, Ohio 43215. Thank
11 you.

12 EXAMINER STENMAN: Thank you.

13 MS. BOJKO: Thank you, your Honor. On
14 behalf of the Kroger Company, the law firm of
15 Carpenter, Lipps & Leland, I'm Kimberly W. Bojko,
16 Mallory M. Mohler, 280 North High Street, Suite 1300,
17 Columbus, Ohio 43215.

18 MR. HART: On behalf of the Greater
19 Cincinnati Health Council and Cincinnati Bell,
20 Douglas E. Hart, 441 Vine Street, Suite 4192,
21 Cincinnati, Ohio.

22 MR. PARRAM: Good morning. On behalf of
23 the staff of the Public Utilities Commission of Ohio,
24 Attorney General Mike DeWine, Assistant Attorney
25 General William L. Wright, Section Chief, Thomas

1 McNamee, Steve Reilly, and Devin D. Parram, 180 East
2 Broad Street Columbus, Ohio 43215, 6th Floor.

3 EXAMINER STENMAN: Thank you.

4 As we discussed off the record, we do
5 have a few pending motions before us. Take the easy
6 one first which would be a motion for admission pro
7 hoc vice filed by Duke Energy Ohio filed on March 20,
8 12-1685-GA-AIR only, on behalf of Kay Pashos. That
9 motion will be granted.

10 We also have a motion to clarify the
11 scope of the proceedings filed on April 16, 2013.
12 That motion doesn't request any specific action from
13 the Commission but the attorney examiners construe
14 that motion as requesting to limit testimony with
15 respect to the prudence of the environmental
16 remediation for which Duke seeks recovery in its
17 application. Staff and OCC both filed memoranda
18 contra.

19 Upon consideration of that motion to
20 clarify the scope of these proceedings, that motion
21 will be denied as we believe that the prudence of the
22 environmental remediation is pertinent to the
23 recovery sought by the company.

24 Also the motion to strike the testimony
25 of James R. Campbell will be denied. More limited

1 motions to strike Mr. Campbell's testimony will be
2 entertained at the time his testimony is sought to be
3 admitted into evidence.

4 On April 24, OCC filed a motion to strike
5 additional testimony that was filed by Duke on
6 April 22. Duke filed a memo contra. Given that the
7 attorney examiners' April 4, 2013, entry clearly
8 invited the filing of additional testimony by staff
9 and the parties, OCC's motion to strike will be
10 denied.

11 On April 24, OCC and OP&E filed motions
12 for continuance of the hearing and to provide more
13 discovery and deposition of Duke's witnesses. I
14 believe in that motion you indicated that you did
15 have potentially a deposition scheduled. Did you get
16 to depose those witnesses?

17 MR. SAUER: We did, your Honor.

18 EXAMINER STENMAN: You did?

19 MR. SAUER: On a hurried basis.

20 EXAMINER STENMAN: We understand. That
21 motion will also be denied. The case has been
22 pending for a while and you did have an opportunity
23 to conduct depositions, so we will commence with the
24 evidentiary hearing as scheduled today.

25 MR. SAUER: I'm sorry, I didn't hear

1 that.

2 EXAMINER STENMAN: The motion to continue
3 the hearing will be denied. We will commence with
4 the evidentiary hearing today as scheduled.

5 Are there any other motions that I
6 missed?

7 All right. At this point we do have a
8 stipulation and it looks like also a corrected
9 stipulation, if you want to go forward with that.

10 MS. WATTS: Yes, thank you, your Honor.

11 MR. SAUER: Excuse me, your Honor. There
12 was one motion OCC had. There was a motion filed on
13 February 19 to strike Duke's objections to the Staff
14 Report. I don't believe that was ever ruled upon.

15 EXAMINER STENMAN: All motions to strike
16 will be addressed in the final opinion and order by
17 the Commission, since those are tantamount to a
18 motion to dismiss, so they will be deferred until
19 that time.

20 Is there any way we can all slide around
21 the table so we can get OCC in around here?

22 Let's go off the record.

23 (Discussion off the record.)

24 EXAMINER STENMAN: Let's go back on the
25 record.

1 Mr. Sauer, you had an issue.

2 MR. SAUER: Thank you, your Honor. As
3 you ruled, OCC had filed a motion to strike the
4 testimony that was filed on April 22. However, it is
5 our position that Mr. Fiore's testimony is actually
6 rebuttal testimony and the fact that although he
7 didn't mention in his testimony that he reviewed
8 Dr. Campbell's testimony, in his deposition he
9 admitted as much, that he had reviewed Dr. Campbell's
10 testimony and that the sequence of topics follow
11 Dr. Campbell's sequentially as well and he is
12 actually rebutting Dr. Campbell's testimony.

13 I would ask that Mr. Fiore's -- the
14 presentation of Mr. Fiore come in the rebuttal phase
15 of the hearing as opposed to Duke's direct phase of
16 this hearing.

17 EXAMINER STENMAN: Thank you.

18 Response.

19 MS. WATTS: Yes, your Honor. Thank you.
20 The substance of what Mr. Sauer is arguing is
21 essentially the same as that which was in the motion
22 which was just denied by the Bench so we understood
23 that to be ruled upon.

24 But in addition to that, the testimony
25 that was filed was filed pursuant to the Commission's

1 entry allowing such additional testimony so we
2 disagree that it can be characterized as rebuttal
3 testimony.

4 EXAMINER STENMAN: Thank you. As
5 previously stated, the attorney examiners' April 4
6 entry did invite the filing of additional testimony.
7 Your motion will be denied.

8 Let's turn to the stipulation at this
9 point. It looks like we have a corrected version
10 that doesn't have any signatures.

11 MS. WATTS: That's correct, your Honor.
12 And I can -- most of the parties that signed the
13 original stipulation are present in the room today to
14 affirm their position with respect to that amended
15 stipulation.

16 EXAMINER STENMAN: Okay.

17 MS. WATTS: And I did not bring copies of
18 the original stipulation but I do have copies of the
19 amended stipulation and to support that stipulation
20 we would like to call William Don Wathen to the stand
21 as a witness.

22 EXAMINER STENMAN: Okay. Are there any
23 signatory parties in the original stipulation that
24 are here that do not agree to the corrected
25 stipulation? This is your opportunity.

1 Okay. It looks like we are missing
2 People Working Cooperatively. It would be wonderful
3 if they could file something in the docket or appear
4 at this hearing and let us know they are in agreement
5 with the corrected stipulation.

6 MS. WATTS: Yes, thank you, I will have
7 them do that.

8 EXAMINER STENMAN: Mr. Wathen, please
9 raise your right hand.

10 (Witness sworn.)

11 MS. PETRUCCI: Your Honor, if I may
12 interrupt for a moment, I just wanted to note on the
13 record Interstate Gas Supply did not sign the
14 original stipulation and is not going to be a
15 signatory party to the corrected stipulation. It
16 does not oppose the corrected stipulation, but I
17 thought it would be appropriate to mention on the
18 record that they -- that they are not going to be a
19 signatory party.

20 EXAMINER STENMAN: Thank you.

21 Is there anyone else who needs to make a
22 similar statement?

23 MR. O'BRIEN: Madam Examiner, City of
24 Cincinnati, due to the delay in getting authorization
25 to execute the original stipulation did not sign but

1 they filed a letter in support of the stipulation.
2 That support would also apply to the corrected
3 stipulation.

4 EXAMINER STENMAN: Thank you.

5 Anyone else?

6 All right, Ms. Watts.

7 MS. WATTS: Thank you, your Honor.

8 - - -

9 WILLIAM DON WATHEN, JR.

10 being first duly sworn as prescribed by law, was
11 examined and testified as follows:

12 DIRECT EXAMINATION

13 By Ms. Watts:

14 Q. Mr. Wathen, would you state your name.

15 A. My name is William Don Wathen, Jr.

16 Q. I feel like you should say something like
17 "I'm back."

18 A. They already did that.

19 Q. Do you have before you -- one moment,
20 please.

21 MS. WATTS: Your Honor, could we go off
22 the record for a moment?

23 EXAMINER STENMAN: Yes. Let's go off the
24 record.

25 (Discussion off the record.)

1 EXAMINER STENMAN: Let's go back on the
2 record.

3 MS. WATTS: Your Honor, what we are
4 distributing is what we would propose to have marked
5 and entered into the record in support of the
6 stipulation and the company's application and so
7 forth in this proceeding -- in these proceedings. If
8 the paradigm for marking the exhibits meets with your
9 approval, that's how we would propose we go forward.

10 EXAMINER STENMAN: All right. I just
11 need you to go over it on the record and we'll go
12 from there.

13 MS. WATTS: Thank you, your Honor. So
14 Duke Energy's first exhibit will be the applications
15 in these proceedings -- I'm sorry, it would be the
16 prefiling notice in these proceedings, and that would
17 be Duke Energy Ohio Exhibit 1.

18 The application including all 14 volumes
19 would be Duke Energy Exhibit 2.

20 The proof of publication that was filed
21 in the docket on November 28, 2012, would be Duke
22 Energy Ohio Exhibit 3. The proof of publication
23 filed on February 19, 2013, would be Duke Energy Ohio
24 Exhibit 4. The proof of publication filed March 12,
25 2013, would be Duke Energy Ohio Exhibit 5.

1 The direct testimony of Julia S. Janson
2 would be Duke Energy Ohio Exhibit 6.

3 The Direct Energy -- direct testimony of
4 Keith G. Butler filed on July 20 would be Duke Energy
5 Ohio Exhibit 7.

6 The direct testimony of Stephen G. DeMay
7 filed on July 20 would be Duke Energy Ohio Exhibit 8.

8 The direct testimony of John J. Spanos
9 filed on July 20 would be Duke Energy Ohio Exhibit 9.

10 The direct testimony of James E. Mehring
11 submitted on July 20, 2012, would be Duke Energy Ohio
12 Exhibit 10. And Mr. Mehring has supplemental direct
13 testimony filed on February 25. His would be Duke
14 Energy Ohio Exhibit 10A.

15 Direct testimony of Carl J. Council, from
16 July 20, 2012, would be Duke Energy Ohio Exhibit 11.

17 The direct testimony of Patricia Mullins
18 filed on July 20 would be Duke Energy Exhibit 12.
19 The supplemental direct testimony of Patricia Mullins
20 filed February 25 would be Duke Energy Ohio Exhibit
21 12A.

22 The direct testimony of Daniel J. Reilly
23 filed July 20, 2012, would be Duke Energy Ohio
24 Exhibit 13. The supplemental direct testimony of
25 Daniel J. Reilly filed on February 25 would be Duke

1 Energy Ohio Exhibit 13A.

2 The direct testimony of Jose Merino filed
3 on July 20, 2012, would be Duke Energy Ohio Exhibit
4 14.

5 The direct testimony of Roger A. Morin,
6 Ph.D., filed on July 20, 2012, would be Duke Energy
7 Ohio Exhibit 15. The supplemental direct testimony
8 of Dr. Morin would be -- which was filed on
9 February -- February 25 would be Duke Energy Ohio
10 Exhibit 15A.

11 The direct testimony of Peggy Laub filed
12 July 20, 2012, would be Duke Energy Ohio Exhibit 16.
13 The supplemental direct testimony of Peggy A. Laub
14 filed February 25 would be Duke Energy Ohio Exhibit
15 16A.

16 The direct testimony of James A. Riddle
17 filed July 20, 2012, would be Duke Energy Ohio
18 Exhibit 17. The supplemental direct testimony of
19 James A. Riddle filed on February 25 would be Duke
20 Energy Ohio Exhibit 17A.

21 The direct testimony of James Zoilkowski
22 filed July 20, 2012, would be Duke Energy Ohio
23 Exhibit 18. The supplemental direct testimony of
24 James Zoilkowski filed on February 25 is Duke Energy
25 Ohio Exhibit 18A.

1 The direct testimony of William D.
2 Wathen, Jr., filed on July 20 is Duke Energy Ohio
3 Exhibit 19. The supplemental direct testimony of
4 William Don Wathen, Jr. filed on February 25 would be
5 Duke Energy Ohio Exhibit 19A. The second
6 supplemental testimony of William Don Wathen, Jr., in
7 support of the stipulation which was filed on
8 February 2 would be Duke Energy Ohio Exhibit 19B.
9 And the third supplemental testimony of William Don
10 Wathen filed April 2nd would be filed Duke Energy
11 Ohio Exhibit 19C.

12 The direct testimony of Dr. Andrew C.
13 Middleton filed July 20 would be Duke Energy Ohio
14 Exhibit 20. The supplemental testimony of Dr. Andrew
15 C. Middleton filed February 25 would be Duke Energy
16 Ohio Exhibit 20A.

17 The direct testimony of Jessica Badnarcik
18 filed July 20 would be Duke Energy Ohio Exhibit 21.
19 The supplemental testimony of Jessica Bednarcik filed
20 February 25, 2013, would be Duke Energy Ohio Exhibit
21 21A.

22 The direct testimony of Gary Hebbeler
23 filed July 20, 2012, is Duke Energy Ohio Exhibit 22.
24 The letter of notice related to the direct testimony
25 of Gary J. Hebbeler filed on July 30 would be Duke

1 Energy Ohio Exhibit 22A. The supplemental testimony
2 of Gary J. Hebbeler filed February 20 would be Duke
3 Energy Ohio Exhibit 22B. The second supplemental
4 testimony of Gary J. Hebbeler filed April 22, 2013,
5 would be 22C.

6 The direct testimony of Kevin D. Margolis
7 which was filed on February 25 would be Duke Energy
8 Ohio Exhibit 23.

9 The direct testimony of Michael Covington
10 filed February 25, 2013, is Duke Energy Ohio Exhibit
11 24.

12 The direct testimony of James P. Henning
13 filed February 25, 2013, is Duke Energy Ohio 25.

14 And the direct testimony of Shawn S.
15 Fiore filed on April 22, 2013, would be Duke Energy
16 Ohio Exhibit 26, and I believe that brings us to the
17 end of the list. I'm done for the day. I'm leaving
18 now.

19 EXAMINER STENMAN: Those will all be so
20 marked.

21 (EXHIBITS MARKED FOR IDENTIFICATION.)

22 MS. WATTS: Thank you, your Honor.

23 Q. (By Ms. Watts) And with that, Mr. Wathen,
24 do you have before you what has been marked as Duke
25 Energy Ohio Exhibit 19B before you?

1 A. That's my second supplemental testimony.

2 Q. Yes.

3 A. I do.

4 Q. And do you also have --

5 MS. WATTS: And, your Honor, we would ask
6 that the Amended Stipulation and Recommendation be
7 marked as Joint Exhibit 1.

8 EXAMINER STENMAN: And that's the
9 corrected stipulation that was filed on April 24?

10 MS. WATTS: That's correct.

11 EXAMINER STENMAN: It will be so marked.

12 (EXHIBIT MARKED FOR IDENTIFICATION.)

13 Q. Mr. Wathen, do you also have Joint
14 Exhibit 1 before you?

15 A. I do.

16 Q. Turning to Exhibit 19 -- I have to look,
17 19B, could you identify that document, please.

18 A. That's my second supplemental testimony I
19 filed in this case.

20 Q. And thank you. Did you prepare that
21 testimony?

22 A. I did.

23 Q. And if I were to ask you the questions
24 contained in that testimony today, would your answers
25 be the same?

1 A. Yes.

2 Q. And are they true to the best of your
3 knowledge?

4 A. Yes.

5 Q. And in that testimony you refer to a
6 stipulation. Do you have that stipulation before
7 you?

8 A. I do.

9 Q. And is that the Joint Exhibit 1 that was
10 just marked?

11 A. That's my understanding it was marked as
12 Joint Exhibit 1, yes.

13 MS. WATTS: Okay. Mr. Wathen is
14 available for cross-examination.

15 EXAMINER STENMAN: Any cross?

16 MR. SAUER: No questions, your Honor.

17 MS. PETRUCCI: No questions.

18 MS. MOONEY: No questions.

19 MR. CLARK: No questions.

20 EXAMINER STENMAN: Ms. Bojko?

21 MS. BOJKO: No questions.

22 EXAMINER STENMAN: Mr. Hart?

23 MR. HART: No questions.

24 MR. O'BRIEN: No questions, your Honor.

25 MR. PARRAM: No questions, your Honor.

1 EXAMINER STENMAN: Thank you, Mr. Wathen.

2 THE WITNESS: That was a lot easier than
3 last Monday.

4 EXAMINER STENMAN: It possibly won't be
5 as easy next time.

6 MS. WATTS: Thank you, your Honor.

7 EXAMINER STENMAN: Thank you.

8 MS. WATTS: I believe there are perhaps
9 some additional witnesses on behalf of the
10 stipulation.

11 EXAMINER STENMAN: Yes. Who would like
12 to call the next witness on behalf of the
13 stipulation?

14 MR. SAUER: OCC would call Beth Hixon to
15 the stand.

16 Could we mark Ms. Hixon's testimony as
17 OCC Exhibit 1.

18 EXAMINER STENMAN: It will be so marked.

19 (EXHIBIT MARKED FOR IDENTIFICATION.)

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BETH E. HIXON

being first duly sworn, as prescribed by law, was
examined and testified as follows.

DIRECT EXAMINATION

By Mr. Sauer:

Q. Please state your full name and business
address for the record.

A. My name is Beth E. Hixon. My business
address is the Ohio Consumers' Counsel, 10 West Broad
Street, Suite 1800, Columbus, Ohio 43215.

Q. And are you the same Beth Hixon whose
direct testimony was filed in these cases on
April 22, 2013?

A. Yes.

Q. And on whose behalf do you appear?

A. The Ohio Consumers' Counsel.

Q. Do you have your prepared testimony with
you on the stand?

A. Yes, I do.

Q. Did you prepare the testimony or have it
prepared at your direction?

A. Yes.

Q. Do you have any changes or corrections to
your direct testimony?

A. No, I do not.

1 Q. And if I asked you today the same
2 questions in your direct testimony in OCC Exhibit 1,
3 would your answers be the same?

4 A. Yes, they would.

5 MR. SAUER: The OCC moves for the
6 admission of OCC Exhibit 1 and tenders the witness
7 for cross-examination.

8 EXAMINER STENMAN: Thank you.

9 Any cross, Ms. Mooney?

10 MS. MOONEY: No cross.

11 MR. CLARK: No, thank you.

12 EXAMINER STENMAN: Ms. Bojko?

13 MS. BOJKO: No, thank you.

14 EXAMINER STENMAN: Mr. Hart?

15 MR. HART: No.

16 EXAMINER STENMAN: Mr. O'Brien?

17 MR. O'BRIEN: No questions.

18 EXAMINER STENMAN: Staff?

19 MR. PARRAM: No questions, your Honor.

20 EXAMINER STENMAN: Thank you, Ms. Hixon.

21 Let's go off the record for a moment.

22 (Discussion off the record.)

23 EXAMINER STENMAN: Let's go back on the
24 record.

25 OCC had previously moved for the

1 admission of OCC Exhibit 1. Are there any
2 objections?

3 MS. WATTS: No objection, your Honor.

4 EXAMINER STENMAN: Hearing none, it will
5 be admitted.

6 (EXHIBIT ADMITTED INTO EVIDENCE.)

7 EXAMINER STENMAN: Staff.

8 MR. PARRAM: Yes, your Honor. Staff
9 would like to call Staff Witness William Ross Willis
10 to the stand.

11 (EXHIBITS MARKED FOR IDENTIFICATION.)

12 - - -

13 WILLIAM ROSS WILLIS

14 being first duly sworn, as prescribed by law, was
15 examined and testified as follows:

16 DIRECT EXAMINATION

17 By Mr. Parram:

18 Q. Good morning, Mr. Willis.

19 A. Good morning.

20 Q. Could you please state your full name for
21 the record.

22 A. William Ross Willis.

23 Q. And by whom are you employed?

24 A. I'm employed by the Public Utilities
25 Commission of Ohio.

1 Q. And do you have before you a document
2 that's been marked for purposes of identification as
3 Staff Exhibit 1?

4 A. I do.

5 Q. What is that?

6 A. It's the Staff Report of Investigation.

7 Q. And do you also have in front of you a
8 document that's been marked as Staff Exhibit 2?

9 A. I do.

10 Q. What is that document?

11 A. It's my prefiled testimony filed on
12 April 22.

13 Q. As it relates to Staff Exhibit 2, did you
14 prepare this document?

15 A. I did.

16 Q. And did you prepare all the questions and
17 answers that were within it?

18 A. I did.

19 Q. Did you answer these questions within
20 this document truthfully when you prepared it?

21 A. I did.

22 Q. And if I were to ask you the same
23 questions today, would your answers be the same?

24 A. Yes.

25 Q. And are you testifying in support of

1 Staff Exhibit 1 in this case?

2 A. I am.

3 MR. PARRAM: Your Honor, I move for the
4 admission of Staff Exhibit 1 and Staff Exhibit 2 and
5 tender Mr. Willis for cross.

6 EXAMINER STENMAN: Thank you.

7 Anything?

8 MR. SAUER: No questions, your Honor.

9 EXAMINER STENMAN: Ms. Mooney?

10 MS. MOONEY: No questions.

11 EXAMINER STENMAN: Mr. Clark?

12 MR. CLARK: No questions.

13 EXAMINER STENMAN: Ms. Watts?

14 MS. WATTS: No questions.

15 EXAMINER STENMAN: Ms. Bojko?

16 MS. BOJKO: No questions.

17 EXAMINER STENMAN: Mr. Hart?

18 MR. HART: No questions.

19 EXAMINER STENMAN: Mr. O'Brien?

20 MR. O'BRIEN: No questions, your Honor.

21 EXAMINER STENMAN: Thank you, Mr. Willis.

22 Any objections to the admission of Staff
23 Exhibits 1 and 2?

24 MS. WATTS: No objection.

25 EXAMINER STENMAN: Staff Exhibits 1 and 2

1 will be admitted.

2 (EXHIBITS ADMITTED INTO EVIDENCE.)

3 MR. PARRAM: Thank you, your Honor.

4 EXAMINER STENMAN: Thank you.

5 Let's go off the record one more time.

6 (Discussion off the record.)

7 EXAMINER STENMAN: Let's go back on the
8 record and you may call your first witness.

9 MR. CLARK: Your Honor, I apologize.
10 Direct Energy wanted to also put in the prefiled
11 testimony of Ms. Ringenbach into the record without
12 cross and wanted to know if I could do that as well,
13 and I contacted the parties earlier. I have not
14 heard anything, anybody did object, but I wanted to
15 also put it on if I could. I do have a copy for the
16 court reporter too.

17 EXAMINER STENMAN: We are on the record.
18 You can go ahead and do that.

19 MR. CLARK: Your Honor, Direct Energy
20 would like to put in the prefiled direct --

21 EXAMINER STENMAN: Can you use a
22 microphone?

23 MR. CLARK: I'm sorry.

24 EXAMINER STENMAN: We have a lot of air
25 conditioning in the back.

1 MR. CLARK: That better?

2 EXAMINER STENMAN: Much better.

3 MR. CLARK: Direct Energy would like to
4 put in the direct testimony of Teresa Ringenbach as
5 filed on February 25 in this case as Direct Energy
6 Exhibit 1.

7 EXAMINER STENMAN: Are there any
8 objections?

9 MS. WATTS: No objection, your Honor.

10 EXAMINER STENMAN: Hearing none, Direct
11 Energy Exhibit 1 will be admitted.

12 MR. CLARK: Thank you, your Honor.

13 (EXHIBIT MARKED/ADMITTED INTO EVIDENCE.)

14 MR. SAUER: Your Honor, if I may?

15 EXAMINER STENMAN: Yes.

16 MR. SAUER: OCC doesn't have any
17 objections but there is a lot of testimony being
18 submitted, everyone is waiving cross. There is a
19 provision in the stipulation that if there is a
20 material modification or there's a stipulation
21 rejected by the Commission, then we fall back as to
22 if there was no stipulation parties can call
23 witnesses.

24 I would just like an acknowledgment of
25 these witnesses, their witnesses would be made

1 available and that they wouldn't hold the fact we
2 waived cross here as an impediment to getting the
3 witnesses back on the stand in a future proceeding if
4 that would take place.

5 EXAMINER STENMAN: Mr. Clark.

6 MR. CLARK: Certainly, your Honor.

7 MS. BOJKO: Your Honor, Mr. Sauer, I know
8 you're standing, I can't hear anything when he's
9 talking.

10 EXAMINER STENMAN: I do need to have you
11 sit down when you address the Bench just so you can
12 use the microphone and it registers.

13 MR. SAUER: Okay.

14 EXAMINER STENMAN: Thank you.

15 MS. BOJKO: Also, your Honor, may we go
16 off the record for one moment.

17 EXAMINER STENMAN: Let's go off the
18 record.

19 (Discussion off the record.)

20 EXAMINER STENMAN: Let's go back on the
21 record.

22 Ms. Watts.

23 MS. WATTS: Thank you, your Honor.

24 Mr. McMurray is going to take -- sorry, Ms. Pashos is
25 going to take this first witness.

1 EXAMINER STENMAN: Okay.

2 MS. PASHOS: Thank you. At this point we
3 would call Dr. Andrew Middleton to the stand.

4 (Witness sworn.)

5 - - -

6 ANDREW C. MIDDLETON, Ph.D.
7 being first duly sworn as prescribed by law, was
8 examined and testified as follows:

9 DIRECT EXAMINATION

10 By Ms. Pashos:

11 Q. Good morning.

12 A. Good morning.

13 Q. Would you please state your name and
14 business address for the record?

15 A. It's Andrew C. Middleton, P.O. Box 58,
16 Mount Sidney, Virginia.

17 Q. And by whom are you employed and in what
18 capacity?

19 A. I'm employed by Corporate Environmental
20 Solutions as its president.

21 Q. And have you prepared testimony for this
22 proceeding?

23 A. I have.

24 Q. And do you have something before you that
25 has or will be marked as Duke Energy Ohio's Exhibit

1 20 and representing your direct testimony filed in
2 July of 2012?

3 A. I did make that and prepare that
4 testimony. I do not have it in front of me.

5 Q. Okay. And did you also have -- do you
6 also -- did you also cause to be prepared and filed
7 in February of this year supplemental direct
8 testimony that has or will be marked as Duke -- Duke
9 Energy Ohio Exhibit 20A?

10 A. I did.

11 Q. And do you have any changes or
12 corrections to either of those pieces of testimony?

13 A. No.

14 Q. And if I were to ask you the same
15 questions as are contained in those testimonies
16 today, would your answers be the same?

17 A. Yes, they would.

18 Q. Do you adopt both petitioners' -- or Duke
19 Energy Ohio Exhibit 20 and Exhibit 20A as your sworn
20 testimony in this proceeding?

21 A. I do.

22 MS. PASHOS: At this point we would offer
23 into evidence, if that's appropriate at this time,
24 Dr. Middleton's direct and supplemental direct
25 testimony, Duke Energy Ohio Exhibits 20 and 20A.

1 EXAMINER STENMAN: Are you tendering the
2 witness for cross-examination?

3 MS. PASHOS: Yes.

4 EXAMINER STENMAN: Do the parties have a
5 preferred order or should I start with OCC and go
6 around the table?

7 Hearing nothing, I will start with OCC
8 and go around the table.

9 MR. BERGER: Thank you, your Honor.

10 - - -

11 CROSS-EXAMINATION

12 By Mr. Berger:

13 Q. Good morning, Dr. Middleton. My name is
14 Tad Berger, I am an attorney with the Office of
15 Consumers' Counsel and I just have some limited
16 questions on your testimony both for direct and your
17 supplemental.

18 First of all, Dr. Middleton, did you
19 review Dr. Campbell's testimony in this matter?

20 A. I did.

21 Q. Were you asked to provide any testimony
22 responding to it?

23 A. No, not -- not in what I filed.

24 Q. I'm not sure that answered the question.
25 Were you asked to provide any testimony responding to

1 it?

2 A. No, not in response to Dr. Campbell's
3 direct testimony.

4 Q. And will you be submitting rebuttal
5 testimony in this proceeding?

6 A. Not that I am aware of.

7 Q. Now, beginning on page 30 of your
8 testimony, Dr. Middleton, you discuss general
9 approaches primarily by utilities to the remediation
10 of MGP sites; is that correct?

11 A. The approaches I have -- what page was
12 that?

13 Q. Page 30 of your direct testimony.

14 A. Page 30. Yes, that is the question.

15 Q. And you discuss all of the steps in your
16 testimony of the site assessment and remediation
17 process; is that correct?

18 A. Yes. In the subsequent pages I discuss
19 what I call the site assessment and remediation
20 process that begins with preliminary investigation,
21 goes through site investigations, and eventually
22 remediation and site closure.

23 Q. And that also includes remediation action
24 development and feasibility studies; is that correct?

25 A. It includes the remediation action

1 development if remediation is found necessary and it
2 includes the possibility of feasibility studies, they
3 are often not done.

4 Q. What is the purpose of a feasibility
5 study, Dr. Middleton?

6 A. Feasibility study is a result of
7 regulations promulgated under a super fund which was
8 passed in December of 1980. And in a USEPA super
9 fund site it calls for the analysis of alternatives
10 for remediation of the site to mitigate unacceptable
11 conditions and they are at the federal level, it's
12 part of the super fund process. It's not part of
13 many, many state processes but when you hear the term
14 "feasibility study," you think of the federally
15 required process.

16 Q. Okay. Well, would you agree with me,
17 though, that generally if you have a large site to
18 remediate that a feasibility study is a prudent thing
19 to perform?

20 A. Not necessarily. As I say in my
21 testimony, it's entirely reasonable to proceed with
22 an analysis of alternatives without preparing a
23 formal feasibility study to address -- in particular
24 if it's a state based cleanup, to address what's
25 necessary to come to the applicable standards in a

1 state based cleanup.

2 Q. Okay. But even -- you said it's quite
3 appropriate to perform an analysis of alternatives
4 rather than to perform a formal feasibility study; is
5 that what you said?

6 A. It's appropriate to consider actions that
7 would help you obtain the applicable state based
8 cleanup standard.

9 Q. Okay. And is it also appropriate in
10 considering alternatives to evaluate the cost of
11 various alternatives to remediate a particular site?

12 A. That's one -- one factor to evaluate.
13 The other factor -- there are other factors to
14 evaluate in selecting a remedial alternative in terms
15 of the overall future of the site, where the site is,
16 and I've identified some of those.

17 It's a site situation, so cost is one of
18 those factors. That's even true in the formal
19 federal USEPA process where they have I think it's
20 something in the order of 8 to 10 factors that you
21 consider in selecting an alternative. Cost is one of
22 those.

23 The threshold factors are protection of
24 human health and environment and, you know,
25 compliance with applicable state laws and

1 regulations, community acceptance is another one in
2 the federal statute. And these are all reasonable to
3 consider when you're cleaning up at the state level.

4 Q. Well, I appreciate your answer,
5 Dr. Middleton. I was just asking you specifically
6 about cost. It's not necessary for you to go far
7 beyond that but cost, you agree, is an appropriate
8 alternative to consider in performing a site
9 accessibility and remediation?

10 A. Cost is an appropriate factor to
11 consider.

12 Q. Okay. And is it -- is it an appropriate
13 factor to consider even where it's a voluntary action
14 program such as -- such as the state of Ohio has?

15 A. The state of Ohio program is -- is named
16 voluntary but people carrying out site investigation
17 and cleanup under that program are satisfying a duty
18 to protect human health and the environment, so in
19 terms of cost being a factor to consider in selection
20 of alternatives, it's certainly a reasonable factor
21 to consider.

22 Q. And do most of your clients ask you to
23 consider cost as you develop alternatives in making
24 recommendations regarding site assessment and
25 remediation?

1 A. Where alternatives are considered to
2 obtain the applicable cleanup standards as required
3 by its state cost is one of the factors in how -- in
4 how to tactically get to that cleanup.

5 Q. Well, my question to you was do most of
6 your clients ask you to consider costs as an
7 important factor in consideration of those
8 alternatives?

9 A. Yes, cost is an important factor to
10 consider.

11 Q. Would you agree with me with respect to
12 the goals of a site assessment and remediation that
13 public utilities are no different than any other
14 entity, the goal is consistently to protect health
15 and the human environment? Is that correct?

16 A. The threshold goal of any cleanup by any
17 party is to protect human health and the environment
18 and -- and to comply with the applicable regulations
19 that are in place.

20 Q. Now, in this case did you review the
21 Phase I and Phase II reports for the two remediation
22 sites that are the subject of this proceeding, which
23 I will call the West End site and the East End site?

24 A. Yes, I reviewed those.

25 Q. But you've not provided any testimony

1 specifically with -- with respect to those reports;
2 is that correct?

3 A. No. The Phase I report had some
4 historical information such as Sanborn maps that I
5 reviewed in particular for some of the history in my
6 supplemental testimony on the individual sites.

7 Q. But you made no comments about the
8 substance of those reports, did you?

9 A. No, I did not.

10 Q. Is there any instance where you would
11 think that it's not appropriate to assess
12 alternatives as part of developing the site
13 assessment and remediation plan?

14 A. In some situations the remedy would be
15 somewhat obvious to do, so I can -- I can conceive of
16 such situations. I can also conceive of situations
17 where it's appropriate to consider different
18 alternatives.

19 Q. Do you know if a feasibility study was
20 conducted with respect to the West End site or East
21 End site?

22 A. It is my understanding that alternatives
23 were considered. I have not seen any formal feas --
24 written feasibility study.

25 Q. Did you see documentation in the Phase I

1 or Phase II reports of the consideration of
2 alternatives?

3 A. As I sit here today, I don't recall that.

4 Q. Would you agree with me that additional
5 alternatives that similarly protect health -- human
6 health and the environment can have significantly
7 different costs?

8 A. In protecting human health and the
9 environment, there are different alternatives that
10 can have different costs. But then there is that
11 second requirement of obtainment of state or federal
12 regulations and standards.

13 Q. Well, I'm talking about alternatives and
14 I use alternatives that are similar -- similarly --
15 excuse me, similarly -- similarly protective of
16 health -- human health and the environment. Would
17 you agree with me that even when you have similar --
18 a similar goal and even with that similar goal, you
19 can have options, alternatives that have
20 significantly different costs to meet that end
21 result?

22 A. They would be similar in a theoretical
23 sense in that a containment alternative would be in
24 theoretically protective of human health and the
25 environment as would a -- could be -- as would be a

1 removal or treatment alternative. However, the
2 long-term viability of such alternatives would be
3 different, so similarity is only in certain aspects.

4 Q. Let me see if I understand what you're
5 saying. You're saying that a containment alternative
6 and a contaminant removal alternative may both be
7 protective of human health and the environment but
8 they may be accomplished in very different ways, or
9 perhaps clarify what you were saying there.

10 A. Alternatives are intended to reduce
11 exposure of receptors, be they human or be they
12 environmental receptors, to chemicals in the
13 environment or those exposures down to acceptable
14 levels. The containment alternatives that prevents
15 that exposure in itself can do that and a removal can
16 do that.

17 So on the surface they would be similar
18 in the nature of the protection but the long-term
19 viability of those alternatives and the acceptability
20 under state regulations of those alternatives may be
21 very different.

22 Q. But you haven't made any assessment of
23 viability of alternatives in this case with respect
24 to either the East End or West End sites; is that
25 correct?

1 A. They seemed reasonable to me when they
2 reviewed what they were doing so that's been my
3 assessment.

4 Q. What you are saying what the company
5 proposed, what Duke Energy proposed here seemed
6 reasonable to you, but you earlier indicated that you
7 saw no analysis of alternatives, correct?

8 A. No, I did not see a written feasibility.

9 Q. So the only alternative you are talking
10 about is the one that was selected by Duke; is that
11 right?

12 A. I am talking about the process that Duke
13 went through of engaging contractors familiar with
14 MGP sites, engaging certified professionals under the
15 Ohio VAP program, considering the future use of the
16 sites, and then going through that procedure
17 resulting in the alternatives they arrived at that
18 seemed reasonable to me.

19 Q. Your understanding that alternatives were
20 considered for the East End and West End sites, you
21 indicated earlier, is not based upon any of the
22 reports issued; is that correct?

23 A. It's based in part on the reports issued
24 which gave me some understanding of the site
25 situation and the site conditions.

1 Q. Right. But you didn't see anything in
2 those reports that discussed alternatives, you said
3 earlier. So your understanding that alternatives
4 were assessed is solely based -- is not based upon
5 any documentation; is that correct?

6 A. It's based upon the direct testimony
7 filed by Ms. Bednarcik in terms of documentation.

8 Q. When you were talking about the
9 difference between a containment alternative and a
10 removal alternative, would you agree with me that
11 those alternatives can have very different costs?

12 A. Yes, they can have very different costs.

13 Q. And you agree that both can be protective
14 of health and human environment -- or human health
15 and the environment.

16 A. As I said, both can on the surface are --
17 in the initial consideration be protective of human
18 health and environment, they do not consider
19 compliance or obtainment of state standards nor a
20 longer term fix. Those would not be similar
21 necessarily.

22 Q. You would agree with me, you've seen all
23 three of the categories of actions you indicate can
24 be used to remediate a site used on a single site
25 including reduction of containments, prevention of

1 exposure of contaminants, and immobilization of
2 containments?

3 A. Yes, I have seen those used in
4 combination or individually, depending upon the site.

5 Q. And would you agree with me that this
6 institutional controls can be some of the most
7 effective measures to control exposure?

8 A. I would state that they can be effective.
9 You used the word "most effective" removal of
10 contaminants from the environment such as they are no
11 longer present at a site to me would be the most
12 effective because they would be not dependent upon
13 enforcement for institutional controls in the future.

14 Q. And institutional controls can be
15 something most effective -- most cost effective
16 measures to control exposure; is that correct?

17 A. Again, that term "most cost effective"
18 cost effective is -- cost effective institutional
19 controls can be lower cost but there is a -- the
20 other factor to consider there is the need to
21 maintain into the future those institutional controls
22 in face of changing conditions in the future or
23 changing regulations, accessibility to the site, many
24 factors. So they are one of the tools, if you will,
25 to consider, but I would be reluctant to use the word

1 "most" in that context.

2 Q. You don't believe that when presented
3 with an option of removal versus utilizing an
4 institutional control that the institutional control
5 would generally be more cost effective than removal?

6 A. The comparison of those two I think
7 oversimplifies the situation in that cost is just one
8 of the factors. Institutional controls would be
9 lower cost which may or may not be the most cost
10 effective for any particular site.

11 Q. Okay. But an institutional control
12 might, for example, include a deed restriction on a
13 property indicating that groundwater on that property
14 cannot be utilized.

15 A. As a general matter, that's one of the
16 possible institutional controls available in certain
17 states.

18 Q. Is Ohio one of those states?

19 A. I am not intimately familiar with the VAP
20 rules. It may be. That would be a question for
21 Mr. Fiore.

22 Q. Have you -- have you reviewed the VAP
23 rules?

24 A. I have gotten an overview of the VAP but
25 I have not read the entire VAP rules.

1 Q. In your experience do site owners or
2 operators generally try to correct the environmental
3 situation more than is necessary to protect human
4 health and the environment?

5 A. As I said before, if we go back to the
6 origins of the feasibility study, there are eight or
7 10 factors there. The two threshold conditions are
8 protection of human health and the environment and
9 complying with the applicable standards or
10 regulations in the state so protection of human
11 health and the environment is on a parallel course.

12 You must also comply with the state
13 regulations, laws, and requirements or at the federal
14 level, the federal level. So those two are parallel
15 threshold requirements.

16 Beyond that there's other factors of
17 which one is cost. Community acceptance, short-term
18 and long-term implement of effectiveness, the ability
19 to implement, you know, a remedy are all
20 considerations as well as the environments of the
21 site, future accessibility so it goes -- it goes well
22 beyond cost. Cost is one of the factors to consider.

23 Q. Well, but my question to you was do your
24 clients generally try to remediate a site beyond
25 meeting the applicable standards?

1 A. The remediation is --

2 Q. I'm talking about your clients.

3 A. Applicable standards is generally the
4 overarching goal of a state based remediation and the
5 clients that I have experience with.

6 Q. Do your clients seek to spend more than
7 is necessary to remediate a site to applicable
8 standards?

9 A. The -- I do not think the clients intend
10 or seek to do that. They seek to spend what is
11 necessary to obtain applicable standards.

12 Q. Now, in your testimony you talk about
13 monitored natural attenuations. Do you remember that
14 testimony on page 34?

15 A. Yes, I see that.

16 Q. And can you just tell us what that is?

17 A. A -- if groundwater has chemicals in it,
18 that this is a plume emanating outward or down
19 gradient from a source area, natural processes within
20 the subsurface environment will degrade often some of
21 those chemicals depending on what they are.

22 Depending on where the groundwater plume
23 that's affected by these chemicals are -- is going,
24 and depending upon the degree to which source
25 materials have been removed from the site, the plume

1 may decay over time down to acceptable standards.
2 There's certain conditions in certain sites where
3 that might be a reasonable approach as compared to
4 more active groundwater remediation.

5 Q. So monitoring of the site to determine
6 whether chemicals are migrating and the level of the
7 chemicals over time might be the most effective --
8 could be the most effective way to manage
9 contaminated groundwater; is that correct?

10 A. In my experience monitoring natural
11 attenuation comes after removal of the source
12 materials at the site and where the plume is not
13 reaching a surface water crossing a property boundary
14 or many other factors so it is possibly an effective
15 remediation tool.

16 Q. And, again, my question to you was could
17 it be the most effective tool?

18 A. You could conceive of sites where it
19 might be a most effective tool. Again, it's
20 generally after source removal, but we're speaking of
21 hypothetically constructing such sites and they could
22 be conceived of.

23 Q. You don't offer any testimony about
24 prudence in your testimony, correct?

25 A. In my prudence on what topic?

1 Q. Prudence with respect to the East End and
2 West End sites, you haven't provided any testimony on
3 that subject matter, have you?

4 A. I said that the process that Duke went
5 through is reasonable in my supplemental testimony.

6 Q. Did your -- since you didn't review any
7 materials indicating a consideration of alternatives,
8 would you agree with me in determining that the
9 process that Duke went through was reasonable that
10 that didn't reflect any consideration of
11 alternatives?

12 MS. PASHOS: I object. I believe that
13 misstates that question. Misstates Dr. Middleton's
14 previous testimony.

15 EXAMINER STENMAN: The objection will be
16 overruled. He can clarify.

17 A. The clarification is I reviewed the
18 reports to understand the sites and I spent probably
19 two days with Ms. Bednarcik in -- last summer, summer
20 of 2012, going over the sites asking her what -- what
21 she did and why she did it and also I read her direct
22 and supplemental testimony, so I have reviewed the
23 decision-making process that's there, and as you've
24 said, I believe the overall decision-making process
25 was reasonable.

1 Q. And -- you can't tell me though what
2 alternatives were considered; is that correct?

3 A. As I sit here today I recall that
4 Ms. Bednarcik explained why what was being done was
5 being done and some of the alternatives were changed
6 in the field such as going to the targets
7 measurements in the field once they were able --
8 found if it was feasible to do with -- some of the
9 changes to solidification of target materials versus
10 removal so we did talk about some of the
11 alternatives.

12 Q. Did you review any documents that
13 indicated pricing for different alternative
14 remediation approaches?

15 A. I do not remember any such documents.

16 Q. Now, you provide expert services with
17 respect to site assessment and remediation; is that
18 correct?

19 A. We provide --

20 Q. Your firm.

21 A. We provide certain services.

22 Q. Well, what expert services does your firm
23 provide in the context of site assessment and
24 remediation?

25 A. We -- well, we routinely provide our

1 services and support of site investigation programs
2 by utilities with respect to MGP aspects of such
3 investigation, with respect to risk assessments in
4 certain cases, with respect to possible means of
5 remediation and -- and the implications of those,
6 with respect to the wide range of factors that should
7 be considered in choosing a remediation alternative.

8 In the past we have also done site
9 investigations and closure analysis in certain states
10 but that was some -- that was years ago.

11 Q. When you perform these services,
12 Dr. Middleton, would you agree with me that if you
13 are performing these services in a jurisdiction where
14 you haven't provided services before, you would go in
15 and you would review any applicable laws or
16 regulations in order to determine how to best perform
17 those services in accordance with applicable
18 standards? Is that correct?

19 A. Actually today we would go in and seek to
20 work with a firm that was familiar with that
21 jurisdiction and the details of those regulations and
22 procedures in that with the advent of state based
23 cleanups across the country, the variation from state
24 to state has become so significant that I would not
25 say that I could, even if I went in and read the laws

1 and regulations that that would clue me in to all the
2 nuances and the unwritten parts of these regulations
3 that exist in the state and how they have been
4 implemented.

5 So we are selective as to where we would
6 attempt to to into a particular state and do the
7 complete program or partner with or subcontract with
8 another firm to do that.

9 Q. Okay. My question to you again is when
10 you go into a state to perform work, do you review
11 applicable rules and regulations and statutes in
12 order to determine applicable standards?

13 MS. PASHOS: Objection. Asked and
14 answered.

15 EXAMINER STENMAN: Overruled.

16 A. In one state we are working in now we
17 have done that where we have gone through the rules
18 and regulations of that state in conjunction with a
19 local firm. Again, we -- we would not -- at least we
20 have not gone into a state that we have not -- we
21 don't have a long working history on without either
22 partnering with or co-consulting with a firm that's
23 local.

24 Q. Do you -- have you done that in Ohio,
25 performed site assessment and remediation services?

1 A. No. Let me ask one point. We have not
2 done that as part of -- I have not done that as part
3 of corporate environmental solutions.

4 Q. Have you done that in the past for other
5 clients or employers?

6 A. In the late 1990s, I want to say around
7 1998, 1999, in the company I was working for then,
8 the construction division of the company which was a
9 sister division came to me to ask what to do about
10 obtaining a VAP closure on a construction project in
11 the Cleveland area.

12 At that time I made some initial
13 investigations into the VAP program, which was only
14 four years old at the time, and very quickly
15 concluded that the approach was to find certified
16 professionals in Ohio and have them provide that
17 service to the construction division, which is what
18 happened.

19 Q. Dr. Middleton, if you're performing an
20 investigation of a site and if you determine at the
21 time that the investigation's performed that
22 additional investigation will be required after the
23 commencement of remediation, would you normally
24 document that fact in your investigation Phase I
25 report?

1 A. I mean it could be documented there or it
2 may not be obvious until the Phase I report has been
3 prepared subsequent to that, so it's possible.

4 Q. Wouldn't you document it if you had an
5 intent -- if you determined that at the time of your
6 Phase I investigation that additional investigation
7 was going to be necessary subsequent to the
8 commencement of remediation, wouldn't you document
9 that in your Phase I report?

10 A. In a Phase I investigation report it
11 might be written as simply presenting the findings of
12 the investigation, it would not necessarily be
13 documented.

14 Q. You wouldn't put it in writing in the
15 Phase I report that additional investigation is going
16 to be necessary because you weren't able to fully
17 investigate a particular aspect because remediation
18 would have to be commenced before you could do that
19 investigation?

20 A. Could you repeat that question, please.
21 Or have it read back.

22 MR. BERGER: Yeah, could the court
23 reporter please read back the question.

24 (Record read.)

25 A. Not necessarily.

1 Q. Why wouldn't you document that?

2 A. As I understand your question, I may not
3 understand at the time I had written the Phase I
4 report that remediation is ongoing and that
5 remediation may nullify the need for additional
6 investigation or the investigative results may be
7 taken or gained during the remediation itself.

8 Q. Even if you believed that additional
9 investigation would be necessary following the
10 commencement of remediation, you wouldn't -- you
11 wouldn't necessarily document that. That's my --
12 that's my understanding of your answer.

13 A. Yeah. That does not mean that I would
14 not necessarily make that recommendation to a
15 particular client.

16 Q. Now, you earlier referred to your
17 testimony, your supplemental testimony on page 12
18 answering the question was the approach followed for
19 investigation and remediation reasonable. Yes, it
20 was.

21 Now, my interpretation of this -- this
22 response was that since you hadn't discussed at all
23 any of the investigation and remediation at the
24 particular site, throughout your testimony you were
25 just talking generally about the steps that were

1 taken and not perform a specific analysis of the site
2 investigation or remediation; is that correct?

3 Or were you actually making a statement
4 about prudence here in this one sentence in your
5 testimony where the only defense in your testimony
6 where you talk about the reasonableness of what the
7 company did?

8 A. I was talking about the reasonableness of
9 the overall approach and the discussions that I had
10 confirming the steps that had been taken with regard
11 to the site assessment or remediation and flow chart
12 that I have in my testimony.

13 Q. So you're saying that the approach the
14 company took followed the flow chart in your
15 testimony?

16 A. And it followed considerations not
17 necessarily explicitly in the flow chart such as
18 accessibility to the site in the future after
19 movement of electrical towers and things such as
20 that.

21 Q. Now, referring to your testimony -- your
22 supplemental testimony on page 11, you talk about the
23 reprioritization of residuals in 2006 due to the
24 anticipated changes in chemical exposure pathways.
25 Do you see that testimony?

1 A. Yes.

2 Q. And do you know how that came about that
3 the company had to reprioritize its determination of
4 when to proceed forward with remediation?

5 A. It's my understanding that it was due to
6 the movement closer of residences and landscape
7 easements and things of that nature.

8 Q. And with respect to that you are talking
9 about the East End site, I take it; is that right?

10 A. Yes, I am.

11 Q. And do you know how -- do you know what
12 brought about the fact that residential development
13 was being contemplated in that area when it had not
14 been contemplated previously?

15 A. It's my understanding there was a
16 developer that expressed plans to do development next
17 door to the East End site.

18 Q. Were you aware that the company sold that
19 developer property in order for that to happen?

20 A. I'm aware there was a small piece of
21 property sold to the developer prior to my
22 involvement. It's not my understanding that was the
23 entire piece of property that was going to be under
24 development.

25 Q. So you believe that only a portion of the

1 property that the company had sold to that developer
2 was a part of the total property that was going to be
3 under development; is that correct?

4 A. My understanding is that the company sold
5 a small parcel to the developer which combined it
6 with a larger parcel and somehow that entire parcel
7 was the subject of the future redevelopment.

8 Q. Do you know if the parcel that the
9 company sold to the developer was a necessary part of
10 what the developer needed to perform the residential
11 development?

12 A. I do not know.

13 Q. Are you aware that the company bought
14 back a portion of the property that it sold to the
15 developer subsequent to that sale?

16 A. Yes, I'm aware of that.

17 Q. Do you know why that was?

18 A. It was to gain access was my
19 understanding to conduct remediation on part of that
20 site and there were other factors involved with the
21 negotiations of the developers is my understanding,
22 but I'm not familiar with the details of those.

23 Q. Do you know why the company sold that
24 property in the first place if they were aware that
25 there might be contamination on that parcel?

1 A. I don't know why the company sold the
2 property.

3 Q. In your -- to your understanding if the
4 company sold that parcel and the only area sold,
5 let's call it the west parcel of the East End site,
6 is it your understanding that the -- because of that
7 sale that the entire East End site including the
8 middle parcel and the east parcel would have to be
9 remediated because of that change in use?

10 A. I think that was one factor. I don't
11 know that it was the entire factor because it's my
12 understanding there is development in other areas and
13 there's a landscape easement across much of the
14 property or near the edges of the property.

15 Q. But you're aware that the company had
16 seen no need to do a site assessment and remediation
17 prior to 2006; is that correct?

18 A. All that I know is that they had not done
19 one before 2006.

20 Q. And would you agree that the reason that
21 they -- the only reason they changed that approach or
22 that determination was because of the sale of the
23 property in 2006?

24 A. I don't know that that's the only reason.

25 Q. Are you aware of how much they sold that

1 property for originally in 2006?

2 A. No.

3 Q. With respect to the West End site and the
4 Brent Spence bridge in particular did you
5 specifically evaluate the Department of
6 Transportation's plans for the Brent Spence bridge to
7 determine whether the company's actions were
8 necessary at the time that they began to perform site
9 assessment and remediation with -- in order to
10 prepare that property for the location or
11 reconstruction of the bridge?

12 A. I did not review anything from the
13 Department of Transportation.

14 Q. Do you know what the Department of
15 Transportation's plans are with respect to when they
16 want to construct that bridge?

17 A. My understanding was that last year it
18 was in the timeframe of several years, possibly
19 beginning work in 2015 or thereabouts or something,
20 so it was in the timeframe of a few years.

21 Q. Now, Dr. Middleton, do you remember
22 testifying in a 1995, approximately, Indiana Gas
23 Company case in which the recovery of MGP costs was
24 denied?

25 A. I believe the testimony was in 1993 and

1 the final decision was made in 1995. But my memory
2 may be serving me -- may not be serving, but I did
3 testify on behalf of Indiana Gas before the IEU RC in
4 Indiana in that timeframe.

5 Q. And you are aware they denied recovery of
6 those costs at the time?

7 A. Yes, I am.

8 Q. Are you aware of the reason that they
9 denied recovery of the costs?

10 A. I remember I read it at the time but I
11 couldn't sit here today and tell you something that
12 was 15 years ago.

13 Q. Do you remember testifying at all in that
14 case as to whether the property that was being used
15 to provide services was or was not related to the
16 provision of -- I'm sorry. Strike that.

17 Do you remember testifying as to whether
18 the property on which the MGP remediation was taking
19 place was not -- was or was not related to the
20 provision of public utility service?

21 A. I remember testifying about the history
22 of the sites but I do not remember that specific
23 testimony you just cited.

24 MR. BERGER: Can I just have a minute,
25 your Honor?

1 EXAMINER STENMAN: Yes.

2 MR. BERGER: Thank you, your Honor.

3 Q. Dr. Middleton, are you aware that there
4 has been no remediation on the piece of property at
5 the East End site, that I earlier called the west
6 parcel that was sold in 2006?

7 A. I'm aware that there has been substantial
8 remediation on the East End site but as I sit here
9 today, I cannot break it down into the parcels that
10 were identified for the -- you know, for the
11 convenience of the remediation.

12 Q. Dr. Middleton, have you testified in
13 other public utilities proceedings other than the
14 Indiana Gas Company in 1993?

15 A. I have.

16 Q. Can you tell me in which cases you have
17 testified?

18 A. I testified before the Massachusetts
19 Department of Utilities. I testified twice before
20 the Utility Commission in New Jersey which I cannot
21 tell you the precise name of that now. I believe it
22 has changed. I testified before the Illinois
23 Commerce Commission.

24 As we said, I testified in the Indiana
25 Gas Company before the IURC. I testified before the

1 Michigan Public Service Commission. And I filed
2 direct testimony with the Public Utilities Commission
3 of Oregon.

4 Q. Have those all been in connection with
5 MGP issues?

6 A. Yes, they have.

7 Q. I take it you are not familiar with the
8 definition of "prudence" before the Public Utilities
9 Commission -- utilized by the Public Utilities
10 Commission of Ohio in its case decisions, are you?

11 A. Prudence to me is what a reasonable
12 person would do given the circumstances, knowledge,
13 in context of the times that the decision is made,
14 and to me that's a general definition of prudence.

15 Q. And a reasonable person would consider
16 cost; is that correct?

17 A. A reasonable person would consider cost
18 as one of the factors.

19 MR. BERGER: Thank you.

20 That's all I have. Thank you, your
21 Honor.

22 EXAMINER STENMAN: Thank you.

23 Let's just take a quick 5-minute break.

24 (Recess taken.)

25 EXAMINER STENMAN: Let's go back on the

1 record.

2 MS. WATTS: Your Honor, the witness seems
3 to be indisposed.

4 EXAMINER STENMAN: I think he's back
5 there.

6 Thank you. All right, since we lost
7 Ms. Mooney, Ms. Bojko, do you have any questions?

8 MS. BOJKO: I do, your Honor. Thank you.

9 - - -

10 CROSS-EXAMINATION

11 By Ms. Bojko:

12 Q. Hello, Doctor. I am Kim Bojko, I
13 represent the Kroger Company here today.

14 A. Good morning.

15 Q. As I understand -- first let's talk about
16 your direct testimony that you filed in July, 2012.
17 As I understand that -- as I understand that
18 testimony, it is just a general description of the
19 MGP industry; is that correct?

20 A. Yes, it is.

21 Q. And so it's not specific -- the first
22 piece of testimony you put in the record is not
23 specific to Duke at all; is that correct?

24 A. Without rereading it and making sure
25 there is no mention in there of the Duke sites, that

1 is generally correct. I can't recall something
2 specific sitting here today.

3 Q. And I can't either so that's my question
4 is did you even review the Duke sites before drafting
5 that piece of testimony?

6 A. I had visited the Duke sites and reviewed
7 what was going on at the Duke sites at the time and I
8 had reviewed some of the history of the Duke sites
9 before that.

10 Q. Okay. But you hadn't included any of
11 that in your direct testimony.

12 A. No. That was not the objective of that
13 testimony.

14 Q. Okay. And then if we turn to your
15 supplemental direct testimony. In that testimony --
16 and that's marked as Duke Exhibit 20A. Do you have
17 that in front of you?

18 A. I do.

19 Q. And in that testimony you talk about the
20 historical use of the East End and West End sites of
21 Cincinnati Gas and Electric; is that correct?

22 A. I do.

23 Q. So you received an overview of the
24 history of the Duke specific manufactured gas plants
25 for your supplemental testimony; is that right?

1 A. I reviewed a number of -- more than an
2 overview. I reviewed details where I could find
3 them.

4 Q. And that information came from Duke; is
5 that correct?

6 A. It came from Duke and it came from
7 independent research that I and my people had done.

8 Q. Okay. And earlier in cross-examination
9 you suggested you have gotten an overview of the Ohio
10 VAP; is that correct?

11 A. Yes.

12 Q. And when you say -- I am trying to use
13 your words, when you said you had gotten an
14 "overview," did Duke provide you that overview?

15 A. Actually Mr. Fiore did.

16 Q. Okay. And was that at Duke's direction?

17 A. I requested an overview and Duke arranged
18 a call for me to talk to Mr. Fiore about the VAP.

19 Q. Okay. And on page 2 of your supplemental
20 direct testimony, you stated that you believe Duke's
21 management appeared to have followed common industry
22 practices, and that's on line 10. Do you see that?

23 A. Yes.

24 Q. And you don't have any personal knowledge
25 of Duke's management practices at the time they made

1 those decisions; is that correct?

2 A. Well, first of all, we are speaking of
3 historic management practices here.

4 Q. It's your testimony, sir. I'm not sure,
5 what are you referencing?

6 A. Okay. The supplemental direct testimony
7 is -- talks about the management of residuals appears
8 to have followed common industry practice at the time
9 of operation so this is about the operation of the
10 MGP sites, so this is historically when these sites
11 were operating.

12 Q. So back to my question, you didn't have
13 any contact with management at the time of operation
14 or any personal knowledge -- knowledge of the
15 decisions made at that time; is that correct?

16 A. The last operation was in 1963 so, and I
17 have not talked to anyone that was an operator at
18 that time or going all the way back to 1843, no.

19 Q. So you have no personal knowledge of
20 management decisions; is that correct?

21 MS. PASHOS: Objection, vague.

22 EXAMINER STENMAN: Overruled.

23 A. The knowledge that I have is often --
24 most often the case in -- when you're looking at MGP
25 history comes from written records that have been

1 found either within company files or in the public
2 utilities domain so I had reviewed a number of such
3 files in coming to that conclusion.

4 Q. And the files that you reviewed you
5 cannot sit here today and tell -- tell us that they
6 were from management of Duke at the time of
7 operation; is that correct?

8 A. Well, there were the annual reports that
9 were during the time of operation. So there were
10 some files that were during the time of operation.

11 Q. Okay. And throughout your testimony you
12 use the word "apparently" a lot. You use it on
13 page 4 a couple of times, you use it on page 6 a
14 couple of times, page 9. And the same question you
15 use the word "apparently" because you're reviewing
16 historical records that you have obtained and you
17 have no personal knowledge of any of the history of
18 Duke's MGP plans; is that fair?

19 A. It is an opinion based upon the
20 historical information I can find rather than
21 personal direct knowledge or finding a document that
22 explicitly defined something.

23 Q. Okay. And on page 4 of your supplemental
24 testimony, line 17, you state that the "...decision
25 was logical given the property's ownership by

1 CG&E....." Do you see that?

2 A. I do.

3 Q. Were you involved in that decision?

4 A. I was not.

5 Q. And you have no personal knowledge of
6 that decision; is that correct?

7 A. I do not.

8 Q. And before you talked about what was
9 necessary to obtain applicable standards. Do you
10 recall that? You said that your clients do what's
11 necessary. Do you recall that discussion that you
12 had with Consumers' Counsel counsel?

13 A. It was a number of places we discussed
14 that subject.

15 Q. Do all of your clients get ratepayer cost
16 recovery for their remediation efforts?

17 A. With respect to utilities that's all of
18 my clients except Indiana Gas and Duke, all my
19 utility clients but private --

20 Q. You have other clients; is that correct?

21 A. I have other nonutility clients, yes.

22 Q. And do they get cost -- ratepayer cost
23 recovery for their remediation efforts?

24 A. They do not.

25 Q. And I think you mentioned -- I didn't

1 count them, but you mentioned a handful of utility
2 rate cases or utility clients that you must have
3 appeared before public utilities commissions before;
4 is that correct?

5 A. That's correct.

6 Q. So also in your testimony there's -- I
7 can't recall the number but you -- there are hundreds
8 of cases that you've been involved in and those would
9 necessarily not be for utility clients; is that
10 correct?

11 A. Not hundreds, tens.

12 Q. Did you say -- is it 50?

13 A. Actually maybe I'm confused of your use
14 of the word "cases." Cases to me implies litigation
15 and expert testimony. In terms of projects involving
16 MGP sites there are hundreds.

17 Q. Okay. Thank you for that clarification.
18 I was speaking of your consulting services. You've
19 had hundreds of clients that you've looked at
20 remediation type efforts for under the MGP industry.

21 A. Tens of clients on hundreds of sites.

22 Q. Okay. Fair enough. Thank you for that
23 clarification.

24 And, again, of those tens of clients,
25 hundreds of cases, not all of your cases have

1 resulted in ratepayer cost recovery approved by a
2 public utilities commission; is that correct?

3 A. In the cases in the projects that involve
4 testimony before public service commissions, of the
5 eight or so that I was involved in, only one did not
6 result in rate recovery for MGP cleanup. The other
7 utility clients that I have which I was not involved
8 in their ratemaking received rate recovery for MGP
9 cleanup.

10 Q. And my question was to the nonutility,
11 the other clients, they also did not receive
12 ratepayer cost recovery; is that correct?

13 A. Well, nonutilities are not subject to the
14 jurisdiction of public utilities commissions.

15 Q. So it's fair to say they would not be
16 able to go in front of a public service or public
17 utility commission and receive that kind of cost
18 recovery; is that fair?

19 A. That's fair but that's not something that
20 would be done.

21 Q. Right. And in those situations the
22 shareholders of the company would likely have to pay
23 for those remediation efforts?

24 MS. PASHOS: Objection. Calls for
25 speculation.

1 EXAMINER STENMAN: Overruled.

2 A. In those cases the costs are borne by the
3 company as a cost and however that company is
4 organized, that's where the consequences would fall.

5 Q. So as I understand, you summarize in
6 multiple places in your testimony, but as I
7 understand it, you've reviewed historical
8 information, you've relied on reports that were
9 issued by Duke itself, and it seems that you allude
10 to you've read some newspaper articles about
11 different MGP sites for Duke over the historic time
12 period that we have been talking about this morning;
13 is that correct?

14 A. Yes, I cite some of them in the direct
15 testimony -- or the supplemental testimony.

16 Q. And from here today, although it's -- or
17 from here this morning it appears you've also had
18 discussions with Duke personnel such as
19 Ms. Bednarcik; is that true?

20 A. Yes.

21 Q. So your conclusion is based on the Duke
22 reports, the Duke interviews that you've had with
23 Duke employees, and some newspaper articles; is that
24 correct?

25 A. Not entirely. In terms of the other

1 things that I would cite here is I have been involved
2 with the history of MGP sites since 1984 so I would
3 put in the basis of my opinions all of the historic
4 information I gained upon those hundreds of sites
5 which includes hundreds of articles in the MGP
6 literature and so forth.

7 So my basis is wider than that, plus I've
8 also worked as a -- worked consulting on MGP sites
9 that are investigation --

10 Q. I understand your experience, sir.
11 I'm -- my question went specifically to the Duke
12 sites that are at issue here, the East End and West
13 End sites.

14 A. It's the documentation that you referred
15 to and talking to Duke personnel.

16 MS. BOJKO: I have no further questions,
17 your Honor. Thank you.

18 EXAMINER STENMAN: Thank you.

19 Ms. Mooney, did you have any questions?

20 MS. MOONEY: Well, yes, I would like to
21 ask.

22 EXAMINER STENMAN: Can you use the
23 microphone.

24 - - -

25

CROSS-EXAMINATION

By Ms. Mooney:

Q. I just want to go back to page 2 of your testimony that Ms. Bojko also asked you about and the sentences there that start on line 9, "The management of the residuals appear to have followed common industry practices at the time of operation," and you responded to her that the last operation was in 1963; is that correct?

A. That would be the last operation that generated residuals. The operations have continued at East End since that in terms of the propane plant and West End on the other things.

Q. But if you were finishing up the sentence there that starts at line 9 referring to the residuals, the common industry practices at the time of operation, that ended in 1963; is that correct?

A. Yes.

Q. And then when you get into the next sentence it starts on page -- I mean, on line 10 of that same page 2, that Duke Energy has taken the steps to manage and remediate the residuals have been prudent and consistent with -- with current common industry practice, would that be at the time of operation also?

1 A. No. That has been more contemporary.
2 That is the investigation, there I am referring to
3 the investigation and remediation efforts that have
4 been ongoing since 2006.

5 Q. Well, oh, because you are referring to
6 the management and remediation of residuals?

7 A. Yes, and their constituents.

8 Q. And their constituents, is that the
9 propane or what?

10 A. I'm sorry, I didn't understand your
11 question.

12 Q. What are their constituents?

13 A. Oh, the residual would be a tarring
14 material a contender of tar might be benzene or
15 Naphthalene, a chemical constituent.

16 Q. So that second sentence there is not --
17 you are saying is not limited to the time of
18 operation that goes beyond 1963?

19 A. No, it is not.

20 Q. And when the current common industry
21 practice that you are referring to there, what is the
22 date or timeframe of that?

23 A. Well, 2012-2013.

24 Q. So that goes beyond the operation?

25 A. Yes, it does.

1 MS. MOONEY: Thank you. That's all.

2 EXAMINER STENMAN: Thank you.

3 Mr. Hart?

4 MR. HART: No questions.

5 EXAMINER STENMAN: Mr. Parram?

6 MR. PARRAM: No questions, your Honor.

7 EXAMINER STENMAN: Redirect?

8 MS. PASHOS: Yes, your Honor, just a
9 couple of questions.

10 - - -

11 REDIRECT EXAMINATION

12 By Ms. Pashos:

13 Q. Just to briefly follow up where Ms. Bojko
14 was questioning, I think you stated in response to
15 one of your questions, and correct me if I'm wrong,
16 please, that your conclusions I think about the facts
17 about the actual Duke East End and West End sites
18 came from information provided by Duke; is that
19 right?

20 A. In part provided by Duke.

21 Q. And my question -- my question is your
22 conclusions about the reasonableness of Duke's
23 actions to investigate and remediate and that sort of
24 thing, is that based solely on information provided
25 to you by Duke or does that come from a wider source

1 of information?

2 A. It comes from my experience working on
3 these sites in that capacity for other utilities
4 across the country and other parties.

5 Q. Thank you.

6 One more question. You recall your
7 discussion with Mr. Berger about the Indiana Gas MGP
8 case and other cases you may have testified in during
9 that discussion?

10 A. I do.

11 Q. Are you aware of any other -- and this is
12 in the utility context, public utility context. Are
13 you aware of any other state other than Indiana that
14 has completely denied recovery for MGP recovery
15 costs?

16 A. No, I believe not.

17 MS. PASHOS: Thank you. That's all I
18 have.

19 EXAMINER STENMAN: Thank you.

20 Recross, OCC?

21 MR. BERGER: Dr. Middleton --

22 EXAMINER STENMAN: Can you turn your
23 microphone on.

24 MR. BERGER: I'm sorry.

25 - - -

RECROSS-EXAMINATION

By Mr. Berger:

Q. Dr. Middleton, when you were talking about working on sites in your redirect testimony, you've never worked on the East End or West End MGP sites, correct?

A. In terms of being in charge of conducting investigations, no.

Q. When you were asked the question a moment ago and you indicated working on sites; you weren't referring to working on these sites in particular, were you?

A. No, I was speaking there of other MGP sites I have consulted on across the country.

Q. And when -- when did you begin the preparation of the testimony that's included in your supplemental testimony?

A. The physical assembly of that testimony was early 2013.

Q. No, no, the supplemental testimony. When did you begin the supplement -- presentation of your supplemental testimony where for the first time you testify about prudence? When did you begin that?

A. In -- in the -- that testimony --

MS. PASHOS: Are you referring to Exhibit

1 20A?

2 MR. BERGER: Yes.

3 MS. PASHOS: Thank you.

4 A. Yes. That testimony was filed on
5 February 25, 2013. And I physically began writing
6 that testimony sometime earlier than that in 2013.

7 MR. BERGER: Thank you. That's all I
8 have.

9 EXAMINER STENMAN: Thank you.

10 Ms. Mooney?

11 MS. MOONEY: No further questions.

12 EXAMINER STENMAN: Ms. Bojko?

13 MS. BOJKO: Yes, your Honor. Thank you.

14 - - -

15 RECROSS-EXAMINATION

16 By Ms. Bojko:

17 Q. When you just referenced the
18 reasonableness of Duke and you stated broad base,
19 there's nothing in your testimony that lays out that
20 analysis except for the one sentence where you say
21 it's reasonable, is that correct, specific to the
22 Duke sites?

23 A. I described the process that they -- that
24 they went through as an overview but nothing beyond
25 that.

1 Q. Correct. And when you referred to all
2 your public utility clients that you've testified and
3 whether they have received cost recovery, I found
4 your Attachment ACM-1 in here and I'm looking at
5 that. Isn't it true that the majority of the
6 proceedings that established or even sought cost
7 recovery were for remediation efforts that occurred
8 from 1999 and before?

9 A. The -- in the Massachusetts case which
10 was before the Department of Public Utilities, that
11 case began in fall of 1989 and continued into 1990
12 and an agreement was reached as to cost recovery in
13 that case in May of 1990. As far as I know, that
14 recovery for MGP cleanup in Massachusetts continues
15 to this date. So that's beyond 1999.

16 Q. I'm talking, sir, I am looking at I see
17 21 proceedings that you've testified before where the
18 cost recovery was for remediation efforts from 1999
19 and prior. Is that -- I am not talking about
20 continuing. I am actually talking about the
21 proceedings where they sought cost recovery.

22 A. The proceedings were in the 1990s
23 except --

24 Q. The majority were in the 1990s.
25 If you would look at the very last case

1 which is 2011, that was before the Oregon Public
2 Utilities Commission.

3 Q. Sir, I asked you about the majority. I
4 have 21 cases that occurred before -- about
5 remediation efforts in 1990. Is that the majority or
6 were in the '90s?

7 A. Yes, but it was --

8 Q. Thank you.

9 A. But --

10 MS. BOJKO: I have no further questions.

11 EXAMINER STENMAN: Thank you.

12 Mr. Hart?

13 MR. HART: No questions.

14 EXAMINER STENMAN: Mr. Parram?

15 MR. PARRAM: No questions.

16 EXAMINER STENMAN: Thank you,

17 Mr. Middleton -- Dr. Middleton.

18 Next witness.

19 MS. WATTS: Yes, thank you, your Honor.

20 MS. PASHOS: Our next witness is

21 Mr. Kevin Margolis.

22 (Witness sworn.)

23 - - -

24

25

1 KEVIN D. MARGOLIS

2 being first duly sworn, as prescribed by law, was
3 examined and testified as follows.

4 DIRECT EXAMINATION

5 By Ms. Pashos:

6 Q. Good morning. Would you please state
7 your name and business address for the record?

8 A. Kevin D. Margolis, 200 Public Square,
9 Cleveland, Ohio 44114.

10 Q. And by whom are you employed and in what
11 capacity?

12 A. I'm employed by the law firm of Benish,
13 Friedlander, Coplan & Aranoff. I am a partner.

14 Q. And have you prepared testimony for these
15 proceedings here today?

16 A. Yes, I have.

17 Q. And do you have a copy of your prefiled
18 testimony marked as Duke Energy Ohio's Exhibit 23
19 before you?

20 A. I have a copy. The exhibit number is not
21 on it but I have a copy of my testimony.

22 Q. Okay. And is it dated February 25, 2013?

23 A. It is.

24 Q. Do you have any changes or corrections to
25 that testimony?

1 A. No, I do not.

2 Q. And if I were to ask you the same
3 questions as are contained in this testimony today,
4 would your answers be the same?

5 A. Yes, they would.

6 Q. Do you adopt Duke Energy Ohio's Exhibit
7 23 as your sworn testimony in these proceedings?

8 A. I do.

9 MS. PASHOS: At this point we would offer
10 into evidence Duke Energy Ohio's Exhibit 23 and make
11 Mr. Margolis available for cross-examination.

12 EXAMINER STENMAN: Thank you.

13 OCC?

14 MR. SERIO: Thank you, your Honor.

15 - - -

16 CROSS-EXAMINATION

17 By Mr. Serio:

18 Q. Good morning, Mr. Margolis.

19 A. Good afternoon.

20 Q. My name is Joe Serio. We didn't formally
21 meet but I did your deposition over the phone. I
22 have some similar questions I'd like to ask you
23 today.

24 First of all, you've appeared in numerous
25 cases and in representing clients you've appeared

1 only as an attorney, correct?

2 A. Correct.

3 Q. You've never been an expert witness or
4 subject matter expert?

5 A. Actually I have been an expert witness
6 once before but not in a proceeding. I was only
7 deposed.

8 Q. Okay. And when you've represented your
9 clients, you've done so as an agent of those clients,
10 correct?

11 A. I've represented them as their attorney.

12 Q. Now, you're not a certified professional,
13 are you?

14 A. No.

15 Q. And have you attended any of the initial
16 training or ongoing training for certified
17 professional?

18 A. No, I have not.

19 Q. And you're appearing today as an expert
20 on the voluntary action plan or the VAP rules,
21 correct?

22 A. Correct. That's part of the substance of
23 my testimony.

24 Q. And is it correct to say that your
25 expertise on those rules is based on your experience

1 as an attorney and working with the rules and reading
2 the rules?

3 A. That's correct, as well as my experience
4 work on projects where the rules and the laws are
5 employed.

6 Q. Now, have you ever represented an
7 investor-owned utility in a proceeding regarding
8 manufactured gas plants?

9 A. No.

10 Q. So it's safe to say that your clients in
11 the past have been private sector clients?

12 A. My clients in the past have been private
13 sector clients, both public companies and private
14 companies.

15 Q. Now, when you represent your clients in a
16 remediation action, the position that you take in
17 those cases is the one that your client directs you
18 to take, correct?

19 A. The position I take -- they are not
20 cases. They are not litigation. They are cleanups.
21 The position I take is based on consultation with the
22 client and discussion with the client and my advice
23 to the client with respect to the numerous factors
24 that relate to the particular project in the context
25 of a particular project.

1 Q. Would you agree with me that ultimately
2 it's the client that makes the decision?

3 A. Ultimately the client does make the
4 decision.

5 Q. Now, when you've worked with clients in
6 the past and you've represented them, would you agree
7 that one of the factors that's considered in
8 remediation work is cost --

9 A. There are --

10 Q. -- of remediation?

11 A. There are many, many factors. That's one
12 of many, many factors that they consider.

13 Q. What are the other factors that they
14 consider?

15 A. They consider the legal exposure. They
16 consider the expediency or timeline of the
17 remediation. They consider the business interests
18 that may relate to a particular project. The context
19 of projects are very different. Some are
20 transactional in nature. Some are risk management or
21 reliability management. Some are in anticipation of
22 potential litigation. Some are in anticipation of
23 enforcement by regulatory authority. Each of those
24 situations may require priortization of different --
25 of different factors.

1 Q. But even with those other factors, cost
2 is considered. For example, in enforcement actions
3 your clients are going to consider the cost of the
4 different alternatives they face, correct?

5 A. Actually, no. I mean cost is often a
6 factor but I have been involved in situations where
7 cost has specifically not been a factor because, as
8 you just mentioned in an enforcement case, the issue
9 that they're -- that's primary and the main focus is
10 responding to the enforcement issues and resolving it
11 and cost may not even be on the list of issues
12 considered.

13 Q. Generally speaking, how important is cost
14 to clients?

15 A. I don't know how to respond to that, it's
16 such a broad question. You say "generally speaking."
17 The context of each situation would demand a
18 different set of priorities.

19 Q. In your experience working with clients,
20 you've had, you know, numerous clients, has it been
21 your experience that the clients find cost to be an
22 important factor generally or that they don't?

23 A. Cost is one of many factors that enter
24 into these decisions.

25 Q. Does the type of business that a client

1 has determine whether cost is more important to them
2 or not?

3 A. Not that I can recall. I'm not sure I
4 can, sitting here giving testimony, specifically find
5 a situation where cost is or isn't a factor.

6 Q. Now, have you ever appeared before the
7 PUCO before?

8 A. No, sir.

9 Q. And do you consider yourself an expert on
10 the PUCO ratemaking?

11 A. No.

12 Q. And you understand the difference between
13 how investor-owned public utilities like Duke operate
14 versus private sector clients -- companies, correct?

15 A. In general, I do.

16 Q. Now, if I understand it, the other focus
17 of your testimony was the conclusion that Duke has
18 the legal liability to remediate the East End and the
19 West End sites, correct?

20 A. Yes.

21 Q. And when did you make that specific
22 conclusion?

23 A. As I prepared my written testimony.

24 Q. Prior to the preparation of your written
25 testimony, was Duke of the opinion, if you know, that

1 they have legal liability and were you simply
2 confirming that, or was Duke unsure and it was your
3 analysis that led them to believe that they have
4 legal liability?

5 A. My written testimony is my opinion; it's
6 not Duke's. It was not offered to me by Duke.

7 Q. Do you know if Duke had concluded prior
8 to your testimony that they had legal liability?

9 A. I don't know if Duke had concluded that
10 they had legal liability. It's my testimony that
11 based on the facts, as I understood them, that they
12 have a duty and obligation to respond to the issues
13 of these two sites.

14 Q. To the extent that Duke has been involved
15 in investigation and remediation prior to the filing
16 of your testimony, would it be safe to assume Duke on
17 its own concluded that they had liability to do that
18 work?

19 A. Yes, it be would be reasonable to assume
20 that they reached that conclusion.

21 Q. Did you have any discussion with anyone
22 at Duke regarding their liability and how they viewed
23 it regarding the East and West End sites?

24 A. No, sir.

25 Q. Now, did you use any specific criteria to

1 reach the conclusion that Duke had that liability?

2 A. I reviewed the testimony of -- when I
3 prepared my written testimony of Dr. Middleton and
4 Ms. Bednarcik and understood the general
5 characteristics of the sites and what activities had
6 been taken at the sites and the general ownership
7 history of the sites and activities at the sites.

8 Q. Is there any specific criteria that you
9 identified as a basis for Duke's legal liability?

10 A. It's my understanding that Duke is the
11 owner and/or operator of both of these sites and as
12 such is liable under the law.

13 Q. Did you review Duke's potential legal
14 liability in any of the other potential manufactured
15 gas plant sites that Duke owns?

16 A. No. It's not the subject of my
17 testimony.

18 Q. Now, you just indicated in response to
19 your prior answer that the fact they owned and
20 operated the sites, that is the basis for your
21 conclusion of legal liability, correct?

22 A. Correct.

23 Q. And generally speaking, it would be
24 ownership and operation that would be two of the key
25 factors that would determine legal liability of any

1 manufactured gas plant site, correct?

2 A. In general with respect to environmental
3 liability for cleanup, the duty and obligation to
4 cleanup, site ownership and/or operation at the time
5 of the contamination are two of several factors that
6 can result in liability.

7 Q. Now, you didn't look at the other sites.
8 Is that because you weren't asked to or because you
9 just simply didn't do it?

10 A. I wasn't asked to. I have no information
11 about any other MGP sites.

12 Q. So Duke just directed you to look at the
13 two sites, the East End and the West End site only,
14 correct?

15 A. Those are the only two sites I looked at.

16 Q. Is that because Duke instructed you that
17 way?

18 A. That's the information that Duke provided
19 me in order to form my testimony.

20 Q. On page 1 of your testimony, Exhibit 23,
21 you talk about environmental insurance matters. Can
22 you describe or explain to me what you mean by
23 "environmental insurance matters"?

24 A. Yes. There are generically two kinds of
25 environment insurance. Environment insurance that

1 one could obtain to potentially ensure an
2 environmental risk on a going-forward basis.
3 Environmental insurance matters as they relate to
4 historic insurance policies and cost recovery on
5 insurance policies, that would be considered
6 environmental insurance.

7 Q. And with respect to the East End and West
8 End sites, which of those two categories applies?

9 A. The latter.

10 Q. Latter. So it's really for any historic
11 insurance policies that Duke had that might cover
12 some of the costs of remediation of either one of the
13 sites, correct?

14 A. To the extent any exist, yes.

15 Q. And have you had an opportunity to review
16 the policies that Duke has with the sites?

17 A. No.

18 Q. But Duke does have some insurance
19 policies that you're aware of, correct?

20 A. I have no specific information about
21 Duke's insurance or insurance policies.

22 Q. And you've had clients in the past that
23 pursued recovery of insurance coverage for
24 remediation from older policies, correct?

25 A. I have clients that have considered it

1 and have pursued it. And I have clients that have
2 considered it and not pursued it.

3 Q. And none of them were investor-owned
4 utilities, correct?

5 A. That's correct.

6 Q. Now, can you explain to me what you mean
7 by "environmental risk allocation"?

8 A. Environmental risk allocation is
9 essentially a lawyer's term for what we do as lawyers
10 as we negotiate dispositions or acquisitions or
11 business transactions and allocate risk between
12 parties.

13 Q. So, for example, if -- if Duke was
14 selling a property that might have remediation costs
15 associated with it, that would be something that
16 might be negotiated between the parties in the
17 transaction, correct?

18 A. Yes.

19 Q. Are you aware that years ago the Duke
20 Company, its predecessor, was owned by Columbia Gas?

21 A. I don't know -- I don't know the exact
22 corporate history of the company. I know Duke is a
23 successor to other companies.

24 Q. To the extent that they are a successor
25 company, did you look into the -- any transactional

1 factors that might have addressed any of the
2 potential environmental factors for when -- for when
3 Duke went from being owned by another company to
4 being spun off as its own independent company?

5 A. No. I have not reviewed any of those
6 documents, if they are available.

7 Q. Now, through your testimony, Duke is
8 acknowledging legal liability for the remediation of
9 the two sites. Are you familiar with the other
10 parties in this proceeding?

11 A. In general.

12 Q. And is it your understanding that any of
13 the parties in this proceeding have questioned --
14 questioned whether Duke has legal liability for
15 remediation?

16 A. It's my -- it's my understanding it's a
17 subject of these hearings.

18 Q. It's your understanding that parties have
19 questioned whether Duke is legally liable for the
20 remediation of the contamination at the East and West
21 End sites?

22 A. No. It was the subject of my testimony
23 as a result of clarifying that they are, in fact,
24 liable for the environmental -- historic
25 contamination at these sites.

1 Q. Let me ask it this way, is it your
2 understanding that any of the other parties are
3 contesting when Duke actually had legal liability?

4 A. I don't know because I haven't reviewed
5 that record.

6 Q. So you haven't looked at the testimony
7 from any of the other parties regarding the MGP
8 issue?

9 A. Not -- not with respect to liability
10 issues.

11 Q. Did you review any of the objections to
12 the Staff Report filed by any of the other parties?

13 A. I recently reviewed some of the staff
14 objections that were filed, very recently.

15 Q. But that was limited to just the staff
16 objections?

17 A. I believe that's correct.

18 Q. Did you review the Staff Report at all?

19 A. I believe I did.

20 Q. And anywhere in the Staff Report or in
21 the staff objections or the testimony that you
22 reviewed, did you see that anybody was contesting
23 whether Duke had legal liability for remediation?

24 A. I don't recall.

25 Q. Now, your testimony does not in any way

1 deal with the prudence of the work done with regard
2 to the PUCO standard of prudence, correct?

3 A. My testimony does not speak to whatever
4 may be the PUCO prudence standard. My testimony
5 speaks to what I thought was reasonable and prudent
6 in terms of activities at these sites based on the
7 information I was aware of.

8 Q. And the information that you are aware
9 of, did you ever see any documentation that showed an
10 analysis of comparing other potential remediation
11 options to the options that Duke selected?

12 A. No.

13 MS. BOJKO: May I have that question and
14 answer read back, please.

15 (Record read.)

16 Q. You never saw any documents that did any
17 kind of cost comparison between other alternatives
18 and the alternative that Duke selected, correct?

19 A. I was not provided any documents like
20 that.

21 Q. Are you aware of any documents that might
22 actually exist that would make that type of analysis?

23 A. No.

24 Q. You are not an environmental engineer,
25 correct?

1 A. Correct.

2 Q. Now, on page 5 of your testimony, you
3 talk about your understanding of what it takes to be
4 a certified professional. And I believe you identify
5 education, experience as two of the factors, correct?

6 A. I am looking for the lines but those are
7 two of several factors that are required to become a
8 certified professional.

9 Q. Whether someone has the requisite
10 education, would you agree with me that's an
11 objective standard that it's easy to determine if
12 somebody has that minimum education or not?

13 A. Are you speaking to the specific
14 statutory requirements for becoming a CP?

15 Q. Yes.

16 A. That's one of the -- an objective, one of
17 many standards and requirements to become a certified
18 professional in Ohio.

19 Q. Right. And another factor is experience,
20 and would you agree with me experience is, again, an
21 objective factor that you can look at based on
22 someone's resume and whether they've actually done
23 the type of work necessary, that they have done it
24 for a sufficient period of time?

25 A. The rules are clear with respect to the

1 specific amount of experience to become a CP but
2 there's also other requirements including training
3 and then in terms of my own experience beyond the
4 specific requirements, the experience with --
5 experience generally in their practice and the
6 experience with voluntary action sites and the rules
7 and regulations that relate to them.

8 Q. Now, when you talk about the training,
9 that -- what's involved in that training is a one-day
10 eight-hour course that's sponsored or put on by the
11 Environmental Protection Agency, correct?

12 A. No. There's initial training that's
13 required to become a certified professional in the
14 state of Ohio. I don't recall how long that takes.
15 But then there is annual training that's required by
16 the statute for all certified professionals and the
17 certified professionals also attend what are called
18 coffees which is where they exchange information with
19 each other and they have to maintain their training
20 each year and, in fact, I do believe if they don't
21 file no further action letter for a period of four
22 years, they have to go back and take the initial
23 training over again.

24 Q. Okay. I understand that there is initial
25 training, and I was just focusing on the initial

1 training. Is it your understanding that initial
2 training is a one-day eight-hour course?

3 A. I don't recall the specific requirements.
4 That may be correct. I don't recall. I have to look
5 at the statute.

6 Q. Do you know if there is any kind of
7 testing that is done at the end of that course to
8 determine if the person attending the course actually
9 learned anything from that course?

10 A. I don't -- I don't believe that there is
11 any testing. I would have to look at the statute.
12 Remember, I'm a lawyer, I don't attend this training.
13 The engineers, certified professionals, attend this
14 training.

15 Q. Right. Now, with the ongoing training it
16 would be similar education courses to the initial
17 course, correct?

18 A. It would be ongoing training. I don't
19 know how it relates to the initial training. It
20 would be ongoing continuing education just as we as
21 lawyers have continuing education.

22 Q. And, again, do you know if there is any
23 kind of testing at the ongoing training that, you
24 know, determines whether you learned or how much you
25 learned in attending those courses?

1 A. Not to my knowledge.

2 Q. Would it be possible for someone to sit
3 in either the initial course or the follow-up courses
4 and learn nothing but simply by attendance get credit
5 for the course and meet the requirement that they
6 attend those courses?

7 MS. PASHOS: Objection. Calls for
8 speculation.

9 EXAMINER STENMAN: Overruled.

10 A. It seems like a speculative question. I
11 mean, anybody could sit in any room and not learn
12 anything. I don't know what one individual certified
13 professional might or might not learn or one
14 individual in an individual CLE might or might not
15 learn. But I know what the requirements are for the
16 training and I know the rigor that's applied to the
17 review of submissions by certified professionals in
18 the terms of the face of EPA and I work with
19 certified professionals on a regular basis and if
20 they are not trained in what they are doing, it would
21 be immediately evident.

22 Q. Can you point to where in the -- what
23 rule it is that talks about certification?

24 A. Specifically what rule number?

25 Q. Yes.

1 A. Doing this off the top of my head without
2 the book in front of me, so I might cite this wrong
3 but I think it's under 3745-300-50 but I would have
4 to look at the actual regs to be certain that's the
5 right citation.

6 Q. Now, a certified professional is
7 necessary if you're following the voluntary action
8 plan rules and your ultimate end goal is to get a no
9 further action or an NFA letter, correct?

10 A. Absolutely necessary, you can't get one
11 without one.

12 Q. I'm sorry.

13 A. You can't get an NFA without one. You
14 need a CP to issue the NFA.

15 Q. But can you do the investigation and the
16 remediation at a site if your goal is not to get an
17 NFA without a CP?

18 A. Any person can read the -- read the rules
19 and hire an engineer and attempt to follow the
20 voluntary action program guidance, but without the
21 guidance of the CP they would not, in my opinion as a
22 professional, professional involved in many of these
23 projects, be prudent in their approach to the
24 project. You need a CP to be involved.

25 Q. In your experience how often does a

1 company in a voluntary action plan pursue an NFA
2 letter versus cases where they complete remediation
3 but don't go forward with an NFA letter?

4 A. Often. I couldn't tell you the specific
5 percentage.

6 Q. So there's a significant number of cases
7 where they don't attempt to get an NFA letter,
8 correct?

9 A. I can't speak to you what's significant
10 but there are cases where clients do not ultimately
11 pursue an NFA but I know many of my clients do pursue
12 an NFA in an attempt not to sue. That's routine in
13 my practice.

14 Q. Now, as part of a process of being a
15 certified professional, does a certified professional
16 in any way to your knowledge have any experience or
17 expertise with regard to public utility ratemaking
18 standards and methodologies?

19 A. Are you asking me whether that's required
20 under the rules or?

21 Q. Yes.

22 A. Not to my knowledge is it required under
23 the VAP rules.

24 Q. You've worked with numerous certified
25 professionals in the past, correct?

1 A. I have.

2 Q. To the best of your knowledge, did any of
3 those certified professionals ever have expertise in
4 the public utilities commission ratemaking process?

5 A. Because I have not personally worked on
6 this process, as I testified earlier, and -- earlier
7 today, I haven't worked with certified professionals
8 because I haven't worked on those matters.

9 Q. Certified professionals who have
10 expertise on PUCO matters.

11 A. One connects to the other.

12 Q. So it never -- it never came up in any of
13 your analysis of a CP's resume or discussions with a
14 CP as to whether any of the CPs that you ever worked
15 with in the past had any experience or expertise in
16 the public utilities ratemaking.

17 A. No, but it certainly would if I was
18 involved in it -- in an MGP or public utilities
19 ratemaking case. That would be part of the criteria
20 I would evaluate with respect to engage in that kind
21 of profession with that individual.

22 Q. Now, do you know if Duke employed a
23 certified professional in this case?

24 A. Yes.

25 Q. And do you know who that was?

1 A. Mr. Fiore.

2 Q. And was that for both East End and West
3 End sites?

4 A. I believe that's correct.

5 Q. And do you know if he was hired to do
6 both investigation and remediation at both sites?

7 A. I believe -- because I have limited
8 information, I believe he was involved in those, but
9 I don't have any expert testimony to offer to you as
10 to what his specific involvement is.

11 Q. Do you know if Mr. Fiore has any
12 expertise in the public utilities ratemaking process?

13 A. No. I don't have specific knowledge.

14 Q. Do you know what a Phase I property
15 assessment report is?

16 A. Yes.

17 Q. Have you ever prepared or submitted such
18 a report for clients in the past?

19 A. No. Those reports are not prepared by
20 lawyers. They are prepared by environmental
21 professionals.

22 Q. And those environmental professionals
23 would include engineers, correct?

24 A. Well, it would include a variety of
25 people if you're talking about a Phase I that's not a

1 VAP Complaint Phase I. If you are talking about a
2 VAP Complaint Phase I, it would involve an
3 engineering firm and a person who is a certified
4 professional that would meet the VAP standards.

5 Q. Now, do you review those Phase I reports?

6 A. Yes.

7 Q. And did you review Duke's -- any of
8 Duke's Phase I property assessment reports?

9 A. No.

10 Q. For either the East or West End site?

11 A. No.

12 Q. Were you asked to do that, or were they
13 simply not provided to you?

14 A. I was -- I didn't review them. I wasn't
15 asked to or I didn't review. It wasn't provided to
16 me.

17 Q. Did it ever occur to you that perhaps you
18 should look at the Phase I property assessment report
19 in making any of the conclusions that you made in
20 your testimony?

21 A. No.

22 Q. Why not?

23 A. Didn't -- I didn't believe it was
24 necessary for me to prepare my testimony.

25 Q. And do you know what a Phase II property

1 assessment is?

2 A. Yes.

3 Q. And you've had clients that have prepared
4 Phase II property assessment reports in the past?

5 A. Yes, but the same answer that I gave you
6 with respect to the Phase Is would apply.

7 Q. Okay.

8 A. VAP Compliant Phase II is a different
9 document than a Phase II in general.

10 Q. Are you familiar with the term
11 "groundwater monitoring"?

12 A. Yes.

13 Q. Have you ever had clients that did
14 groundwater monitoring at contaminated sites in the
15 past?

16 A. Yes.

17 Q. Do you know if Duke performed any
18 groundwater monitoring or sampling at the East End or
19 the West End sites?

20 A. It's my general understanding there has
21 been groundwater monitoring.

22 Q. Do you know that for a fact or just
23 general?

24 A. General; I have not reviewed any specific
25 data or environmental reports.

1 Q. Did you -- are you aware if Duke has any
2 groundwater monitoring reports for either the East or
3 West End sites?

4 A. I'm not specifically aware of any
5 environmental documents. They have not been provided
6 to me nor have I requested them.

7 Q. So you couldn't have reviewed them
8 because you are not aware of them, correct?

9 A. Correct.

10 Q. Now, your testimony on page 3, line 6,
11 page 3, line 17, and then on page 5, lines 8 and 17,
12 you have a number of spots where you indicate that
13 it's your understanding, and can you explain to me
14 what you mean by your understanding in those areas of
15 your testimony?

16 A. My understanding based on discussions
17 with Duke personnel.

18 Q. So that understanding is based entirely
19 on what you learned from talking to the company and
20 not any independent analysis or review on your part,
21 correct?

22 A. In part -- it's in part based on those
23 conversations as well as the review of some -- the
24 documents I've discussed.

25 Q. Okay. So if I look on page 3, line 6,

1 the company's objecting to the staff recommendations
2 regarding recovery of MGP. Is there any documents
3 that you reviewed to get your understanding there or
4 was that based on discussion with Ms. Bednarcik?

5 A. It's based on my discussions, my general
6 understanding of the subject matter of this
7 proceeding.

8 Q. And then on -- same page on line 17, what
9 was the basis of your understanding there? Is there
10 any formal documents that you reviewed?

11 A. The review of Ms. Bednarcik's testimony.

12 Q. And then page 5, line 8, are there any
13 documents there or was that based on discussions?

14 A. Page 5, line 8. It's the same answers I
15 just provided to you.

16 Q. And would it be the same on line 17?

17 A. Yes.

18 Q. So to the extent that you relied either
19 on Mr. Middleton or Ms. Bednarcik's testimony, you
20 have no independent basis other than just relying on
21 those two pieces of testimony, correct?

22 A. That's correct.

23 Q. Do you know if Duke considered any
24 remediation options other than the specific options
25 that they selected at either the East End or the West

1 End sites?

2 A. No. I have not been party to any of
3 those discussions or any discussions like that.

4 Q. So you have no direct knowledge of
5 whether they considered any other option, correct?

6 A. I have no personal knowledge of any -- of
7 any consideration of options.

8 Q. So you don't know if any of the option --
9 any of the other options that might have been
10 available to Duke might have been options that would
11 have cost less money, correct?

12 A. What options are you speaking of?

13 Q. I'm asking if Duke looked at other
14 options, you wouldn't know if there was any cost
15 analysis or if any of them would have been less
16 costly than the option Duke selected, correct?

17 A. No. My testimony was based directly on
18 the information I was provided. Your question
19 suggests other options that I might have considered.
20 I didn't review any other options.

21 Q. When you've worked with clients in the
22 past, have your clients in the past reviewed various
23 different options before selecting a particular
24 option with a remediation plan?

25 A. Sometimes.

1 Q. And when they look at those other
2 options, is there any kind of analysis or
3 documentation comparing the different options that
4 are available?

5 A. Depends -- it depends on the transaction
6 or the context of the situation or the priorities of
7 the client or the issues related to the site. Every
8 site is different.

9 Q. Now, if you know, have any of the parties
10 in this proceeding questioned whether the efforts
11 that Duke undertook were reasonable in achieving
12 protection of health and human welfare?

13 A. Not to my knowledge based on what I
14 reviewed.

15 You're speaking generally with respect to
16 their actions or are you speaking with respect to
17 specific activities?

18 Q. To the actual activities that they
19 selected to do remediation in this case.

20 A. So are you asking me whether what they
21 did was protective of human health and safety and the
22 environment?

23 Q. I am asking if any of the parties to this
24 proceeding have questioned whether the actions that
25 Duke took were reasonable in protecting health and

1 human safety?

2 A. No. That's a different question. I
3 don't think -- I must -- I misheard. I don't believe
4 you asked me whether they were reasonable before. I
5 think you asked me if anybody questioned them.

6 To my knowledge I don't know that anybody
7 has questioned them. If you're asking me are they
8 reasonable, that's a different question.

9 Q. Okay, did -- to your knowledge did
10 anybody question the activities that Duke actually
11 performed?

12 A. Yes, people have questioned the
13 activities that they've performed in sitting through
14 this hearing this morning and reviewing the
15 testimony.

16 Q. So that's based on what you heard today.
17 That's not based on any other understanding in the
18 case, correct?

19 A. A general understanding of the case
20 sitting here today.

21 Q. Can you identify who those other parties
22 might be and what they objected to?

23 A. Based on the earlier testimony that I was
24 sitting here listening to --

25 Q. Or your general understanding of the

1 case.

2 A. The methodology that Duke may have chosen
3 for the remediation activities.

4 Q. And by whom?

5 A. And by whom?

6 Q. Yes.

7 A. By the other parties in this case. I
8 can't speak specifically.

9 Q. On page 7 of your direct testimony,
10 bottom of the page you talk about the VAP being an
11 efficient and cost effective alternative. And you
12 would agree with me that alternative is compared to
13 EPA coming in and ordering a specific type of
14 remediation, correct?

15 A. That's correct.

16 Q. The VAP does not indicate that there is
17 only one specific way to investigate or remediate a
18 site, correct?

19 A. The voluntary action program statutes and
20 rules provide guidance and an outline of
21 how environmental -- voluntary environmental
22 remediation project would be conducted in the state
23 of Ohio.

24 Q. And that outline is filled in combination
25 of the certified professional, the company, and any

1 other experts that they have working on the matter,
2 correct?

3 A. That outline is filled in by the client,
4 certainly the certified professional who directs the
5 cleanup, the experience of the certified
6 professional, and more -- and probably as important
7 or mostly important the specific facts as they relate
8 to the site. Each site is different. Each site
9 demands different responses and there are different
10 responses required based on the context of the site.

11 Q. I think you answered this but I want to
12 make sure I understand. The VAP rules do not
13 identify any single specific type of investigation or
14 remediation plan that should be used at any
15 particular site, correct?

16 A. They do not identify a single methodology
17 for how you would clean up a site because there are
18 many sites with many different characteristics.

19 Q. Now, in your experience does a certified
20 professional evaluate different options that might be
21 available to remediate a site?

22 A. A certified professional may evaluate --
23 would evaluate options. It depends on the site. It
24 depends on how obvious the solution is or is not as
25 it relates to a site. It depends on the human health

1 and safety risk factors present at the site. It
2 depends on the legal risks that may be associated
3 with the site, whether it's enforcement or otherwise.

4 Q. Is it possible under the VAP rules that
5 there could be different options on how to remediate
6 a site and each of those options could have a
7 different cost?

8 A. It's possible.

9 Q. Have you had any clients that had
10 instances where they had different options available
11 to them on how to remediate a site?

12 A. Yes.

13 Q. Now, I think on your testimony on page 9
14 you talk about the fact that I think it was the East
15 End site was impacted as a result of the real estate
16 developer purchasing land, correct?

17 A. Yes.

18 Q. And you're aware that Duke sold a small
19 piece of land to that developer, correct?

20 A. Yes.

21 Q. Do you know why Duke sold that land to
22 the developer?

23 A. No.

24 Q. Do you know if, at the time that Duke
25 sold land to the developer, Duke was aware they might

1 have potential liability at the East End site?

2 A. No.

3 Q. To the extent that Duke may have been
4 aware that they had potential liability at the East
5 End site and they went ahead and sold that piece of
6 property to the developer, wouldn't you agree with me
7 that -- strike that.

8 It's your understanding that Duke
9 purchased the parcel that they originally sold to the
10 developer and additional property back from that
11 developer, correct?

12 A. Yes.

13 Q. Do you know why they purchased that back
14 from the developer?

15 A. No.

16 Q. Do you know if they paid more for the
17 property when they repurchased it than when they sold
18 it to the developer?

19 A. I have no specific knowledge about the
20 business transactions involved with the transactions.

21 Q. But the purchase -- the original sale
22 from Duke to the developer occurred in 2006, correct?

23 A. Yes. That's part of my testimony.

24 Q. And do you have any knowledge as to
25 whether Duke in 2006 had acknowledged any liability

1 for any of the contamination at the East End site?

2 A. I have no personal knowledge.

3 EXAMINER STENMAN: Mr. Serio, I hate to
4 break up your cross, but I think now would be a great
5 time to take a lunch break.

6 MR. SERIO: That's fine with me, your
7 Honor.

8 EXAMINER STENMAN: Great. Let's come
9 back at 10 until 2.

10 (Thereupon, at 12:45 p.m. a lunch recess
11 was taken until 1:50 p.m.)

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Monday Afternoon Session,
April 29, 2013.

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EXAMINER STENMAN: All right. Let's go
back on the record.

Mr. Serio.

MR. SERIO: Thank you your Honor.

- - -

KEVIN D. MARGOLIS
being previously sworn, as prescribed by law, was
examined and testified further as follows.

CROSS-EXAMINATION (Continued)

By Mr. Serio:

Q. Good afternoon, Mr. Margolis.

A. Good afternoon.

Q. Pick up where we left off.

Page 9 of your testimony, you talk about
the developer that was involved in the original
purchase of land and then the resell back to Duke
having an easement for ingress and egress of
utilities across the East End site. Do you know if
you had those easements before Duke sold that piece
of property?

A. No, I don't.

Q. And can you explain for me what the

1 easement for ingress and egress of utilities means?

2 A. In general, and because I have not
3 reviewed the specific easement, ingress and egress
4 easement would be for access either between two sites
5 or on to a site.

6 Q. So essentially he had the ability to get
7 utility lines or gas mains laid across to access his
8 property.

9 A. I don't know specifically whether --
10 well, it -- I guess it was across the East End site
11 so, yeah, across the site.

12 Q. And then what's your understanding of a
13 landscape easement?

14 A. In general a landscape easement is an
15 agreement between two parties usually with an
16 abutting property allowing the party that doesn't own
17 the property to put up some kind of landscaping, some
18 kind of buffer or usually shrubbery of some sort.

19 Q. So in this case it was the developer that
20 had an easement to plant necessary landscape on his
21 property or was it an easement that Duke had to plant
22 such vegetation on the Duke property?

23 A. The developer had the easement so I
24 believe that means that he would have had the
25 easement on what would then have been the Duke

1 property.

2 Q. And that would have required Duke then to
3 put some landscaping up to separate the two?

4 A. I don't know -- I haven't reviewed the
5 easement so I don't know if it would have required
6 Duke or permitted the developer to put it up. I
7 don't recall who -- who, if anyone, had an
8 obligation. I think it was just an easement so it
9 could be put up.

10 Q. You also say on page 9 that the change in
11 potential exposure for historic contamination changed
12 as a result of the -- of the sale. If Duke would
13 have never sold the initial piece of property to the
14 developer, if you know, would that have changed the
15 necessity for Duke to do the investigation and
16 remediation at the East End site at that time?

17 MS. PASHOS: I object. I think the
18 question mischaracterizes Mr. Margolis's testimony.

19 EXAMINER STENMAN: The objection is
20 overruled. He can clarify.

21 A. Duke's obligation under the law with
22 respect to the historic contamination at the site
23 existed before and after the sale of the real
24 property. The liability under the law for cleanup as
25 a result of being the owner and the operator of the

1 real property under the law and what the transaction
2 or change in use may have done is changed the
3 priorities perhaps as to when the remediation would
4 have started.

5 Q. Is it your understanding that Duke began
6 the investigation and remediation at the East End
7 site because the developer initially purchased land
8 in order to do the residential development on the
9 property adjacent to the East End site?

10 A. I believe it's my understanding that
11 transaction changed the -- the risk profile of the
12 site and may have changed the decision-making process
13 internal to Duke as to whether -- as to when to start
14 the remediation with respect to various historic
15 liability.

16 Q. So my question is had Duke not sold that
17 piece of property to the developer, would the
18 developer have been in a position to go forward
19 triggering that change that Duke then reacted to?

20 A. Can you repeat that question?

21 Q. Sure.

22 MR. SERIO: Can you read that back,
23 please.

24 (Record read.)

25 A. I don't know. I'm not sure I understand

1 the question. I'm not sure I know how to answer your
2 question.

3 Q. Do you know if the developer would have
4 been able to go forward with the development without
5 purchasing the piece of property from Duke?

6 A. No, I don't know what the developer's
7 plans were.

8 Q. So you don't know if he could have even
9 gone forward without it.

10 A. I don't know what the developer's plans
11 were.

12 Q. Are you aware, were there any third-party
13 lawsuits that were threatened against Duke with
14 regard to the sale of the land to the developer?

15 A. I'm not specifically aware of any
16 third-party lawsuits.

17 Q. Are you generally aware of any?

18 A. No. Not the subject of my testimony.

19 Q. So no one from Duke spoke with you or
20 informed you about any threats, real or threatened,
21 with regard to the developer and the purchase of the
22 property?

23 A. No.

24 Q. Did you do any investigation on your own
25 to determine if there were any potentially

1 responsible persons other than Duke for the East End
2 and West End remediation site costs?

3 A. No.

4 Q. Do you know if Duke has done any
5 investigation to determine if there's any potential
6 third party that might be liable for any of those
7 costs?

8 A. No.

9 Q. Have you had clients in the past that
10 looked into whether there was third parties that
11 might be responsible for remediation costs at sites
12 that they owned?

13 A. Yes.

14 Q. Would you consider it reasonable for a
15 company to look to see if there was any third-party
16 liability when they're in the process of remediating
17 a site?

18 A. It would -- it depends on the site and
19 the circumstances and it certainly depends on the
20 timing of that investigation. If they were to
21 proceed with one, it would be highly dependent on the
22 circumstances and the context of the site cleanup.
23 Every site's different.

24 Q. Are there any circumstances under which
25 it would be unreasonable for a company to look to see

1 if there was any third-party liability associated
2 with the site that they own?

3 A. Yes. If the company had -- if a client
4 of mine had determined that the liability was all or
5 mostly theirs and/or the cost/benefit analysis they
6 had made with respect to pursuing third parties made
7 that effort not worth the effort. It's expensive,
8 time consuming, and is often unproductive.

9 Q. Do you know if Duke has done either one
10 of those two steps?

11 A. No.

12 Q. Have you reviewed any of the insurance
13 policies that Duke has with regard to potential
14 coverage of the East End or West End sites?

15 A. No.

16 Q. Do you know if Duke has any insurance
17 policies that might cover the East or West End site?

18 A. No.

19 Q. On page 14 of your testimony, you talk --
20 your question that begins on line 10 you talk about
21 types of liability insurance policies and that
22 there's this modern general commercial liability
23 policies since 1985 that include the absolute
24 pollution exclusion. Can you explain to me what that
25 is?

1 A. In 1985, commercial general liability
2 policies that insurance companies provided to
3 companies for general liability were changed to
4 include a pollution exclusion which included coverage
5 for sudden and accidental releases of contamination
6 that previously had not been a standard part of
7 commercial general liability policies.

8 Q. So generally speaking, if you had a
9 policy that dated prior to 1985, they did not have
10 that absolute pollution exclusion?

11 A. Generally speaking, but the policies that
12 one might look at, you know, over the decades are all
13 different and all have different provisions and
14 coverage and limits.

15 Q. But for -- for that -- is it correct to
16 say that since '85, that absolute pollution exclusion
17 has been a constant in those type of policies?

18 A. Yes.

19 Q. You've indicated in your testimony on
20 page 14 that sometimes it's very time -- it takes a
21 lot of time and can be expensive to determine if
22 there's insurance coverage. Do you know if Duke has
23 done any of the analysis necessary to determine if
24 they have appropriate insurance coverage?

25 A. No.

1 Q. So when you talk about being time --
2 taking a lot of time and being expensive, that's just
3 generally speaking, correct?

4 A. Yes, that's my testimony.

5 Q. Now, are you familiar with soil removal
6 as an -- as a means of remediating at a contaminated
7 site?

8 A. Yes.

9 Q. And are you familiar with groundwater
10 treatment as a remediation technique?

11 A. Groundwater treatment is a broad term
12 generally covering many, many different remediation
13 technologies, but groundwater treatment as a remedial
14 technology. In general terms I understand what that
15 means.

16 Q. And are you familiar with using barriers
17 such as clay or asphalt caps as an option in
18 remediating an MGP site?

19 A. Well, those are two different caps that
20 would likely be in two different locations, I
21 believe, at a time and I generally understand using
22 caps as part of remediation of a site.

23 Q. Now, those are just three of the various
24 types of remediation techniques that are available
25 when you are cleaning up the site, correct?

1 A. Yes.

2 Q. And the different remediation techniques
3 all have different costs associated with them that
4 is, in part, contingent upon the specifics of the
5 site, correct?

6 A. Yes. Everything is site specific and --
7 site specific and based on all of the factors that
8 affect the site and risks that are associated with
9 the site.

10 Q. Now, do you know if in particular Duke
11 did any analysis as to whether soil removal,
12 groundwater treatment, or use of barriers was an
13 alternative they could have used at either the East
14 End or West End site?

15 A. No.

16 Q. Your attachment to your testimony KVM-3
17 is a 21-page attachment and it's titled "Ohio
18 Voluntary Action Program Annual Report," and it says
19 "September, '94, through June, '97." So that's more
20 than a one-year period. Can you kind of explain to
21 me how an annual report and those two and a half
22 years there kind of work together?

23 A. I am sure the Ohio EPA could explain it
24 better. The reference I am looking for, the
25 reference in my testimony to that KDM-2, KDM-3, and,

1 again, I don't know specifically, I am making an
2 assumption here that it's Ohio EPA's terminology.
3 It's an annual report covering the annual periods of
4 '94, '95, '96, and '97, but I can't speak
5 specifically to what is in Ohio EPA's mind. I am
6 still looking for the reference to KDM-3 in my
7 testimony.

8 Q. While you are looking for it, let me put
9 a question to you.

10 A. It's KDM, that's actually a typo.

11 Q. What's the purpose of attaching this
12 report to your testimony?

13 A. In -- on page 13 of my testimony
14 beginning in line 13, I make reference to this
15 attachment. This is in connection with the question
16 that was -- with respect to my experience does Ohio
17 have a public policy in favor of appropriate response
18 actions being taken with regard to historic
19 contamination.

20 I attached this particular report as I
21 was searching for a written document evidencing Ohio
22 EPA's public policy which I believe continues to
23 today which is that the voluntary action program as
24 a -- as an approach and program to cleanup
25 contaminated sites is an appropriate and reasonable

1 improvement approach for cleaning up contaminated
2 sites as opposed to the other methodologies that
3 preceded the existence of the voluntary action
4 programs and other choices.

5 Q. Now, to the best of your knowledge, is
6 this document still accurate and reflect the EPA
7 policies today?

8 A. Yeah, I believe that the state -- it's
9 attached for the purpose of the statement that's
10 included in my testimony, I believe that that
11 statement is consistent with Ohio EPA policy today.

12 Q. Do you know if there is anything in the
13 attachment that's dated or no longer in effect today?

14 A. I think there's references in here to --
15 first of all, it's from 1997 and only references
16 projects to that date, makes references to the list
17 of NFA and covenants issued to that date which, of
18 course, there are many more of them to this date but
19 this particular document included that statement as
20 to the intent of the program that was more timely
21 connected to the creation of the program in 1994, the
22 issuance of the regulations of the program in 1996,
23 the initial issuance of the regulations. They have
24 since been amended.

25 Q. Okay. If you could turn to page 3 of

1 KVM-3, it's 3 of 21, near the bottom of the page
2 under "Financial Assistance" it says there that "The
3 Voluntary Action Program offers financial relief to
4 people undertaking voluntary cleanups in the form of
5 loans, grants, and tax relief." Do you see that?

6 A. I do.

7 Q. Do you know if Duke, who is participating
8 under the voluntary action plan, has discussed
9 internally whether they would look to take advantage
10 of any of the loans, grants, or tax relief offered
11 under the VAP?

12 A. This is, in fact, a piece of this
13 attachment that is, in fact, dated. I don't know
14 what Duke investigated with respect to financial
15 assistance but the financial assistance that might
16 have been available in 1997 through Ohio EPA or any
17 other state agency of the state government of Ohio
18 has significantly changed since then.

19 Q. Do you know if there is anything that has
20 been put in place in lieu of the loans, grants, and
21 tax relief contemplated in '97 under the VAP?

22 A. There is a program called the Clean Ohio
23 Revitalization Program, Clean Ohio -- Clean Ohio
24 Assistance Fund, which was formally run by the
25 Department of Development and it's just moved. It's

1 a very involved process for remediation projects
2 usually that are going -- that are being redeveloped
3 into some other use.

4 I've typically not seen it used by
5 private parties responsible for contamination in
6 cleaning up their own sites. I have no specific
7 recollection of anybody using it for that purpose.

8 Q. Do you know if Duke has looked into any
9 of the other options for loans, grants, or tax relief
10 that might be available today?

11 A. I do not.

12 Q. Would it be reasonable if there were
13 loans, grants, and tax relief available that a
14 company would look into them as part of their
15 remediation efforts?

16 A. In general it would be reasonable as a
17 component of looking at issues at the site, but
18 addressing the issue of the environmental issues and
19 the human health and safety concern contamination to
20 the environment would be the primary issue that you
21 would be wanting to look at, not whether there are
22 loans or tax relief type issues.

23 Q. I understand that, but once you made the
24 decision to begin investigation and remediation,
25 wouldn't it be reasonable then to look to see if

1 there is any type of programs available that would
2 help defray some of those costs?

3 A. Yes.

4 Q. Are you familiar with VAP Rule 37 --
5 3745-300-01?

6 A. Those would be the definitions under the
7 regulations.

8 Q. And in general under the definitions
9 engineering controls are one of the measures that are
10 acceptable as a remediation methodology, correct?

11 A. One of -- that's actually a definition of
12 an engineering control but that's one of many, many,
13 many approaches to resolving issues at a VAP site.

14 Q. Is there anything in the VAP rules that
15 would prohibit using institutional controls as a
16 means of remediation in either the East End or West
17 End site?

18 A. There's nothing specific in the rules
19 that would prohibit the use but the use -- one would
20 not use the rules that way. The rules are the
21 guidance that would be utilized by the certified
22 professional who would be utilizing the rules and the
23 law in order to determine what was the appropriate
24 methodology for addressing contamination at a site.
25 There are many, many tools that are available under

1 the statute including engineering controls.

2 Q. Are you familiar with the variances that
3 are available to a company to get a lesser
4 restriction from one of the standards that's set out?

5 A. Are you speaking about the variance
6 that's specifically referenced in the VAP statute?

7 Q. Yes.

8 A. I'm aware of that provision in the
9 statute.

10 Q. And do you know if Duke has considered
11 applying for any of the variances that might be
12 available to them?

13 A. I don't know of anyone who has ever
14 utilized the variance provision of the statute
15 because in my experience and in practicing law in
16 Ohio and working on sites using the VAP, it is not
17 a -- one of the tools that is useful or practical in
18 terms of resolving issues at a site. I don't know if
19 Duke has utilized it, but I also don't know of any
20 other client that's utilized it.

21 Q. Do you know what's involved in requesting
22 a variance?

23 A. Besides paying a significant fee, there's
24 a variance board and I believe the complexity of the
25 process has, at least in my experience when I have

1 looked at it several times for clients, been
2 prohibitive.

3 Q. How much is the fee, if you know?

4 A. \$28,000, and I'm just guessing at that
5 but roughly in that range.

6 Q. And what is involved in preparing your
7 argument to go before that board?

8 A. Oh, I don't know. I would have to look
9 at the statute again to refresh my recollection what
10 all is involved but I know when we looked at it
11 before on behalf of clients, we've never pursued it
12 and I don't believe Ohio EPA has issued very many, if
13 any, variances since the program's inception but I
14 don't know exactly what the statistics are. It's not
15 a variance like a zoning variance at all. It's a
16 completely different tool.

17 MR. SERIO: Give me just a second, your
18 Honor. I believe I may be done.

19 Q. Could you turn to page 6 of your
20 testimony. I don't know if I asked you this
21 previously or not. I just want to close the loop.
22 Beginning on line 11 you talk about Duke's liability,
23 and at the end of your sentence you indicate that
24 Duke is acting prudently in a reasonable manner and
25 responsible manner in conducting their activities.

1 Now, when you make that statement, you're
2 not making that statement with regard to prudently as
3 used by the PUCO in a ratemaking formula, correct?

4 A. I'm making that statement that based on
5 the -- on the information as I understand it with
6 respect to Duke's ownership in connection to the site
7 and remediation activities at the site, that they
8 were reasonable and prudent in utilizing the
9 voluntary action program and employing sophisticated
10 and experienced environmental professionals and
11 engineering firms and minimizing liability and risk
12 to human health, safety, and the environment and the
13 company.

14 Q. But when you made that statement, you're
15 not aware of any documentation that compared other
16 remediation options that might have been available to
17 the company, correct?

18 A. No. I've already testified as to other
19 remediation options.

20 Q. Now, I think you indicated earlier you
21 are not an engineer, so what's the basis that you're
22 concluding that the cleanup of the contamination was
23 done reasonably and responsibly?

24 A. The basis for my conclusion is my
25 experience as an environmental lawyer who has worked

1 with voluntary action programs and cleanups --
2 cleanup sites, Brownfield sites, in the state of Ohio
3 for 20 plus years, I guess almost 20 years with the
4 voluntary action program, that the approach and steps
5 and methodology that Duke has taken were reasonable
6 and prudent.

7 Q. You're not qualified to put together any
8 type of plan on how to remediate a site, correct?

9 A. Correct. I'm a lawyer, not an engineer.

10 Q. And any of your analysis on whether that
11 could prudently is based on you looking back at it
12 based on the documents you've reviewed, correct?

13 A. Yes.

14 MR. SERIO: That's all the questions I
15 have, your Honor.

16 Thank you, Mr. Margolis.

17 THE WITNESS: Thank you.

18 EXAMINER STENMAN: Ms. Bojko.

19 MS. BOJKO: Yes, thank you, your Honor.

20 - - -

21 CROSS-EXAMINATION

22 By Ms. Bojko:

23 Q. Mr. Margolis, my name is Kim Bojko and I
24 represent the Kroger Company here today.

25 You had a discussion with Mr. Serio this

1 morning about enforcement activities, and isn't it
2 true that if there's an enforcement order, that there
3 could also be multiple ways to resolve those
4 enforcement issues under that enforcement order?

5 A. Yes, depending on the enforcement order,
6 the facts, the situation, and what statute was being
7 referenced.

8 Q. And it's not your testimony today that
9 Duke has an enforcement order that it's been ordered
10 to follow; is that correct?

11 A. I'm not aware of an enforcement order.

12 Q. And that's why we've been discussing the
13 VAP; is that accurate?

14 A. I'm -- I don't understand --

15 Q. The VAP is an alternative to any kind of
16 governmental enforcement activity?

17 A. The VAP is an alternative -- insofar as
18 it is an efficient and smart and practical and
19 reasonable approach to cleaning up a site as opposed
20 to an enforcement order which may put a company or a
21 responsible party in a position where they would have
22 to make much more expensive, complicated, and
23 convoluted, shall we say, in my experience cleanup
24 decisions based upon a demand and control approach
25 that Ohio EPA would take with respect to an

1 enforcement order doesn't afford the flexibility that
2 one has under the voluntary action program with a
3 certified professional working on the cleanup.

4 Q. I may have misheard what you just stated
5 but you said that the VAP was -- I thought you just
6 said a reasonable approach, but it's my understanding
7 as you testified earlier today that it is more of an
8 outline in the statute and that there are many
9 reasonable methods for implementing those cleanup
10 activities; is that accurate?

11 A. It's both. The VAP is a reasonable
12 approach for -- prudent approach for cleaning up a
13 contaminated site, the VAP program itself. The
14 statutes and the rules provide an outline of the
15 approach that would be directed by a certified
16 professional which one must employ to properly
17 utilize the voluntary action program and who would
18 direct -- ultimately direct the cleanup looking to
19 the statutes and rules under the VAP.

20 Q. And when Duke decided to enter into a
21 VAP, you didn't have any part in the decision making
22 of how they would implement the statute and the
23 outline that you were just referencing; is that
24 right?

25 A. No. I had no part in it.

1 Q. And isn't it -- I'm sorry.

2 A. That's okay.

3 Q. I am getting some feedback so I'm not
4 hearing you very well.

5 A. I had no part in that decision.

6 Q. Thank you. Isn't it also true that you
7 didn't look at other Duke remediation options that
8 could have been available to them?

9 A. Yes.

10 Q. And so you don't -- you didn't go back
11 and look at other options and determine whether those
12 would also have been reasonable or prudent; is that
13 correct?

14 A. No. My testimony is with respect to
15 being reasonable and prudent to utilize the voluntary
16 action program as an appropriate approach to cleaning
17 up a site, it would be the certified professional
18 that would be directing a cleanup, that would be
19 helping to direct the choices that one would be
20 making throughout the cleanup in terms of
21 investigation, remediation, et cetera.

22 Q. Thank you. I appreciate the distinction.
23 You're making a distinction between you believe it
24 was prudent and reasonable to follow the VAP outlines
25 and standards and do it under the -- under a VAP but

1 you didn't have any review or you're not testifying
2 today to the reasonableness of what Duke actually did
3 under the VAP; is that correct?

4 A. Yes.

5 Q. And you had some discussion earlier today
6 and you spent a couple of pages in your testimony
7 talking about insurance policies and that you're
8 familiar with clients that you've had in the past
9 pursue those insurance policies; is that accurate?

10 A. That's correct.

11 Q. And you stated that -- well, first of
12 all, Duke wouldn't be any different than any of those
13 other companies in its attempt to pursue an insurance
14 policy or even with regard to the fact of having an
15 insurance policy; is that correct?

16 A. I don't believe so.

17 Q. And you stated that you didn't review
18 Duke's insurance policies. In fact, you don't even
19 know if they have one; is that correct?

20 A. Yes, that's correct.

21 Q. Did you ask Duke if they had an insurance
22 policy, or did you ask to see any documentation
23 regarding an insurance policy?

24 A. No. My testimony was just with respect
25 to the utility of pursuing insurance cost recovery in

1 general.

2 Q. So whether Duke does or doesn't have an
3 insurance policy, you're not sure as if they may or
4 may not be able to recover under that if they have
5 it; is that correct?

6 A. No. It's not my opinion as to any
7 specific insurance policy as to whether they could or
8 could not recover. I did not testify to that.

9 Q. And with respect to your other clients,
10 you -- those clients have pursued the insurance
11 policy claims as you've suggested, correct?

12 A. Some have.

13 Q. And some of those have been successful in
14 that pursuit and have recovered money from insurance
15 companies; is that correct?

16 A. Some have. A percentage of those clients
17 who pursued recovery recovered funds and many have
18 not.

19 Q. And you talked a little bit earlier, it's
20 in your testimony as well, about the sale of the
21 property to the developer. Do you recall that
22 discussion?

23 A. Yes.

24 Q. And when Duke would have sold the
25 property to the developer, would they have been --

1 would they have had to disclose if they had some kind
2 of liability with regard to contamination and
3 remediation efforts that they were required to do
4 under the statutory provisions you've set forth in
5 your testimony?

6 A. I testified to the voluntary action
7 program, and I spoke to the federal statute CERCLA.
8 None of those are disclosure statutes. I don't know
9 what Duke did in terms of disclosure.

10 Q. So it's your testimony today, at least
11 under the environmental statutes that you know about,
12 that they wouldn't have had to disclose such a fact?

13 A. Ohio does not have a disclosure law that
14 would apply. That doesn't mean that in the course of
15 a private transaction one party would not be
16 disclosing environmental liability in the course of
17 that transaction pursuant to negotiations, and I do
18 not know any of the details of those negotiations or
19 what was disclosed or not disclosed.

20 Q. And when you just stated Ohio does not
21 have a law, are you talking about an environmental --

22 A. Correct.

23 Q. -- provision?

24 You are not here to testify as a real
25 estate agent and whether there would be any

1 requirements under real estate laws, correct?

2 A. I am not testifying to an Ohio real
3 estate transaction.

4 MS. BOJKO: Thank you.

5 I have no further questions, your Honor.

6 EXAMINER STENMAN: Mr. Hart?

7 MR. HART: Yes, your Honor.

8 - - -

9 CROSS-EXAMINATION

10 By Mr. Hart:

11 Q. Mr. Margolis, I want to go through your
12 testimony and identify where you have actually
13 rendered opinions and try to understand exactly what
14 the scope of those opinions is.

15 First one I've identified is on page 6
16 starting at line 11. I understand here you are
17 rendering an opinion that Duke has liability under
18 CERCLA, correct?

19 A. Yes.

20 Q. And assuming these sites, whatever
21 activities occurred on them, ceased as of 1963, would
22 you agree that CERCLA liability would have existed
23 starting in 1980?

24 A. That was when CERCLA was passed but
25 CERCLA is a retroactive statute.

1 Q. But there wasn't any CERCLA liability
2 before 1980. That's when the liability came into
3 existence.

4 A. CERCLA didn't exist before 1980.

5 Q. So Duke has had that liability under
6 CERCLA for over 30 years.

7 A. As a matter of CERCLA, they have had that
8 liability for more than 30 years. With respect to
9 the common law and their responsibility as an owner
10 of the site, I'm not opining to that.

11 Q. Okay. The last two lines of that
12 opinion, lines 15 and 16, you say Duke "is acting
13 prudently and in a reasonable and responsible manner
14 in conducting these activities," and I want to
15 understand exactly what you're opining about as far
16 as "these activities." What activities?

17 A. Responding to their legal liability and
18 duty under CERCLA as the responsible party for
19 historic contamination.

20 Q. So the fact they are investigating and
21 obtaining some sort of remediation action?

22 A. Yes.

23 Q. I take it you're not opining at all as to
24 the appropriateness or reasonableness of the actual
25 activities that they have engaged in.

1 A. I am opining with respect to -- in other
2 parts of my testimony as to the general methodology
3 of utilizing the voluntary action program and
4 certified professional and following that course
5 of -- course of action in connection with their
6 cleanup as being reasonable and prudent.

7 Q. If I can characterize it then, you're
8 talking about they were procedurally reasonable in
9 following that process.

10 A. Yes, they were -- I don't know
11 procedurally what word I would use, but they were
12 prudent and reasonable in following that process.

13 Q. You're not offering an opinion on the
14 substantive reasonableness of the remediation
15 activities they have conducted.

16 A. When you say "substantive," do you mean
17 the actual techniques they used to remediate the
18 sites?

19 Q. Correct.

20 A. I am not opining as to the actual
21 remediation techniques.

22 Q. It's reasonable to do remediation but
23 what remediation they do you are leaving up to
24 engineers to talk about.

25 A. That's correct.

1 Q. The same would be true with the
2 investigation; that it's reasonable to investigate
3 but exactly how they go about investigating you would
4 leave to the engineering professionals?

5 A. Yes, that's -- that would be consistent
6 with every other site that would be cleaned up under
7 the voluntary action program in Ohio.

8 Q. Okay. Thank you. I guess I should ask
9 you before I move on, was that the first opinion,
10 that paragraph we have been talking about, was that
11 the first opinion you rendered in your testimony?

12 A. Let me read my testimony.

13 Q. I'm searching on the word "opinion," so I
14 really want to figure out whether you were offering
15 any opinions where you don't actually use those
16 words.

17 A. I don't know if you are searching. I
18 guess my entire testimony is my opinion.

19 Q. Well, let's go to page 9, line 6. You
20 are asked is it reasonable for Duke to conduct its
21 investigation and remediation of the West End and
22 East End sites pursuant to the VAP, and, again, I
23 think you're giving the opinion that VAP is a
24 reasonable way to go about this.

25 A. Yes. It's my opinion that the VAP is a

1 reasonable way to approach environmental cleanups
2 including the environmental cleanups investigations
3 that Duke conducted.

4 Q. And, again, the particular professional
5 they chose or what that professional chose to do you
6 are not rendering opinions about.

7 A. I'm certainly not opining on specific
8 techniques; I am not opining to the specific
9 professional. I'm opining as to utilization of the
10 VAP, utilizing the sophisticated experience of the
11 environmental firm professional.

12 Q. And you're not opining as to the
13 appropriateness of any of the costs that were
14 incurred?

15 A. I am not opining to the costs.

16 Q. Okay. Let's go on to page 10 at the top,
17 line 3, you say it's your "opinion that Duke had a
18 duty under the law to conduct environmental
19 investigation activities at this site in order to
20 protect human health and safety and the environment."
21 I take it you are talking about the East End site
22 there?

23 A. Yes.

24 Q. What exactly did you consider to be the
25 triggering event for Duke to be required to conduct

1 those activities?

2 A. Well, I think Duke had -- has a duty as
3 the owner of the property to clean up the site
4 pursuant to their liability under CERCLA which we've
5 discussed, and as I mentioned, discussed in my
6 testimony, the change -- potential change in use
7 exposure pathways and to residential uses near and
8 more proximate to the site triggered a reasonable
9 response in terms of cleaning up the site now.

10 Q. Let me back up a second. What is your
11 source of knowledge about the change in use of East
12 End site or near the East End site?

13 A. As I mentioned in my testimony, in 2006,
14 a real estate developer purchased the land and
15 announced plans to conduct a large residential
16 development.

17 Q. I am not asking what happened. I am
18 asking you how do you know about it? Where did you
19 learn that from?

20 A. Discussions with personnel of Duke.

21 Q. Exactly which personnel did you discuss
22 that with?

23 A. Julie Ezell.

24 Q. I'm sorry?

25 A. Julie Ezell.

1 Q. When did you have that discussion?

2 A. Shortly before I prepared my testimony.
3 I can't tell you exactly when. General background of
4 the site.

5 Q. When were you engaged to be a witness in
6 this case?

7 A. I think in early February, 2013.

8 Q. I am going back to the bottom of page 9.
9 You talk about this transaction in 2006. Is that the
10 transaction where Duke sold land to the developer, or
11 did the developer buy land from some other party?

12 A. It's the transaction where the developer
13 bought land from Duke.

14 Q. And was that the event that would trigger
15 Duke to have a duty to investigate?

16 A. Duke has had a duty to investigate the
17 triggering event for performing the remediation and
18 the change in use triggered their need for performing
19 the investigation and remediation.

20 Q. Well, I'm trying to get a little more
21 specific. You talked about a sale of land in 2006,
22 and you have talked about a potential change in use.
23 Are those the same thing or two different events?

24 A. They are the same thing. That's what my
25 testimony says.

1 Q. Okay. So the sale of property in 2006
2 itself would have triggered a duty for Duke to
3 investigate.

4 A. The sale in 2006 to a developer who he
5 was going to be constructing a large residential
6 development adjacent to the Duke site.

7 Q. Would it not have been prudent to make
8 that investigation prior to selling the land to the
9 developer instead of afterwards?

10 A. I don't know what activities Duke
11 undertook before the transaction with the developer.
12 Change in use though would have triggered a change in
13 the conditions surrounding the site and the risk
14 profile for the site based on my experience as a real
15 estate lawyer.

16 Q. And would you agree that change in use
17 was made possible by Duke selling the land?

18 A. Yes, but there may have been other
19 conditions surrounding the site that I am not aware
20 of.

21 Q. Because while Duke owned that land,
22 nobody else could develop it, correct?

23 A. Not necessarily. I don't know that
24 they -- somebody else couldn't have done something
25 else on that site.

1 Q. While Duke owned it?

2 A. I don't know the answer to the question.

3 Q. Okay. Well, Duke could control
4 development on the site while it owned it, couldn't
5 it?

6 A. I would presume as the owner they could
7 control the site.

8 Q. Let's go on to page 11 where you are
9 talking about the West End site. And I take it there
10 you're saying that the activity involving the Brent
11 Spence bridge project triggered that investigation;
12 is that correct?

13 A. That's correct.

14 Q. And what is your source of knowledge
15 about that transaction or potential transaction?

16 A. My conversation -- conversations I had
17 before getting general background on the sites.

18 Q. Do you know when that occurred?

19 A. Sometime before I prepared my written
20 testimony.

21 Q. Well, that wasn't a very good question.
22 When did the activity involving the bridge occur that
23 led to the investigation?

24 A. Oh, I don't know the specific timeframe.
25 I don't have those specific details.

1 Q. Well, you say on line -- page 11, line
2 11, the impending bridge project. What do you mean
3 by "impending"?

4 A. Common use of the word, soon to occur.
5 Apparently it's been announced and it's planned and
6 that would make it impending.

7 Q. So you just have the one source for
8 information on that?

9 A. I don't know that that's one source. I
10 think that's generally common knowledge in terms of
11 general information that's out there that I may have
12 come across.

13 Q. You talk about on line 11 or around that
14 area that this was going to cause the relocation of
15 some power equipment and disturbed surface caps.
16 What do you know about when those surface caps were
17 installed?

18 A. I don't recall when those service caps
19 were installed. I can't respond to your question.

20 Q. Okay. Do you know if Duke did an
21 investigation of the site before the surface caps
22 were installed?

23 A. I don't know. I can't answer your
24 question.

25 Q. I am going to turn to page 15. You

1 render an opinion that Duke is acting reasonably in
2 pursuing rate recovery, insurance recovery, and cost
3 recovery from PRPs. I don't see where in your
4 testimony you identify Duke's strategy in pursuing
5 insurance recovery. Could you point that out?

6 A. I don't believe I've testified to their
7 specific strategy for insurance recovery. I'm
8 testifying there as to general proposition of using
9 insurance recovery along with the recovery and cost
10 recovery as -- in a combined way to approach the
11 resolution of the issues as it relates to the sites.

12 Q. Well, I read your opinion as saying
13 Duke's strategy in pursuing insurance recovery is
14 prudent and reasonable, and I would like to know what
15 that strategy is.

16 A. I think I just answered your question. I
17 said generally pursuing insurance recovery. I don't
18 know the specifics of their insurance recovery.

19 Q. Do you know if they are pursuing
20 insurance recovery?

21 A. It's my understanding they plan to do
22 insurance recovery. I don't know the specifics.

23 Q. I don't see in your testimony where you
24 even say they are doing that. Could you point that
25 out?

1 A. I can't.

2 Q. Okay. I think you've given the opinion
3 that it's sometimes reasonable to pursue insurance
4 and sometimes not and it depends on the
5 circumstances, correct?

6 A. It depends on the circumstances and the
7 information available when one begins the
8 investigation into insurance recovery and the
9 documents available to pursue it.

10 Q. And you don't have any information on
11 exactly what Duke is doing in that regard, whether
12 it's pursuing it or not pursuing it.

13 A. I do not have any specific information.

14 Q. How can you say what they are doing is
15 reasonable?

16 A. Because it's my understanding that they
17 are pursuing cost recovery, insurance recovery, and
18 cost recovery and those three things combined are a
19 reasonable combination of activities to address the
20 site.

21 Q. Where do you tell us what they're doing
22 to pursue cost recovery from PRPs?

23 A. It's my general understanding that cost
24 recovery will be part of their strategy. I do not
25 have specifics.

1 Q. Is there anything in your testimony that
2 describes that?

3 A. No. It just describes general issues
4 relating to cost recovery.

5 Q. Do you know who the PRPs are that they
6 would be pursuing?

7 A. No.

8 Q. But you're willing to give an opinion
9 what they are doing is reasonable.

10 A. I think generally pursuing cost recovery
11 is reasonable in connection with a site like this.

12 MR. HART: Thank you, that's all I have.

13 EXAMINER STENMAN: Mr. Parram.

14 - - -

15 CROSS-EXAMINATION

16 By Mr. Parram:

17 Q. Yes, good morning.

18 A. Good morning.

19 Q. I'm sorry, good afternoon. My name is
20 Devin Parram. I'm counsel on behalf of staff for the
21 Public Utilities Commission. I have just one
22 follow-up question. You state it's your general
23 understanding that Duke is pursuing insurance
24 recovery?

25 A. It's my general understanding part of the

1 strategy will be insurance recovery.

2 Q. And where did you get that understanding?

3 A. In conversations generally with Duke
4 personnel.

5 Q. Okay.

6 A. Getting background on the site.

7 Q. And who was the Duke personnel that you
8 spoke to?

9 A. I can't recall specifically which person
10 I spoke with.

11 Q. And earlier in response to some questions
12 that Mr. Serio asked, you said you were not aware of
13 what insurance policies Duke has.

14 A. Correct.

15 Q. And you did not review any insurance
16 policies that Duke has.

17 A. No. My testimony was specifically the
18 general strategy of pursuing insurance recovery in
19 connection with sites like this.

20 MR. PARRAM: That's all I have, your
21 Honor.

22 EXAMINER STENMAN: Thank you.

23 Redirect?

24 MS. PASHOS: Yes. Could we take a
25 5-minute break? Is that allowed?

1 EXAMINER STENMAN: Yes.

2 MS. PASHOS: Thank you.

3 (Recess taken.)

4 EXAMINER STENMAN: Let's go back on the
5 record.

6 Redirect?

7 MS. PASHOS: Yes, thank you, your Honor.

8 - - -

9 REDIRECT EXAMINATION

10 By Ms. Pashos:

11 Q. Mr. Margolis, first, I would like to ask
12 you you were answering some questions maybe from
13 Mr. Hart about CERCLA liability and CERCLA being
14 passed in 1980. And that I think you may have
15 answered something along the lines of yes, there's an
16 obligation or a liability that, you know, stems from
17 CERCLA circa 1980. Does CERCLA require affirmatively
18 someone with liability, does it affirmatively require
19 that remediation actions be taken immediately with --
20 to deal with that liability?

21 A. No. CERCLA is a liability statute.
22 CERCLA establishes liability for historic
23 contamination.

24 Q. Then what -- if you're an entity that has
25 that CERCLA liability and it's just kind of sitting

1 there, what triggers that -- those next steps, that
2 duty to actually investigate and remediate?

3 A. One could be an enforcement lawyer from a
4 federal or governmental agency or another could be a
5 change in circumstances of the site or the use of the
6 site which would change the risk profile of the site
7 and create a duty to resolve the environmental issues
8 and risks by the site.

9 Q. Which of those two is applicable in this
10 case?

11 A. At the East End site the change in the
12 use of the site and the neighboring properties on
13 both sides of the site to residential uses would have
14 changed the risk profile of the site and in my
15 opinion changed the duty of the company to address
16 the environment -- the historic environmental
17 contamination at the site because now they had
18 potential residential development on either side of
19 the property.

20 Q. And what about the West End site? What
21 triggers in your view the duty to investigate and
22 remediate there?

23 A. The change in circumstances at that site
24 as they relate to the bridge construction and the
25 expected and planned new bridge going across and

1 through and directly into the existing site and all
2 of the excavation work and activity that would
3 likely -- not would likely but will be occurring at
4 that site changed the risk profile of the site.

5 Q. And would a mere transfer of ownership by
6 itself without a change of use necessarily trigger
7 that duty to investigate and remediate?

8 A. The mere transfer of real property would
9 not trigger in my opinion a specific duty to
10 remediate.

11 Q. I think you were -- I think you would
12 agree with me that you were asked a lot of questions
13 about specifics of the investigation and remediation
14 and the property sale and the insurance proceeds and
15 all that sort of thing. Would it be fair to say
16 that's not what your testimony addressed?

17 A. No, that's not -- that's correct, that's
18 not what my testimony addressed. I believe the
19 appropriate person whose testimony addressed that is
20 Ms. Bednarcik in her -- in her testimony.

21 Q. And is she the right person to address
22 questions about -- I am going to list a number of
23 things and tell me if she's the right person for all
24 of these. The company's strategy about pursuing cost
25 recovery from potential insurers and potential other

1 PRPs, is she the right person for that?

2 A. Yes, she is the right person.

3 Q. Is she the right person to address
4 questions to you about specific remediation
5 alternatives the company may have considered?

6 A. Yes, she would be the right person for
7 that testimony.

8 Q. And is she also the right person to
9 address questions to you about specifics of the site
10 in terms of layout, ownership, you know, transfers of
11 ownership, whatever?

12 A. Yes. Ms. Bednarcik would be the right
13 person to testify as to those issues.

14 Q. And just to be clear, is it your
15 testimony that Duke did not consider remediation
16 alternatives at these sites or is it just that your
17 testimony and your knowledge doesn't extend to that?

18 A. My knowledge doesn't extend to that. It
19 is not my testimony whatsoever that Duke did not
20 consider alternatives.

21 Q. Thank you.

22 Do you recall a series of questions from
23 Mr. Serio about certified professionals and training
24 and all that sort of thing?

25 A. Yes.

1 Q. I have some follow-up questions on that,
2 but first, I just want to clear up something. I
3 believe in an answer to a question of his you said
4 something along the lines that it would be important
5 for a certified professional to have regulatory
6 expertise. Do you remember --

7 A. I do remember -- I do remember a question
8 like that.

9 Q. And because I'm a utility regulatory
10 lawyer, not environmental, I immediately think
11 regulatory ratemaking. Is that what you meant when
12 you answered that way?

13 A. No, not at all. In my mind in my field
14 of expertise as environmental law, when I speak of
15 regulatory law, I'm speaking of environmental
16 regulation, environmental liability law, not
17 ratemaking or utility law whatsoever.

18 Q. You understand utility law is regulatory
19 law, don't you?

20 A. Yes.

21 Q. Thank you.

22 Now, I think your testimony as a whole
23 indicates you are very familiar with the VAP program
24 and its rules and how it works; is that right?

25 A. Yes.

1 Q. Can you please just very briefly describe
2 some of your personal experience with the VAP -- Ohio
3 VAP program?

4 A. Sure. I've been involved with the Ohio
5 voluntary action program, or the VAP, since its
6 inception, even before the law was passed I was part
7 of working groups that were discussing how the law
8 would be structured. It was passed in 1994. And
9 then from 1994 to 1996, I was part of one of the
10 stakeholder committees that worked on developing the
11 rules that were actually developed and drafted after
12 the statutes passed.

13 I worked on dozens of voluntary action
14 program projects since 1994 including some that are
15 first VAP projects that were completed to covenant
16 not to sue just as the rules were being finalized and
17 completed in the 90s all the way up until just last
18 week one of my projects was a voluntary action
19 program that was completed and I have got several I
20 am working on now.

21 Q. In connection with your, I guess, many
22 years of experience working with the Ohio VAP
23 program, have you had the occasion to work with
24 certified professionals on VAP projects?

25 A. Yes. In fact, on VAP projects I would

1 only be working with certified professionals along
2 with their company and engineering firms that have
3 certified professionals to work on a VAP project.

4 Q. And you've testified, I think, and you
5 discussed with Mr. Serio a little bit that you are
6 familiar with the requirements to become a certified
7 professional and to maybe obtain that certification;
8 is that right?

9 A. Yes.

10 Q. What does it take in your opinion to be
11 an effective certified professional?

12 A. In my opinion having hired or been part
13 of the decision to hire many, many certified
14 professionals for projects utilizing the VAP,
15 obviously the person has to be a certified
16 professional meaning meeting all the requirements and
17 being properly licensed by Ohio EPA but that's really
18 just the first level of analysis.

19 The other level of analysis that I would
20 go through as an advisor and lawyer for a client on a
21 project would be looking specifically at the
22 experience of the certified professional on projects
23 in Ohio, how recent those projects were, how relevant
24 those projects were to the project at hand, and how
25 active that certified professional had been over the

1 years on voluntary action program projects in the
2 field as opposed to just sort of understanding the
3 law and having a CP.

4 I believe there are -- my experience
5 there are numbers of people who are certified
6 professionals technically who I would not hire
7 because they do not have that second level of
8 practical real world experience that I would demand
9 for a client.

10 Q. Do you think you can be an effective
11 certified professional under the Ohio VAP program
12 simply by reading the statute and the rules and
13 taking eight hours of training?

14 A. No, and I would never hire or recommend
15 the hiring of a person with that level of experience
16 if it's experience to work on a project and certainly
17 not on a major project.

18 The program has too many nuances and
19 requires too much practical knowledge as well as
20 ongoing learning and relationships with other CPs and
21 with Ohio EPA staff that is critical to every product
22 that I work on with a certified professional.

23 Q. Why is it important to have a VAP
24 certified professional involved in a remediation
25 project like this one?

1 A. In the first instance it's specifically
2 required by the statute because the certified
3 professional is, in fact, the agent, as it were, for
4 the state of Ohio that issues the no further action
5 letter.

6 The way Ohio's cleanup program works,
7 unlike some other states, is the state doesn't issue
8 a no further action letter. The certified
9 professional is charged with the responsibility
10 and -- and essentially the agency of the state issues
11 that no further action letter.

12 That person has the requisite knowledge
13 of the rules and the regulations and the practical
14 knowledge of how to address issues at a site to
15 complete the project.

16 Q. Switching gears a little bit now. Do you
17 recall, I think you might have had this discussion
18 with a couple of different lawyers, about the use of
19 the phrase "reasonable and prudent" in your
20 testimony. And I think specifically you might have
21 been asked by both lawyers whether you were using
22 that phrase in a PUCO ratemaking context. Do you
23 recall that?

24 A. I do.

25 Q. And since we have already established you

1 are not a real regulatory lawyer, is it fair to say
2 you were not using it in the ratemaking context?

3 A. I was not. I was using it in the common
4 parlance of it being a reasonable and prudent
5 approach to a project or the activity.

6 Q. And how -- in that common parlance, how
7 do you define "prudence"?

8 A. Taking reasonable steps that based on my
9 experience would be consistent with the effect of
10 completion of a remediation project.

11 MS. PASHOS: If I could have just one
12 minute here.

13 Thank you, that's all I have.

14 THE WITNESS: Thank you.

15 EXAMINER STENMAN: Thank you.

16 Mr. Serio?

17 MR. SERIO: Thank you, your Honor.

18 - - -

19 RECROSS-EXAMINATION

20 By Mr. Serio:

21 Q. A couple of follow-up questions. You
22 just indicated you would never hire a CP that didn't
23 have significant experience for a project, correct?

24 A. Correct.

25 Q. And that experience would involve being

1 involved in successful remediation of various
2 projects, correct?

3 A. I don't know that I would use the word
4 "successful" specifically but had a significant -- I
5 think significant experience on VAP projects and that
6 experience was current.

7 Q. Now, if your ultimate goal was to get a
8 covenant not to sue, would you hire a CP that had
9 never achieved the covenant not to sue?

10 A. If my goal was to get a covenant not to
11 sue, it would depend on the project and the person's
12 experience with the program and whether or not that
13 person was working on voluntary action projects. I
14 don't know that it would be determinative whether or
15 not a covenant not to sue was actually issued for
16 that particular professional. It would be helpful
17 but not necessarily determinative or the single
18 factor I would look at.

19 Q. You indicated that it was your
20 understanding that CERCLA established liability at
21 the East End and West End sites approximately 1980,
22 correct?

23 A. Yes.

24 Q. So under CERCLA Duke had that liability
25 as of 1980, correct?

1 A. Yes.

2 Q. Yet your testimony indicates that Duke
3 did not publicly acknowledge that liability until you
4 filed testimony, correct?

5 A. That's not my testimony. I don't believe
6 I testified at all to when Duke publicly acknowledged
7 their liability.

8 Q. Do you know if Duke publicly acknowledged
9 their liability prior to the filing of your
10 testimony?

11 A. I don't know the answer to that question.

12 Q. So do you know why Duke waited almost a
13 quarter century after they had liability to do
14 anything at either one of the two sites?

15 A. As I just testified a few moment ago, the
16 change in use and risk profile of the site -- at both
17 sites, one with respect to the bridge procurement
18 project and one with respect to the residential
19 development surrounding the site, I believe changed
20 their duty to act and begin remediation activities at
21 the sites.

22 Q. Let's look at the East End site. You
23 talked about in your testimony and this morning we
24 talked a lot about the developer that was involved
25 with the property that was west of the western parcel

1 of the East End site, correct?

2 A. Correct.

3 Q. And I believe in redirect you indicated
4 that there was plans for residential development on
5 both sides?

6 A. It's my general understanding that there
7 was a larger residential development planned for the
8 general area of the site on both sides of the site.

9 Q. Can you point to me anywhere in your
10 testimony where there is any reference at all to a
11 development on the East End of the eastern parcel?

12 A. I don't know that my testimony is that
13 specific.

14 MR. SERIO: Well, your Honor, if his
15 testimony doesn't mention it at all, I don't see how
16 through redirect he can put it into his testimony.
17 It seems to me any -- any testimony regarding
18 development -- alleged development on the west -- on
19 the east side of the eastern parcel should be
20 stricken from the record. There's nothing in his
21 direct testimony about that whatsoever.

22 EXAMINER STENMAN: So are you making a
23 motion to strike?

24 MR. SERIO: Yes, your Honor.

25 EXAMINER STENMAN: Do you have a

1 response?

2 MS. PASHOS: Yes, your Honor.

3 Mr. Margolis's testimony, his expert testimony,
4 relies on facts provided by the company and not just
5 provided by the company but presented through
6 witnesses that will be here from the company. To the
7 extent, you know, the OCC attorney is certainly
8 welcome to probe those facts with those fact
9 witnesses and if Mr. Margolis is wrong, that goes to
10 the weight of his testimony but he's entitled to rely
11 on the company's witnesses' facts and they will be
12 here subject to cross-examination.

13 EXAMINER STENMAN: The motion to strike
14 will be denied.

15 MR. SERIO: Thank you, your Honor.

16 Q. (By Mr. Serio) Do you know anything about
17 the potential development that we've just learned
18 about on the eastern side of the east parcel?

19 A. I don't know any specific facts but
20 Ms. Bednarcik, Ms. Bednarcik is probably the best
21 witness to ask about that.

22 MR. SERIO: That's all I have. Thank
23 you, your Honor.

24 EXAMINER STENMAN: Thank you.

25 Anything, Ms. Mooney?

1 MS. MOONEY: No.

2 EXAMINER STENMAN: Ms. Bojko?

3 MS. BOJKO: Yes, thank you, your Honor.

4 - - -

5 RECROSS-EXAMINATION

6 By Ms. Bojko:

7 Q. Mr. Margolis, I'm a little confused
8 because I thought we had a discussion about insurance
9 policies and how you did not know or weren't aware
10 of, A, the existence of an insurance policy and, B,
11 whether Duke was pursuing any insurance policies; is
12 that still your testimony or are you changing and
13 saying now that you are aware that Duke is pursuing
14 insurance policies?

15 A. My testimony was that I'm not aware of
16 any specific insurance policies. My testimony which
17 is in my written testimony was that I believe that
18 part of Duke's strategy is to pursue insurance
19 costs -- insurance recovery as well as cost recovery.
20 There's general strategy is my understanding and
21 Ms. Bednarcik has more information about the
22 specifics.

23 Q. But you don't even know if an insurance
24 policy exists; is that correct?

25 A. I'm not opining as to a specific

1 insurance policy.

2 Q. Do you know whether one exists?

3 A. I'm opining as to the general strategy of
4 pursuing policies at historic contaminated sites.

5 Q. And can Duke pursue a specific insurance
6 policy if it doesn't have one?

7 A. No. If it doesn't have one, it can't
8 pursue a specific insurance policy.

9 Q. So, again, I don't understand how you
10 believe that's the strategy if you don't know whether
11 one exists or not.

12 A. Because the first part of implementing
13 that strategy would be determining what insurance
14 policies exist and the viability of pursuing those
15 insurance policies.

16 Q. Do you know what's been done to date with
17 regard to the insurance policy investigation or
18 discovery thereof or lack thereof?

19 A. No. I'm not the appropriate expert on
20 that topic.

21 Q. And in your redirect you spent a good
22 deal of time explaining what you do with clients that
23 you consult with regard to talking to them,
24 discussing matters with them, and discussing matters
25 with the CP. Do you recall that?

1 A. Yes.

2 Q. Did you do any of that in this case for
3 Duke?

4 A. Did I discuss management with CP?

5 Q. Yes, for one.

6 A. No. My testimony is based on -- well,
7 it's in my testimony. I am opining to the specific
8 actions or activities that Duke has already taken.

9 Q. Right, so you didn't discuss with Duke
10 during any of their strategy -- strategy sessions
11 with regard to how they are implementing the VAP?

12 A. No. I haven't been -- I wasn't even
13 engaged probably when those discussions took place.

14 Q. And you didn't hire the CP. You had some
15 discussion about what you would look for in hiring a
16 CP. You did not assist Duke in the hiring of a CP in
17 this case, did you?

18 A. No, I did not.

19 Q. And as you just mentioned, it's -- part
20 of that reason is because --

21 EXAMINER STENMAN: Ms. Bojko, if you
22 could perhaps slide the computer -- part of the
23 problem, it's sandwiched into between the two so
24 closely.

25 MS. BOJKO: Do you think?

1 EXAMINER STENMAN: I think it's all the
2 electronics over there. That seems to be the problem
3 today.

4 MR. HART: It's my fault.

5 MS. BOJKO: We haven't changed anything
6 in two weeks.

7 Q. I apologize for that.

8 A. That's okay.

9 (Record read.)

10 Q. Because you weren't even hired by Duke
11 until February of 2013; is that correct?

12 A. That's correct.

13 Q. And when you talked about you're not
14 making general comments about the utilities' rate
15 recovery; is that accurate?

16 A. Yes.

17 Q. And you're not making specific comments
18 about any of the PRPs that they may seek cost
19 recovery from or they may not; is that correct?

20 A. Yes, that's correct.

21 Q. And you're not making any specific
22 determinations here today of whether there's an
23 existence of insurance recovery or there's not
24 existence; is that correct?

25 A. That's correct.

1 Q. And you do not -- you're not testifying
2 here to the reasonableness of any strategies that
3 Duke has implemented under the VAP; is that correct?

4 A. I'm only testifying as to the prudent and
5 reasonable approach taken in terms of utilizing the
6 VAP as methodology for remediating the sites.

7 Q. And not any specific activities that Duke
8 has or hasn't done with regard to the East or West
9 End sites?

10 A. No, I'm not the appropriate witness for
11 that.

12 MS. BOJKO: Thank you. I have no further
13 questions.

14 EXAMINER STENMAN: Mr. Hart?

15 MR. HART: Yes, your Honor.

16 - - -

17 RECROSS-EXAMINATION

18 By Mr. Hart:

19 Q. I want to go back and talk about this
20 East End site a little bit more. You understand that
21 that site is bound on the north by Eastern Ohio and
22 on the south by the Ohio River?

23 A. Yes.

24 Q. And when you talked about the change in
25 use of surrounding properties, which properties

1 exactly were you talking about?

2 A. I believe it's the properties on either
3 side of Duke -- the Duke real estate.

4 Q. You mean to the east and to the west?

5 A. Yes.

6 Q. And also between Eastern Avenue and the
7 Ohio River?

8 A. No. I would have to see a map but I
9 don't believe so. On either side of the Ohio River
10 bounded in the road above it on either side.

11 Q. Let's back up a second. The East End
12 Duke property is between Eastern Avenue and the
13 river, correct?

14 A. Yes.

15 Q. And when you say properties on either
16 side of Duke's property, you mean up river and down
17 river?

18 A. I think that would be accurate.

19 Q. On the same side of Eastern Avenue as the
20 Duke property.

21 A. Yes.

22 Q. Okay. So when did you learn there was to
23 be residential development on the eastern end of the
24 East End property?

25 A. I don't recall but I believe it's part of

1 Ms. Bednarcik's testimony. I reviewed that
2 testimony.

3 Q. Was that development to be on the
4 softball fields?

5 A. I believe it's -- if that's the part you
6 are referring to?

7 Q. Yeah.

8 A. I believe that's accurate. That's my
9 general recollection.

10 Q. Okay. Isn't that city property?

11 A. I don't recall specifically.

12 Q. All right. Let's just talk about the
13 real estate transaction a moment. That's on the
14 western end, correct?

15 A. I believe so.

16 Q. Western end of the East End property,
17 you -- it gets confusing, I know. And that was a
18 transaction that occurred in 2006 in the sale by
19 Duke?

20 A. I believe that's accurate and that's in
21 my testimony.

22 Q. And certainly Duke knew in 2006 it had an
23 MPG site, correct?

24 A. That its site was an MPG site?

25 Q. Yes.

1 A. I believe generally they knew that.

2 Q. And whatever CERCLA liability Duke had
3 existed at that point in time, correct?

4 A. Yes, we've discussed that.

5 Q. And when you sell a property that's got
6 CERCLA liability, you keep that liability, don't you?

7 A. You are -- you are in the liability chain
8 as an owner.

9 Q. Unless you make some sort of indemnity
10 deal with the purchaser, you are also on the hook for
11 that property, correct?

12 A. If that property that you sell is, in
13 fact, affected.

14 Q. Okay. And if you have a contaminated
15 site that had MGP, I guess "P" is for plant, MGP
16 plant, it would be prudent before releasing that
17 property to another party to investigate whether it
18 has CERCLA liability attached, wouldn't it?

19 A. I don't really have an opinion on that
20 because I wasn't a party to that transaction or the
21 information available at the time of the transaction
22 so I have no opinion.

23 Q. Well, in your practice when you have a
24 client that has a piece of contaminated property,
25 isn't it your practice to do at least a Phase I

1 investigation of the property you're selling that's
2 part of an MGP site?

3 A. No.

4 Q. It's not your practice to do that?

5 A. As a buyer it might be.

6 MR. HART: Thank you.

7 EXAMINER STENMAN: Mr. Parram?

8 MR. PARRAM: No questions, your Honor.

9 EXAMINER STENMAN: Thank you,
10 Mr. Margolis.

11 THE WITNESS: Thank you.

12 MR. McMURRAY: Duke Energy Ohio calls
13 Jessica Bednarcik to the stand.

14 MS. BOJKO: Your Honor, while they are
15 taking the stand, are we -- I know we talked about
16 this previously, but I didn't fully appreciate the
17 ramifications. Are we admitting all the evidence of
18 all these testimonies at the end or did you mean to
19 say as they are taken or how are we going to do that?

20 EXAMINER STENMAN: I think given the
21 complexity of what we marked at the beginning would
22 be easier to take them all at the end of Duke's case
23 which has been the practice thus far this morning.

24 MS. BOJKO: Okay. Thank you.

25 - - -

1 JESSICA L. BEDNARCIK

2 being first duly sworn, as prescribed by law, was
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 By Mr. McMurray:

6 Q. Good afternoon, Ms. Bednarcik.

7 A. Good afternoon.

8 Q. Can you please state your name and
9 business address for the record.

10 A. My name is Jessica L. Bednarcik and my
11 business address is 526 South Church Street,
12 Charlotte, North Carolina 28202.

13 Q. Who are you employed by and in what
14 capacity?

15 A. I am employed by Duke Energy and I am the
16 manager of the remediation and decommissions group
17 within environmental services.

18 Q. Did you prepare and cause to file
19 testimony in this proceeding?

20 A. Yes, I did.

21 Q. Do you have in front of you your direct
22 testimony and your supplemental direct testimony?

23 A. Yes, I do.

24 Q. I believe those two documents are marked
25 as Duke Energy Ohio Exhibit 21 for the direct

1 testimony filed July 20, 2012, and Duke Energy Ohio
2 Exhibit 21A for the supplemental testimony filed
3 February 25, 2013. Is that what you have in front of
4 you?

5 A. They do not have the exhibit numbers on
6 them but that's what I believe.

7 Q. Are there any changes or corrections you
8 would make to the testimony that you have filed?

9 A. Yes, there are a few minor corrections.
10 On the direct testimony page 5, line 22, based upon
11 additional information discovered by Dr. Middleton,
12 it has been discovered the West End site stopped
13 manufacturing gas in 1928. Again, that was page 5,
14 line 22, West End stopped in 1928.

15 On the direct testimony page 18, line 1,
16 the original testimony stated that the work along
17 Pittsburgh Street was to occur in 2013. Based upon
18 additional work at the site related to operations of
19 the gas plant, that has been delayed until 2014 or
20 2015.

21 Also in my direct testimony on Attachment
22 JLB-1 on page 2, the very last line is another
23 incident where the date of the West End site the last
24 year gas was manufactured was incorrectly stated and
25 it is -- should read it was manufactured until 1928.

1 And, finally, in my supplemental direct
2 testimony on page 20, line 18, the sentence should
3 read that East End began subsurface investigations in
4 2007 and West End in 2010 instead of 2006 and 2009.
5 And that is it.

6 MR. PARRAM: I apologize, can you read
7 the last one?

8 THE WITNESS: The last one again was on
9 page 20 of the supplemental testimony, line 18, it
10 incorrectly stated that the work subsurface
11 investigation started in 2006 and 2009. It should
12 read 2007 and 2010 respectively.

13 MR. PARRAM: Thank you.

14 THE WITNESS: You're welcome, and that is
15 it.

16 Q. Thank you. Other than those corrections
17 and clarification, would your answers be the same if
18 I asked you the same questions today?

19 A. Yes.

20 Q. Do you hereby adopt this direct testimony
21 and supplemental direct testimony with the above
22 corrections as your testimony in this proceeding?

23 A. Yes.

24 MR. McMURRAY: Thank you. We would move
25 for admission of the testimony at the appropriate

1 time. The witness is now available for
2 cross-examination.

3 EXAMINER STENMAN: Thank you.

4 Mr. Sauer?

5 MR. SAUER: Thank you, your Honor. I
6 have a few questions and may have some motions to
7 strike but I'll delay those for a while.

8 - - -

9 CROSS-EXAMINATION

10 By Mr. Sauer:

11 Q. Good afternoon, Ms. Margolis.

12 A. Ms. Bednarcik.

13 Q. Get the right witness. Ms. Bednarcik.

14 Is it your testimony that Duke has
15 remediated the East and the West End MGP sites in
16 accordance with the Ohio voluntary action program.

17 A. The current work -- the work that has
18 been conducted this far to -- to handle the impacts
19 in the ground has been conducted underneath the
20 guidance of VAP CP as part of the VAP program. Of
21 course, there is additional work that's going on now.

22 Q. And is one of the attractions of the
23 voluntary action program is that Duke is a volunteer
24 participating in that program relying on the
25 oversight of a certified professional, or CP, that is

1 certified by the Ohio EPA?

2 A. That is one of the reasons that we
3 decided to move forward with the remediation of the
4 sites using the availability of a VAP program.

5 Q. And is the VAP attractive to Duke maybe
6 in contrast to other remediation programs because
7 under the VAP you are not remediating under the
8 oversight of an Ohio EPA employee?

9 A. That -- there are many different ways
10 that you can remediate a site. The VAP was chosen
11 because Duke Energy believed that it was the best
12 course of action in order to remediate the site in a
13 prudent, cost effective way while meeting all
14 applicable standards and being protective to human
15 health and the environment.

16 Q. And you're not a lawyer, correct?

17 A. I am not.

18 Q. And you are not a certified professional?

19 A. I am not, which is why I hired one.

20 Q. And you relied on the CPs to advise you
21 with regard to the scope and necessity of the
22 remediation work at the East End and West End MGP
23 sites?

24 A. The certified professional was hired in
25 order to provide direction related to performing the

1 work in compliance with the VAP but they did not
2 unilaterally direct the cleanup of the VAP. It was a
3 combination of the experience of myself, the Duke
4 Energy team, I've worked on numerous MGP sites in the
5 past, the environmental consultants that we hired
6 which have a lot of MGP experience, in collaboration
7 with the gas operations and power delivery groups
8 since they own the site management, CP. It was a
9 collaborative -- collaborative joint group that put
10 forward what the actual remedial actions were going
11 to be.

12 Q. And beside yourself who else was involved
13 from the Duke team?

14 A. From the Duke team that did include my
15 management. I had members in our analytical group
16 who also helped me on coming up with some of great
17 methods for sampling of the sites and with analytical
18 labs. I had a construction manager internal to Duke
19 who helped manage some of the work on-site and
20 provide oversight.

21 There was also members of the gas
22 department, one of which will be a later witness,
23 Gary Hebbeler, and also people within the power
24 delivery site, plus my management was involved in --
25 in the decision-making process.

1 Q. When you say your management, who exactly
2 are you referring to?

3 A. At the beginning of the sites when we
4 started working on them in 2006 and 2007,
5 specifically East End, my manager at that time was
6 Mr. Bill McCabe.

7 Q. I'm sorry, who is that?

8 A. His name was Bill McCabe. He has since
9 retired from the company.

10 Q. And who is it now?

11 A. Right now, my manager is Mr. David
12 Mitchell.

13 Q. And what are their -- what were their
14 titles and what is Mr. Mitchell's title?

15 A. Currently Mr. Mitchell is the director of
16 air and waste programs in environmental services.

17 Q. Did Mr. McCabe have the same title?

18 A. No. Mr. McCabe was the manager of waste
19 and remediation management and Mr. Mitchell at that
20 time was the director of air, water and waste, I
21 believe that was his title. It changed when --
22 within the last year we've had a reorganization.

23 Q. And through that reorganization, did your
24 responsibilities change?

25 A. Yes, they did.

1 Q. And what were they prior to the
2 reorganization?

3 A. Prior to the reorganization I was a
4 senior engineer in the waste and remediation
5 management team as a direct project manager having
6 oversight on a number of manufactured gas plant
7 cleanups as well as other remediation projects.
8 Currently I am the manager of the remediation and
9 decommissioning team.

10 Q. And how many MGP sites have you been
11 involved in remediating during your career with Duke?

12 A. During my career with Duke, Duke
13 currently has 50 manufactured gas plants that we are
14 working on. I, of course, as a manager of the group
15 am involved in some way, shape, or form in all of
16 them. But I've had direct man -- management of the
17 two sites in Ohio; a number of sites in Indiana, I
18 believe it's around 11 or 12; 10 sites in North
19 Carolina and South Carolina; and I am currently
20 involved in two sites in Florida.

21 Q. There -- the sites that you have
22 described, you said generally 50 sites.

23 A. 50 manufactured gas sites are currently
24 part of Duke Energy's portfolio.

25 Q. And that includes the two in Ohio,

1 correct?

2 A. That is correct.

3 Q. And the 11 -- how many have you been
4 involved in remediating?

5 A. What do you mean specifically by
6 "remediating"?

7 Q. Well, let's start how many have you been
8 involved investigating the sites to determine if
9 there are impacts that will require further
10 remediation?

11 A. On every one of the sites that I have
12 worked on I have done some part of investigation of
13 soil and/or groundwater and on some sites the soil
14 excavation, remediation occurred prior to my tenure
15 at Duke -- Duke Energy. Some have had excavation
16 solidification that has occurred after I became
17 involved in the site so it's a wide variety of sites,
18 different phases of remediation and investigation.

19 Q. And the 11 or 12 sites you mentioned in
20 Indiana, are those being remediated or are they just
21 at the investigation stage right now?

22 A. They are all in different phases,
23 investigation and/or remediation. On some of the
24 sites we are just starting the investigation. Some
25 we've already done the soil remediation. Some we are

1 done with the soil remediation and into long-term
2 groundwater monitoring and some have received
3 certificates of closure.

4 Q. Okay. Of the sites you're familiar with
5 in Indiana have -- have you pursued cost recovery for
6 those sites from customers?

7 A. I am not involved with the ratemaking
8 side. I do not believe we have cost recovery in
9 Indiana but I was not involved in those decisions.

10 Q. Are the sites you're familiar with in
11 Indiana, are they comparable to the sites, the two
12 sites in Ohio that are the subject of this hearing?

13 A. They are comparable only in the fact that
14 they all produce manufactured gas. They are not
15 comparable in many different ways including the size
16 of the sites.

17 The two in Ohio and Cincinnati are really
18 the largest footprint of the Duke Energy portfolio,
19 some of the largest manufactured gas plants actually
20 in the country. They also are -- differ in the way
21 that geology is structured underneath the site, the
22 depth to bedrock, how much clay, how much soil is
23 there, the type of MGP processes that were used,
24 whether it was coal carbonization or oil, gas, and
25 Mr. -- Dr. Middleton's testimony talked about the

1 different types but that produces all of the
2 different chemical makeups and by-products and so
3 that also plays into the fact of what it is in the
4 ground and how it moves and how it needs to be
5 remediated.

6 There is also a difference in that the
7 Indiana cleanup laws, or the IDEM how they handle
8 cleanup is, of course, not word-for-word verbatim as
9 what's in the Ohio VAP rules.

10 Q. Are they more stringent than the Ohio
11 rules?

12 A. I believe that they are -- it depends.
13 It depends on how you look at it. In both locations
14 they -- is my understanding, and I hire consultants,
15 of course, that know the Indiana rules just like I
16 hired a VAP CP in Ohio, but it's my understanding
17 that with respect to if you can remove the material
18 and get it offsite, that is the most preferred method
19 of remediation because it limits future liability and
20 it takes care of the problem for long-term use. I do
21 know there have been some managers within IDEM that
22 have requested that in order to stop future
23 contamination or leaching in the groundwater so it
24 really depends on the specifics of the sites and also
25 the project managers.

1 Q. Were there any -- was there an event or
2 events in Indiana that triggered the investigation or
3 remediation of some of the sites at once in Indiana?

4 A. It is my understanding that in Indiana
5 the sites have been phased and implemented the
6 remediation over a number of years, I believe that
7 the company that was the predecessor to Duke Energy
8 in Indiana, Cinergy, and before that PSI, Public
9 Service of Indiana, had started their sites in a --
10 certain order after discussions with the Indiana
11 Department of Environmental Management and it was
12 based upon in some of the sites an agreed upon order
13 to start the remediation but there was some other
14 sites that were entered into voluntary programs.

15 Q. Were there formal enforcement actions
16 going on in Indiana?

17 A. That was before my tenure with Duke
18 Energy so I'm not sure what was the initial trigger
19 on those sites.

20 Q. Has Duke admitted CERCLA liability at
21 those sites as well?

22 A. Based upon understanding that has been --
23 of course, I have sought legal counsel on this and
24 on -- legal counsel in the past on environmental
25 liability related to manufactured gas plants. It is

1 my understanding that Duke Energy knows that we have
2 liability related to the environmental impacts that
3 were generated on Duke Energy or its predecessor
4 companies owned or operated all of the MGP sites.

5 Q. How many of those sites did you say have
6 been completely remediated?

7 A. I do not know exactly. I believe that
8 there is a handful, maybe five, maybe six that have
9 received a certificate of completion per IDEM, the
10 Indiana Department of Environmental Management, but
11 keep in mind that, of course, if someone were to find
12 something on the site in the future that we did not
13 know about or we did not find in the investigation,
14 that closure document is -- basically goes away and
15 we would, of course, because we have the ongoing
16 liability, have to revisit the site if additional
17 information was found in the future or additional
18 impacts in the ground.

19 Q. Do you know how much remediation costs
20 were in the -- in the Indiana sites on average?

21 A. I would not be able to tell you that it
22 costs an average. Again, it is highly dependent upon
23 the regulatory environment how big the site was, how
24 often -- how long it operated, the depth to a
25 confining layer, whether it is a competent clay or a

1 bedrock, it depends upon lots of -- lots of different
2 variables but I do not know what the costs were on a
3 per-acreage site at the time.

4 Q. Do you have the same level of
5 responsibility for those sites as you have for the
6 two sites in Ohio?

7 A. Indiana specifically?

8 Q. Yes.

9 A. We share the Indiana sites with a number
10 of other utilities. The projects that I was directly
11 involved in with -- in Indiana were sites that we
12 shared the liability where the other utility had the
13 lead on the site and Duke Energy was, of course,
14 since we are helping to pay for the costs, had
15 oversight in approving and accepting any type of the
16 remedial things that went forward.

17 In North Carolina and South Carolina I
18 had direct oversight of all the work that was going
19 on on those MGP sites. And in Florida I currently
20 have direct oversight with a number of other
21 potentially responsible parties on cleanup of those
22 sites.

23 Q. And in Indiana have you pursued insurance
24 claims on any of the sites that are being remediated?

25 A. It is my understanding before I started

1 work with Duke Energy and before Duke Energy merged
2 with Cinergy and the predecessor company in Indiana,
3 Public Service of Indiana, that insurance recovery
4 had been pursued and to the extent that it was able
5 to get insurance recovery, it's pennies on the
6 dollar. A lot of insurance companies are insolvent,
7 bankrupt. It also depends on the types of policies.
8 We got what we could in Indiana is my understanding.

9 Q. And do you know if in pursuit of those
10 insurance claims they instituted those early on in
11 the process?

12 A. As, again, I was not involved with the
13 Indiana sites until Duke Energy merged with Cinergy
14 in 2006, I do not know at what time and what way they
15 pursued insurance recovery.

16 Q. I thought the previous witness,
17 Mr. Margolis, had kind of pointed to you as the
18 witness who would have some knowledge on the
19 insurance claims and those things. Is that not
20 appropriate?

21 A. For Duke Energy Ohio in the current
22 insurance case related to the insurance policies
23 related to the East End and West End site, I do have
24 some knowledge on that but not the Indiana insurance
25 case.

1 Q. You also noted that there are -- there is
2 a construction manager or there is construction
3 managers for the sites in Ohio?

4 A. Prior to I believe it was November of
5 2012, for the active remediation, the excavation
6 solidification act, the east parcel and west parcel
7 of East End -- accuse me, east parcel and west parcel
8 of, yeah, East End and the West End site.

9 A construction manager who had excessive
10 knowledge on the remediation of MGP sites from his
11 work on the MGP sites in the Carolinas, he was
12 brought on-site to make sure that the work was
13 carried out per Duke Energy's specifications and in
14 such a way that things happen day to day, changes
15 happen day to day, so he was an on-site person
16 ordered to help manage those remedial efforts.

17 Q. And who is that?

18 A. His name is Kenneth Ramsey.

19 Q. So he's responsible for both sites then
20 as construction manager?

21 A. He was responsible and provided that
22 oversight, day-to-day construction oversight, though,
23 of course, he communicated with me multiple times a
24 day as to what was going on on the site and there
25 was, of course, weekly calls, weekly construction

1 calls. I was involved all throughout the work that's
2 going on at the sites, but he was physically on-site
3 Monday through Thursday I believe most weeks.

4 Q. And who was the CP that advised you of
5 the VAP requirements for the remediation of the East
6 End site?

7 A. The East End site the initial
8 investigations had been conducted by a firm called
9 Amec and they had hired a certified professional that
10 was not directly related to their firm to provide
11 oversight on the initial investigation.

12 When I became involved on the sites in
13 2007, we did go out for bid in order to do a
14 competitive bid process for additional
15 investigations. At that time the firm that was hired
16 to do the work was Burns & McDonnell. They also
17 hired an out -- a firm, someone from Bureau of
18 Veritas, I believe, who was a VAP CP to provide
19 guidance related to the VAP regulations that is for
20 the East End site. That carried us through the
21 investigation as we moved into the remediation, of
22 course, we went out for bid to get competitive bids
23 for the actual remediation of the sites. At that
24 time the firm that was awarded the bid was Haley &
25 Aldrich, and Mr. Fiore who is a witness later on in

1 this proceeding is our VAP CP related to the
2 remediation of the East End site.

3 Would you like me to tell you about the
4 West End site?

5 Q. In a minute.

6 In 2007, you said you brought Burns &
7 McDonnell, and did they have a CP?

8 A. They hired a CP to provide the functions
9 of a CP as we were forming and going forward with
10 that investigation.

11 Q. And who was their CP?

12 A. I believe his name was Tom Shalala but I
13 would have to look at the exact Phase I that was part
14 of, of course, the discovery that was done as part of
15 this proceeding. His name and he is the one who
16 certified the VAP Phase I for the East End site.

17 Q. So Burns & McDonnell, did they have an
18 in-house CP?

19 A. They did not have, not at that time, but
20 since, subsequent since that time I do know that
21 someone from Burns & McDonnell who has extensive
22 knowledge of the cleanup and manufactured gas plants
23 and the cleanup of other types of contaminated pieces
24 of property, he has sought and received VAP
25 certification, is our VAP CP for the remediation

1 that's going on at West End, which Burns & McDonnell
2 has the construction oversight of that project.

3 Q. So Tom Shalala the CP that Burns &
4 McDonnell brought on, did he have significant
5 experience?

6 A. I believe that as a VAP certified
7 professional, he had significant experience related
8 to the VAP CP itself. But Burns & McDonnell, of
9 course, had the experience of working on manufactured
10 gas plants and, therefore, by having both of them
11 together we had the best of both worlds in order to
12 work in that collaborative environment to figure out
13 what needed to be done on the sites.

14 Q. Prior to Burns & McDonnell did you say
15 Amec?

16 A. Amec, A-M-E-C?

17 Q. And who was their CP?

18 A. I do not remember who their CP was. Amec
19 was working on the site whenever I took over
20 responsibilities as project manager. And it was soon
21 after that when they finished up their scope of work
22 that I went out for bid so I did not have direct --
23 direct interaction with their CP, therefore, his name
24 isn't on the tip up of my tongue.

25 Q. Was it Tom Shalala then who was the CP

1 that was involved on the East End site for
2 development of the remedial action plan?

3 A. I believe so.

4 Q. And who was the CP that advised you of
5 the VAP requirements for the West End site?

6 A. The firm that won again a competitive bid
7 in order to perform the investigations on the West
8 End site was a firm called AECOM and the VAP CP,
9 again his name is -- is escaping me right now but he
10 is the one who is listed on the VAP Phase I for the
11 West End site. He is the one who, of course,
12 certified that document in the VAP Phase I for the
13 West End site.

14 Q. And it was -- for the West End site was
15 it the AECOM CP that developed the remedial action
16 plan for the West End site?

17 A. For the West End site, the remedial
18 action plan really wasn't called remedial action
19 plan. It was the basis of a design memorandum and it
20 was developed, again, a collaborative between the VAP
21 CP who worked for AECOM, the technical people who
22 have the best management practices who have worked on
23 MGP sites in the past, so it was those environmental
24 engineers and construction engineers, myself, and
25 there was, of course, being at the east -- West End

1 site where there is a lot of -- there's some gas
2 lines and also some electrical equipment. We did
3 have input from that side of Duke Energy.

4 Q. And if you could turn to page 22 of your
5 supplemental testimony, lines 15 to 18.

6 A. Could you repeat that, please.

7 Q. Supplemental testimony page 15, lines 15
8 to 18.

9 A. Page 15?

10 Q. Just a second. I'm sorry, page 22, lines
11 15 to 18.

12 A. I am there.

13 Q. Okay. Thank you. And it states, does it
14 not, that "The Phase II Property Assessment involved
15 soil and groundwater sampling and determined
16 hazardous substances and petroleum was present at the
17 East End site at concentrations which did not meet
18 applicable VAP standards for such contaminants"?

19 A. That is what it states.

20 Q. And could you point me to the VAP rule
21 stating the concentration standards for soil
22 contamination?

23 A. I do not have the VAP standards in front
24 of me. If you look at the VAP Phase II report which
25 was submitted as part of discovery, there are tables

1 in there that shows specifically what the generic
2 cleanup standards are for underneath the VAP and they
3 are what was compared to those -- those generic
4 numbers were line item by line item, chemical by
5 chemical each and every sample that we took at the
6 site was compared directly to what came out of the
7 analytical laboratory. We could clearly see if it
8 was above the VAP standard or not.

9 Q. And can you point me to the VAP rule
10 where the concentration standards for groundwater
11 contamination are stated?

12 A. Again, very -- very similar to my answer
13 for soil contamination is that in the VAP II phase --
14 the VAP Phase II report there are tables that show
15 directly what the VAP standard is and where we were
16 above or below those VAP standards. We also, of
17 course, compare groundwater to the MCLs, or the
18 maximum contaminate levels, which is promulgated by
19 the USEPA which, of course, the VAP has to at least
20 meet the MCL from the USEPA or be more stringent and
21 in some cases we're above.

22 Q. So did you rely exclusively on the CP
23 involved at the East End site for determining whether
24 or not the VAP concentration standards for soil
25 contaminant exceeded?

1 A. Again, the VAP has some generic numbers
2 that are in their statutes and their rules that may
3 not exactly -- in their statutes on their website
4 they show what their -- the generic soil standards
5 and groundwater standards are.

6 Anyone can go to their website and pull
7 down those standards and do a quick comparison with
8 what comes out of the analytical laboratory but, of
9 course, working with the VAP CP is the way that we
10 looked at that in order to determine did it meet
11 residential, commercial, industrial, construction
12 worker, that was on the specific analyticals, though,
13 of course, there was a lot of tar-like material and
14 oil-like material in the soil borings and in the
15 groundwater which based upon evaluation and
16 consultation with my legal team and also with the VAP
17 CP, that, of course, was not in compliance with VAP
18 standards.

19 Q. Are you telling me you independently
20 verified that the VAP rule concentration standards
21 for soil contamination had been exceeded at the East
22 End site?

23 A. My VAP certified professional, of course,
24 is the one who certifies the VAP Phase II report and
25 represented those with people underneath him,

1 prepared those tables and figures, but I, of course,
2 did look at them and made sure that they did match
3 what is publicly available on their website and had
4 discussions based on when the analytical results came
5 back.

6 Q. And you did the same thing for the
7 groundwater contamination; you independently verified
8 that the VAP rule concentration standards had been
9 exceeded on the East End site?

10 A. For -- every time I get some analytical
11 things in from the laboratory the first thing I do is
12 go in, look at the chemicals, look at what the levels
13 are, and see if they need -- are above the generic
14 standards and then that gives me a basis so I can
15 call my VAP CP and my environmental consultants and
16 talk about what do these mean, where do we go, what
17 do we do from here?

18 Q. Ms. Bednarcik, do you have a copy of your
19 deposition with you today?

20 A. I do not have one in front of me.

21 MR. SAUER: May we go off the record for
22 a minute, your Honor?

23 EXAMINER STENMAN: Let's go off the
24 record.

25 (Discussion off the record.)

1 EXAMINER STENMAN: Let's go back on the
2 record.

3 Q. (By Mr. Sauer) Could you turn to page 20
4 to 23 of your direct testimony.

5 A. Page 20?

6 Q. Yes. And is that -- starting with page
7 20 where you describe the general process used to
8 ensure the reasonableness of costs, do you see that?

9 A. Yes, I do.

10 Q. Would you agree that the process you
11 describe in your direct testimony involves the
12 following components: You describe ensuring the
13 scope of the cleanup work is appropriate and the cost
14 to form that work is reasonable?

15 A. That is what it states in lines 18 and
16 19.

17 Q. You state further in that portion of your
18 testimony "When deciding upon the most prudent course
19 of action for investigation and remedial actions,
20 scopes of work, the Company worked with the Ohio EPA
21 CPs and environmental consultants to evaluate
22 different options based on various criteria,
23 including but not limited to compliance with
24 environmental regulations, best practices,
25 feasibility, constructability, safety, prior

1 experience, and cost." Do you see that?

2 A. Yes, I do.

3 Q. And when you say "not limited to," can
4 you tell me what other criteria might -- you might
5 consider when analyzing the scope of the cleanup work
6 to be performed?

7 A. We look at things such as, as
8 Dr. Middleton stated earlier, there is a threshold
9 that we look at for the cleanup of sites. The first
10 one is whether it is being compliant -- being
11 protective of human health and the environment and
12 also meeting all applicable standards. So those are,
13 as Dr. Middleton said, are the threshold.

14 Beyond that when we look at what needs to
15 be done at the site, as long as it's -- the actions
16 are protective of human health and environment and
17 applicable standards, we also take into account the
18 long-term impacts, short-term impacts to the
19 community and the area at large, the uses, the known
20 and anticipated future uses of the site and current
21 uses of the site.

22 We take into account the costs, the
23 short-term liability, the long-term liability, the
24 implementability, that is, the ability to actually
25 implement the work at the site. There is whether it

1 will be acceptable to regulatory environment as a
2 whole. I know there's others.

3 EPA has a list of things that they --
4 they usually use in evaluating whether a site action
5 should go forward or not and those are the general
6 things I just mentioned that we use when we determine
7 what needs to be done at a site.

8 Q. Your list included constructability, is
9 that different than implementability?

10 A. That's generally the same thing.

11 Q. Okay. Are the criteria you identify in
12 your direct testimony listed in the order of
13 importance?

14 A. The -- of course, as Dr. Middleton
15 stated, that the two thresholds, the most important
16 are being protective of human health and the
17 environment and meeting applicable standards. All
18 the rest of the criteria are in no particular order
19 and are all weighted somewhat the same. It really is
20 a site specific type of evaluation that's done at
21 every site.

22 Q. In obtaining the two threshold
23 considerations that you're talking about, protective
24 of human health and the environment and meeting
25 applicable standards, there are different options

1 available to achieve those -- those goals, are there
2 not?

3 A. Of course.

4 Q. And when you state that you evaluate
5 different options, do you mean different remediation
6 technology options?

7 A. Different remediation technology options
8 specifically or a combination thereof.

9 MR. SAUER: Okay. May I approach the
10 witness, your Honor.

11 EXAMINER STENMAN: You may.

12 MR. SAUER: May I have marked as OCC
13 Exhibit 2.

14 EXAMINER STENMAN: Do the witness and the
15 Bench get a copy and the court reporter?

16 MR. SERIO: Oh, I'm sorry.

17 (EXHIBIT MARKED FOR IDENTIFICATION.)

18 Q. (By Mr. Sauer) Ms. Bednarcik, have you
19 been handed what has been marked as OCC Exhibit 2?

20 A. Yes, I have.

21 Q. And it is a two-page document that is
22 Duke responses to OCC interrogatory 11-441 and
23 11-452; is that correct?

24 A. That is correct.

25 Q. And you are the person identified as

1 responsible for responding?

2 A. Yes, I am.

3 Q. And the response is a list of different
4 technologies that are available to remediate an MGP
5 site; is that correct?

6 A. That is correct.

7 Q. And the -- what's listed for the East End
8 site applicable technologies are the same as what was
9 listed for the West End site?

10 A. Yes.

11 Q. And are these the technologies that were
12 considered in developing the remedial action plan for
13 the East End site?

14 A. These technologies are the technologies
15 that I consider at all manufactured gas plants when I
16 look at what technologies need to be implemented or
17 can be implemented.

18 Q. And each technology option involves a
19 different cost, correct?

20 A. That is correct.

21 Q. And each technology involves a different
22 long-term and short-term risk profile?

23 A. Yes.

24 Q. And you list costs in your list that you
25 provided in your testimony. That appeared last in

1 your -- in your testimony. Is that because it's the
2 least important of the list of criteria?

3 A. As I've previously stated a couple
4 minutes ago, cost is evaluated in the same realm and
5 the same way as many different other items, it is
6 nowhere near the lowest on the list.

7 Q. Was the process that you described on
8 page 20, lines 18 to 23 of your direct testimony used
9 to evaluate the different options potentially
10 utilized in ensuring the scope of the cleanup work
11 was appropriate in the East End site?

12 A. They were -- tell me again. I closed my
13 testimony, I lost the page.

14 Q. Page 20, lines 18 to 23.

15 A. They were used in conjunction also with
16 those other things that I stated in a previous
17 comment or previous question related to customers,
18 the local neighborhood at large, of course, all those
19 are used together.

20 Q. Make sure I understand, in your testimony
21 on page 20 when you're talking about when deciding
22 upon the most prudent course of action of
23 investigating and remediating action scopes of work,
24 the company worked with the Ohio EPA, CPs, and
25 environmental consultants to evaluate different

1 options based on various criteria including but not
2 limited to the compliance with environmental
3 regulations, best practice, feasibility,
4 constructability, safety, prior experience, and cost,
5 and you -- is that the process that you went through
6 when you were trying to determine which was the best
7 approach at the East End site in analyzing the
8 technologies that appear on your response to 11-441?

9 A. Those factors, of course, not
10 specifically in that order but all of those factors
11 are used including the constructability,
12 implementability, the long-term, short-term impacts
13 to the community, the other short-term, long-term
14 impacts, how long, whether it will manage the
15 liability in a short- and long-term basis, all of
16 those things were used in order to determine what
17 went forward as part of the chosen remedial options.

18 Q. And the process you just described used
19 to -- strike that.

20 Was the process you described on page 20,
21 lines 18 to 23, documented by Duke within a written
22 report in which Duke evaluated the various criteria
23 and reached a decision on the appropriate scope of
24 the cleanup work for the East End MGP site?

25 A. The process was not explicitly documented

1 mainly because looking at it, a written documentation
2 related to looking at the evaluated options is not
3 required on the Ohio VAP and also in my personal
4 evaluation would have been an imprudent use of money
5 because a lot of these options were not -- would not
6 have met the threshold of being protective of human
7 health and the environment and meeting all applicable
8 standards and it was pretty obvious what were the
9 available technologies that could be implemented on
10 the site in order to meet those two threshold goals
11 at the specific areas that we were looking at.

12 Q. So without a documented -- I'm sorry.
13 Scratch that.

14 So what you're -- if I understand your
15 testimony is that you went through the process that
16 you describe on page 20, lines 18 to 23, through
17 informal discussions between yourself, the Ohio EPA,
18 CP, and environmental consultants, and that decision
19 established the scope of the cleanup work was absent
20 any written documentation that demonstrated how the
21 criteria you relied on were evaluated.

22 A. The -- if you look at the remedial action
23 plan for the East End site and the basis of design
24 memorandum for the West End site, it does show how
25 those remedies are protective of human health and

1 environment and will meet applicable standards.

2 Of course, as we came up with those
3 different remedies that was reviewed with the
4 internal group, with the environmental consultant,
5 and what we could actually execute on the site in
6 order to handle the tar-like material and oil-like
7 material that was on the site.

8 It was also, of course, reviewed with my
9 manager and with my other people within the
10 environmental area and, of course, the people who are
11 operating on the site, the gas department and the
12 power delivery department, because it's their site
13 and they still have ongoing utility service from
14 those properties so, of course, we reviewed it with
15 them, went over the thought process with them, how we
16 came to our decision in order to -- before we moved
17 forward with going out for bids.

18 Q. Sitting here today can anyone else follow
19 through with the decision process that was made and
20 analyze what decisions were made based on the
21 information you relied on?

22 A. Of course, looking at it's been many
23 years since those decisions were made and we have
24 made tweaks out in the field based upon information
25 as has come up and things have changed in the field

1 in the actual implementation, but based upon the
2 knowledge that we knew at that time in 200 -- I can't
3 remember the exact timeframes of when the basis of
4 design memorandum and the remedial action plan were
5 sent out for bid, based upon the information that we
6 knew at that time and the guidance that had been
7 given to us at that time by our VAP CP and by legal
8 and doing an evaluation -- evaluating our long-term
9 liability and our requirements to meet human health
10 and environment and be protective meet the applicable
11 standards, yes, I believe they would come up with the
12 same evaluation.

13 Q. But are there any documents that the PUCO
14 can review or does the PUCO have to rely on Duke's
15 verbal claims?

16 A. There are no documents.

17 Q. And does the same hold true with the East
18 End site?

19 A. Yes.

20 Q. There are no documents?

21 A. Again, imprudent use of funds I believe.

22 Q. Could you tell us how much it would cost
23 to have the analysis that you describe in your
24 testimony on page 20, lines 18 to 23, that carry over
25 onto page 21 on the first line to have had a report

1 prepared that documented that process?

2 A. I do not have an exact dollar amount. I
3 do know that I am working on a USEPA-led federal
4 super fund or MGP site cleanup that, of course,
5 using -- going through USEPA you have to create one
6 of these documents. It's actually a requirement.
7 And I believe we have spent as a group upwards of a
8 quarter of a million dollars to create that document.

9 Q. Is that a stand-alone document or is it a
10 combination that would serve as the Phase I
11 investigation and Phase II property assessment? Is
12 that all rolled into that?

13 A. The Phase I and the Phase II terminology
14 as related to the VAP is specific related to the Ohio
15 EPA VAP. In USEPA there are remedial investigations
16 and feasibility studies that are conducted and there
17 are multiple reports that are prepared and submitted
18 to USEPA that document all on the work that is used
19 to help implement and put together a feasibility
20 study.

21 Q. You're -- your answer to the prior
22 question was \$250,000 to prepare a similar report for
23 the federal EPA.

24 A. That was for that one specific site that
25 I'm working on right now based upon the information

1 that I know. It's very site specific based upon the
2 complexity of the site, what is chosen on the site,
3 and basically it really depends upon what are the
4 different options and if you know an option is not
5 technically feasible to actually implement on the
6 site, then if you're not required to prepare a
7 document to show that just to confirm that is
8 technically and feasible, I looked at it is why
9 prepare a document to just to show what you already
10 know based upon your experience of working on other
11 manufactured gas plants.

12 Q. But since you didn't prepare the document
13 in Ohio, you don't know it would have cost \$250,000
14 to prepare this document in this case.

15 A. I did not request that my environmental
16 consultants prepare that document.

17 Q. Do you know about how much time you spent
18 evaluating the options that are listed on 11-441 and
19 11-452 when you were trying to determine what
20 remediation actions to take at the East End site or
21 the West End site?

22 A. At both of the sites multiple days,
23 months were spent as we would get information in. I
24 do remember that there was multiple calls with my
25 environmental consultants and if I'm not mistaken on

1 both sides I ended up going to the environmental
2 consultant's headquarters offices in order to meet
3 with a large number of the people that work for their
4 firm accord -- including in some cases their VAP CP
5 as we sat through and looked at all the different
6 options, and most of those meetings that took place
7 were two to three days as we really looked through
8 what can we do on this site when people have done
9 this type of work in the past, so it was not taken
10 lightly.

11 Q. But it was never -- it wasn't important
12 enough to put it down in writing though.

13 A. It was. It was how it was put down in
14 writing at the end of the day we prepared the basis
15 of design memorandum for West End and remedial action
16 plan for East End.

17 I will say, I mean, one great point is
18 that at West End we looked at it and said we weren't
19 sure whether solidification or containment law would
20 be the best method. There it wasn't quite as clear
21 as it was on East End, so when we went out for bid
22 for the work at West End we actually solicited bids
23 for both the containment law and for the
24 solidification.

25 Of course, when it came out at the end of

1 the bid we determined that the solidification law
2 would be very hard to implement because we would have
3 to go down 130 feet and that it would be very
4 expensive and that it would not meet all the -- all
5 the criteria that we were looking at for that site,
6 so in that instance because there was a little bit
7 uncertainty, we did carry it forward and go out for
8 bid for two different types of design.

9 Q. And what did that cost you to do that?

10 A. That wasn't specifically called out as a
11 different line item.

12 Q. Can you estimate what it would have cost
13 for you to prepare a report that included all of that
14 analysis?

15 A. I would not be able to put together an
16 idea. Again, it's highly dependent upon the number
17 of things that needed to be evaluated. The
18 combination there of the size of the site, the
19 geology, it really is site specific and each
20 individual component is very specific as to what it
21 would cost to put together that type of
22 documentation.

23 Q. And so if I understand your testimony,
24 the process you went through on page 20, lines 18 to
25 23, and carries over to the first line of page 21,

1 was the process used to develop the remedial action
2 plan for the East site and the basis of design
3 memorandum for the West End site; is that correct?

4 A. I guess I'm not quite sure what you're
5 asking.

6 Q. It was the analysis that you did on page
7 20, lines 18 to 23, and then carries over to the
8 first line of page 21, that process that we have been
9 talking about, that ended up being the remedial
10 action plan for East End and memorandum for the West
11 End site?

12 A. Using the two threshold values,
13 protective of human health and the environment and
14 meeting all applicable standards, and then everything
15 else is listed in that area of my direct testimony
16 you reference and there is, of course, other items
17 that are listed in my supplemental testimony.

18 For example, how it would affect the
19 local community is one of those items that was not in
20 the original list. All those factors were used in
21 order to determine what would go forward as remedial
22 options.

23 Q. And the remediation action plan for these
24 sites reflected the remedial technologies chosen to
25 investigate and remediate the site, correct?

1 A. Chosen to remediate, not investigate.

2 Q. Okay. And the option allows an entity
3 the remedial action plan that is included in the RFP
4 issued by Duke to solicit bids to design and build
5 requirements for the remedial action plan; is that
6 correct?

7 A. As part of the request for proposal that
8 goes out and all -- actually all my requests for
9 proposal that goes for MGP sites I do provide things
10 like the remedial action plan or the basis of the
11 design memorandum, but, of course, in my proposal I
12 leave it open to the consultant that I ask them
13 please give me a plan and a cost to implement those,
14 what's in those plans, by always asking them if they
15 have cost savings ideas or things -- the ways to look
16 at things a little bit differently for the
17 implementation to prepare that and put that in their
18 proposal.

19 And as I evaluate proposals, I look at
20 the base bid which is what's in the basis of the
21 design memorandum or remedial action plan. I also
22 look at what are these great things that these
23 consultants want to go out for bid are thinking of,
24 what are they thinking of that maybe I didn't or the
25 CP helped me before and the environmental consultant

1 did before, and I take that into consideration in
2 choosing what firm would go forward with the next
3 phase of work?

4 Q. Could you turn to page 2 to 22, you
5 describe the --

6 A. My supplement or direct, please?

7 Q. We're still on the supplement --

8 A. Supplemental or direct?

9 Q. I'm sorry. I'm sorry, I think it's
10 direct. Where you talk about the RFP process itself.

11 A. Starting line 13.

12 Q. Yes.

13 A. Okay.

14 Q. The RFP is not a process where Duke is
15 looking for a contractor to offer alternative
16 remedial approaches, correct?

17 A. As I just stated, when I go out and issue
18 an RFP, I ask for a cost to do and a plan to
19 implement what is considered the base bid and I do
20 ask for are there anything else out there, different
21 items that I maybe did not consider, maybe different
22 technologies how things could be implemented, really
23 best management practice that is -- that the bidders
24 offer up as part of their proposal and use in the
25 evaluation of coming up with who is awarded the bid.

1 Q. And Duke's selection of the environmental
2 consultant to be responsible for the design and build
3 of the approved remedial plan of the East and West
4 End sites were not necessarily based on the cheapest
5 option, was it?

6 A. The way we evaluate bids is always --
7 always the same and it's a very painstaking -- I take
8 a very long time evaluating these bids, mainly
9 because I know that it's a significant cost output to
10 actually implement the remedial action so I want to
11 make sure that a good, thorough review is done on the
12 bids.

13 The very first thing that I do and that
14 my contractors or the people within my group are
15 helping me to evaluate these bids, the very first
16 thing we do is read through the technical side. Can
17 they actually implement what -- what we're saying?
18 Do they have the experience? Do they understand what
19 the remedial objectives are?

20 And also looking at, of course, those
21 alternative things that they have put in their bid.
22 We evaluate all of that and determine is there anyone
23 who doesn't meet that initial threshold of the
24 technical being able to understand everything and
25 implement the work.

1 After that, we do look at dollars, we
2 look at the costs. Now, of course, the basis of
3 remedial actions is that you never know exactly
4 100 percent what's in the ground whenever you go out
5 for bid, so one of the ways that I use to help manage
6 and am able to look at costs going forward is to ask
7 for bids, not lump sum, because there's lots of
8 things that are going on and I really don't like
9 change orders, is to ask for things on a per-unit
10 basis, so, a per-ton basis for the excavation of
11 soil.

12 Now, of course, there are some things
13 we'll know will be a lump sum. For example, an earth
14 retention system, we know what that's going to look
15 like, that's a given of where the boundaries are
16 going to be, so that will look at line item by line
17 item cost, but we do look at a per-unit basis for
18 those type of things that may change out in the
19 field.

20 I do an evaluation of who are the senior
21 people versus the junior people who are going to be
22 on the site and make sure that there is a good mix of
23 experience on the site. I also look at the total
24 number of hours that the different bidders are using
25 in order to evaluate what actually has to be

1 implemented on the site because you can really look
2 at it and sometimes some bidders will underbid in
3 order to win the bid and come back with change
4 orders.

5 So if I look at all the values for -- to
6 create a -- create a document per se and there are
7 some bidders that really underestimated or
8 overestimated the number of hours that it takes into
9 account as I consider who is the successful bidder.

10 Q. In your direct testimony, page 21 to 22,
11 lines at the end of page 21 carrying over to page 22
12 under technical screening and there is no
13 consideration of cost at that time; is that correct?

14 A. Of course, if someone can't technically
15 do the work why would I hire them if they are the
16 lowest bidder if they are going to not perform to the
17 standards that is required for the site?

18 So, of course, technical is the first
19 thing. Can they do the work? And I'll tell you
20 this, on all the bids for East and West End I do not
21 remember one time where any of the bidders did not
22 meet that technical threshold. And then, of course,
23 we went forward with the costs.

24 EXAMINER STENMAN: Why don't we take just
25 a 15-minute break for our afternoon break and we'll

1 come back at 20 until 5 and we will go to about 5:30,
2 6:00 o'clock tonight. Thanks.

3 (Recess taken.)

4 EXAMINER STENMAN: All right, let's go
5 back on the record.

6 Mr. Sauer.

7 MR. SAUER: Thank you, your Honor. Now,
8 I have copies of a transcript from Ms. Bednarcik's
9 deposition. May I approach the witness, your Honor?

10 EXAMINER STENMAN: You may.

11 Q. (By Mr. Sauer) Could you turn to page 61
12 of the transcript. And you are the same Jessica
13 Bednarcik that was deposed on April 10 of 2013?

14 A. Yes.

15 Q. And earlier I had asked you some
16 questions about the VAP and whether you had done any
17 independent analysis of the soil sample requirements
18 and the groundwater contamination requirements under
19 the rules. Do you recall that?

20 A. And yes, I answered I compared it to the
21 readily accessible tables, lookup tables that are
22 found on their website.

23 Q. If you -- I'm sorry, if you turn to page
24 99 of your deposition transcript. We were talking
25 about your supplemental testimony at that point and I

1 was discussing the Ohio -- what the Ohio VAP
2 requirements were for the removal and treatment of
3 such material. And asked if you could point me to
4 the VAP rules where that requirement existed.

5 And your attorney objected and it was
6 stated you're not a lawyer and you are not a
7 certified professional on the VAP rules and told you
8 you could go ahead and answer if you knew.

9 And your answer was you hired a certified
10 professional who is certified by the Ohio EPA and
11 understands the regulations and have relied upon them
12 related to the decisions made specifically towards
13 tar-like material and oil-like material. Do you see
14 that response?

15 A. Yes, I do.

16 Q. Is your testimony changing today in terms
17 of what you are familiar with in terms of the VAP
18 requirements and what you are not familiar with?

19 A. No, I'm not, because this specific
20 deposition question asked about the tar-like material
21 and the oil-like material. Tar-like material and
22 oil-like material are not found in those readily
23 available lookup tables that are on the website.
24 Those only contain the chemical constituents like
25 benzene or naphthalene or toluene or benzoapyrene

1 that are found in the soil and the groundwater.

2 So by looking at those, again, readily
3 accessible lookup tables you can look and determine
4 what's above or below these numbers and what's in the
5 soil and the groundwater but it does not specifically
6 say anything about the tar-like materials and
7 oil-like materials so, therefore, this statement is
8 correct, I relied upon my VAP CP to tell me what is
9 in the VAP rules related to that material.

10 Q. And I asked follow-up questions and I say
11 are all the references in your testimony to the VAP
12 rules from your understanding from the certified
13 professional that you've hired as opposed to your own
14 personal knowledge? And your answer was because I am
15 not a VAP certified professional, yes, I relied upon
16 Ohio VAP certified professionals where it's
17 referenced in my testimony. Do you see that?

18 A. Yes.

19 Q. So the references that we were talking
20 about earlier, I believe we were at page 23, lines 19
21 to 22 of your supplemental testimony.

22 A. I think this is the first time you have
23 referenced page 23 of my supplemental testimony.

24 Q. Page 22, line 15 to 18 of your
25 supplemental testimony where you were discussing what

1 was required under the VAP to meet VAP standards for
2 these insights, were you relying upon the CP to
3 establish what those requirements were or did you
4 independently establish for yourself what those
5 requirements were?

6 A. As I stated previously, I do a quick and
7 dirty cut on looking at what those tables are on
8 line, just, frankly, I'm really get into MGP stuff so
9 when I get the things from the lab, I get kind of
10 excited to see what is there.

11 I do a quick and dirty look, and as I
12 previously stated, I call my CP and I call my
13 environmental consultants and say what does this
14 mean? Where do we go from here? What are you
15 seeing? So that, again, I call my CP.

16 Q. I'm trying to understand then between
17 your deposition and what you are telling me today
18 there seems to be a disconnect. Either you were
19 relying on the CP or you have independent knowledge
20 and I'm trying to -- at the time of the deposition
21 you were telling me you relied on the CP. Today you
22 seem to have the ability to independently determine
23 these things for yourself. Is that the case?

24 MR. McMURRAY: I am going to object in
25 that the witness has already answered that question

1 and said there is not an inconsistency.

2 EXAMINER STENMAN: Overruled.

3 A. I do not believe there is any
4 inconsistency at all in that I call my VAP CP. I
5 rely upon them as to the interpretation of the rules.
6 All I do is a quick and dirty check off of what is
7 publicly available documentation on the VAP website.

8 I also do the same thing looking at EPA
9 levels of soil and groundwater constituents. So I
10 look at it just to kind of get a feel before I talk
11 to the VAP CP as what does this mean and where are we
12 going, so when I do talk to my VAP CP I am not
13 totally in the dark as to what's in the results.

14 So I rely upon them as to what does this
15 mean. I ask them that. But I do do a quick check
16 beforehand so that I am -- I know somewhat before I
17 call them, I have some knowledge before I call them
18 to aid in the discussion.

19 Q. Is there a reason why you didn't state
20 that at the time of your deposition?

21 A. Well, frankly, it was my very first
22 deposition. I was a little bit nervous. You didn't
23 specifically ask about the groundwork -- groundwater
24 constituents and I didn't feel that was the direction
25 that the questions that you are asking me were asking

1 that specific information.

2 Q. Well, I asked about all references in
3 your testimony and the -- and what the VAP
4 requirements were, and whether or not you relied on
5 this certified professional, and you said you did.

6 A. And I repeat, I did rely upon my
7 certified professional but I have been working on MGP
8 sites for a very long time so in order to provide --
9 again, it's a team effort to be able to look at it
10 and go what do those numbers mean, I think aids in
11 that evaluation with the CP but it's the CP who will
12 tell me based upon the results that come through what
13 needs to be done for the VAP requirements to meet all
14 the applicable standards.

15 The VP also -- sorry, VAP CP, the CP will
16 also look at it. I know we have done multiple
17 chemical adjustments on the VAP numbers that come
18 through because what's on the website is a generic
19 number and the VAP CP can look at it and go, well,
20 looking at background numbers or looking at multiple
21 chemical adjustments, we can look at this in a
22 different way and come up with a site specific
23 comparison number.

24 That's something I don't know about, I
25 have no idea about, but my VAP CP, of course, is the

1 person who will tell me what do these numbers truly
2 mean and how do we have to move forward to maintain
3 and meet all applicable standards.

4 Q. If you turn to page 25, lines 12 to 16 of
5 your testimony.

6 A. Page 25 of my direct or.

7 Q. Supplemental.

8 A. Okay, what lines?

9 Q. 12 to -- 12 to 16.

10 A. Yes.

11 Q. And your testimony you're speaking to
12 the -- what the VAP requires regarding removal or
13 treatment of such materials; is that correct?
14 Tar-like material or the oil-like material?

15 A. Yes, tar-like material, oil-like material
16 only, not the just chemicals that are in the
17 groundwater and the soil.

18 Q. And can you point me to the VAP rules
19 where that requirement exists?

20 A. No, because that -- that's something
21 that, based upon my certified professional's
22 knowledge of the VAP rules and in discussions that
23 they have had with the Ohio EPA, I rely upon their
24 evaluation of what needs to be done with that
25 specific tar-like material and oil-like material.

1 Q. And if you looked at page 26 of your
2 supplemental testimony, lines 10 through 12, you're
3 again talking about "as discussed above, Ohio EPA's
4 VAP required removal and/or treatment of source
5 material and subsurface, if it could be removed or
6 treat in a feasible manner." Do you see that?

7 A. Yes, I do.

8 Q. And do you know -- can you point me to
9 the VAP rule where that requirement exists?

10 A. As I just stated, I relied upon my VAP CP
11 because they know the rules and regulations that are
12 promulgated by the VAP and have had discussions with
13 people within the Ohio EPA specifically about
14 tar-like material and soil -- oil-like material,
15 source like material.

16 Q. And when you would turn to page 27, line
17 16 to 18 --

18 A. What lines, please.

19 Q. 16 to 18.

20 A. Yes.

21 Q. And it says there "As with the East
22 Parcel, capping was considered but not selected as a
23 viable option for long-term risk management and did
24 not meet Ohio EPA VAP requirements."

25 Can you point me to the VAP rules where

1 those requirements exist?

2 A. Those VAP requirements, as stated in
3 other parts of my supplemental direct testimony, had
4 to deal with the oil-like material and the tar-like
5 material that was located on that site, so it
6 connects back to the last couple of questions you
7 asked me.

8 Q. So you have no opinion on whether the --
9 or your opinion -- strike that.

10 Your opinion is based solely on what the
11 Ohio EPA VAP CP told you with regards to whether or
12 not capping was a viable option at the -- at the east
13 parcel; is that correct?

14 A. The decision was based upon what the VAP
15 CP told me as to how Ohio EPA looks at treating
16 oil-like material and source like material and also
17 making sure that we were being protective of human
18 health and the environment and meeting all applicable
19 standards. Of course, we also included in that
20 evaluation the long-term risk and liability related
21 to the site.

22 Q. Did you have any independent knowledge of
23 what the VAP required under the -- for that
24 requirement under the VAP rules?

25 A. Related specifically to the oil-like

1 material and tar-like material, which is what is
2 referenced in that supplemental testimony, as I
3 previously stated, I relied upon what was told to me
4 by my VAP CP.

5 Q. And, Ms. Bednarcik, the VAP CP whose
6 opinion you are relying on in this case, are there --
7 have they filed testimony in this case?

8 A. One of the VAP CPs who has worked
9 specifically on the remedial action, implementation
10 of the remedial action at the East End has filed
11 testimony as per the VAP certified professional
12 program specifically. The other VAP CPs have not
13 filed testimony in this matter.

14 Q. When -- I'm referring now to your
15 supplemental testimony, page 25, lines 12 to 16, when
16 were those determinations made?

17 A. The determinations were made as part of
18 developing the strategy for the remedial options in
19 order to determine what needed to be done in the
20 site. Of course, I had discussions with my VAP CP,
21 well, how does Ohio EPA look at the tar-like
22 material, oil-like material, the source material in
23 the ground? What do we need to do with this in order
24 to meet applicable standards?

25 Q. And which CP was that that you had those

1 discussions with?

2 A. For the East End site that would have
3 been the CP who worked for Burns & McDonnell who
4 developed the remedial action plan for the east
5 parcel and the west parcel at East End, and at the
6 West End site it was the CP who worked for AECOM who
7 was the firm that -- that was hired in order to do
8 the investigation who prepared the basis of the
9 design memorandum.

10 Q. And that CP is not -- has not filed
11 testimony in this case.

12 A. That CP has not filed testimony but I
13 have had discussions with Mr. Fiore who is the CP who
14 has filed testimony specifically about the -- how
15 Ohio EPA looks at tar-like material and oil-like
16 material. Of course, I also had conversations with
17 legal counsel and based upon their experience working
18 in Ohio and with these type of materials in the
19 ground.

20 Q. But, again, Mr. Fiore has not filed
21 testimony with regards to what the -- what the VAP
22 requirement -- what the -- what the requirements were
23 at the time that the remedial action plan was being
24 developed, correct?

25 A. It is my understanding that the

1 requirements or the way that the VAP looks at
2 tar-like material and oil-like material has not
3 changed since the time that those documents were put
4 together. But you'll be able to, of course, ask
5 Mr. Fiore that.

6 MR. SAUER: Go off the record for a
7 minute, your Honor?

8 EXAMINER STENMAN: Yes.

9 (Discussion off the record.)

10 EXAMINER STENMAN: Let's go back on.

11 MR. SAUER: May I approach the witness,
12 your Honor?

13 EXAMINER STENMAN: You may.

14 MR. SAUER: I would like to have marked
15 OCC Exhibit No. 3, this is three-page discovery
16 responses to OCC request for production 15-156,
17 interrogatory 15-627, and interrogatory 15-631.

18 EXAMINER STENMAN: It will be so marked.

19 (EXHIBIT MARKED FOR IDENTIFICATION.)

20 Q. (By Mr. Sauer) And, Ms. Bednarcik, have
21 you been handed the documents that have been marked
22 OCC Exhibit 3?

23 A. Yes, I have.

24 Q. And can you identify those documents for
25 me?

1 A. They are OCC-POD-15-156, 15-627, and
2 15-631.

3 Q. And you are the same Jessica Bednarcik
4 who was the person identified as responsible for the
5 response?

6 A. Yes.

7 Q. Referring to the first document request
8 for production 15-156, in the response Duke is
9 identifying annual budgets for the two projects, the
10 East End project and the West End project, for the
11 years 2008 to 2012; is that correct?

12 A. That is correct.

13 Q. And under the column labeled "OMGPESSEND,"
14 would that be for the East End MGP site?

15 A. Yes.

16 Q. "OMGPWSEND" would be for the West End
17 site?

18 A. Yes, that is correct.

19 Q. And if you look at interrogatory 15-627,
20 Duke's responses to inquiry regarding Duke's budget
21 process for the MGP remediation, correct?

22 A. Yes.

23 Q. And looking at the response to OCC
24 interrogatory 15-627, it states budgets are initially
25 compiled in June or July of the previous year,

1 correct?

2 A. That is for the amount of money that is
3 expected to be spent in the following calendar year.

4 Q. Do you know when the annual budget is
5 typically approved?

6 A. I do not.

7 Q. Has your involvement at the East End site
8 covered the years 2008 to 2012?

9 A. I started to become involved with the
10 East End site in 2008.

11 Q. And has your involvement at the East End
12 site -- the West End site, excuse me, covered the
13 years 2008 to 2012?

14 A. Yes.

15 Q. And is the preparation of annual budgets
16 for these sites included within your job
17 responsibilities?

18 A. Yes, again, this is for what the -- we
19 expect to be spent in the following -- following
20 calendar year and I think as I was looking through
21 the deposition, I think there was some confusion as
22 to what the budget meant. Specifically for these
23 production of documents it was, again, only what
24 we -- the cash flow of what was expected for that
25 next calendar year but it was not a budget per se for

1 all the work that was known at that time that needed
2 to be carried on at the site.

3 Q. How -- maybe I don't understand the
4 differentiation between the cash flow and the actual
5 expenditures for the projects that you anticipate
6 will be completed during the budget year.

7 A. Based upon accounting rules and what is
8 required for disclosures, when an environmental
9 liability is both known -- is -- actually the words
10 are probable and can be estimated, Duke Energy as a
11 company has a legal requirement -- liability
12 requirement to actually budge -- not "budgets,"
13 that's wrong word, to reserve, there is an
14 environmental reserve as soon as work can be
15 estimated, probable and estimable, we are required to
16 actually reserve those dollars into a separate
17 account. And that is based upon the information that
18 is known at that time.

19 I prepare an update of those reserves,
20 those environmental reserves that are reported in our
21 annual reports and our 10-K and also in our 10-Qs for
22 all the jurisdictions based upon what's probable and
23 estimable at that time of that report on a quarterly
24 basis.

25 These budgets themselves are related to

1 what the cash flow is expected, when do we actually
2 think we are going to implement the actions on the
3 site. So once I know something is probable and
4 estimable, I am required by law to actually disclose
5 that in our annual reports and make my management
6 aware of it in filings and then these numbers are
7 specifically related to when based upon scheduling,
8 permits, what we actually think we are going to be
9 spending in the next -- in the next calendar year.

10 Q. When you say under law when you identify
11 something that's probable and estimable, are you
12 talking about, for example, the East End site, what
13 the total remediation project cost is going to be?

14 A. The -- what you are required to disclose
15 under -- under the public documents on annual and
16 quarterly reports is what is probable and estimable
17 at that point.

18 It's not a total remediation not to clean
19 up the entire site because you only know what you
20 know and you are required to reserve the money for
21 what you know at that time. In the disclosure
22 documents a great example is the annual report that
23 Duke Energy just sent out. We disclose what is in
24 that environmental reserve for Duke Energy Ohio. The
25 dollars that are in there are different than the

1 dollars that were in the 2013 budget because not all
2 that work is actually going to be spent or done in
3 2013.

4 We also in that annual report do give a
5 worst case which we believe based again on what we
6 know right now of what information we have available
7 to us, what we believe would be a nonrisk based clean
8 closure cleaning it up so day cares could be on the
9 facility.

10 We have disclosed that amount also in our
11 public documents. We are required to give a range
12 although in the environmental reserve what is the
13 most probable and estimable numbers is actually what
14 is put in this environmental reserve.

15 Q. I think I heard you say in the answer,
16 maybe that one or previous one, that you looked at
17 your deposition transcript and you thought there was
18 some confusion. Did you prepare an errata sheet to
19 identify where there may have been some confusions in
20 your responses?

21 A. It wasn't confusion in my responses. It
22 was -- it was I was answering the questions based
23 upon the questions that were -- or I was answering
24 based upon the questions you were asking me on budget
25 and upon reading it I come -- it's my belief that the

1 way that Duke Energy does the budget is not what you
2 were thinking related to the budget based upon total
3 costs of the site, is the way you asked it.

4 Q. See if I can parse through this. In
5 April or -- I'm sorry, June or July of 2007, you had
6 prepared the 2008 budget.

7 A. For what would be spent in that calendar
8 year, yes.

9 Q. Right.

10 A. Or expect to be spent.

11 Q. In 2007, you may have understood that the
12 costs or the probable or estimable costs associated
13 with that site may have far exceeded the \$200,000 you
14 had in the budget.

15 A. That's exactly right.

16 Q. All of your 2008 budget reflects what you
17 anticipate you will -- you will be spending on
18 investigating or remediated site in that calendar
19 year.

20 A. That is correct.

21 Q. I don't think there was any confusion on
22 my part.

23 A. Okay. Then that's my --

24 Q. Okay.

25 A. I'm sorry if I didn't portray it

1 correctly and how I thought you were understanding
2 it.

3 Q. So when you are compiling your 2009
4 budget, are you working from a clean slate or do you
5 start with the 2008 budget and add to the budget for
6 known changes?

7 A. Again, the 2009 budget was based upon
8 what I expected to spend in that calendar year. What
9 I do is look at what is in that probable and
10 estimable what I believe needs to be done on the site
11 based upon the known information and what had
12 actually been executed and completed on the site, of
13 course, that would have been subtracted from that
14 total probable and estimable.

15 If we found out more information on the
16 site that would have increased that probable and
17 estimable, then that number would go up. I would
18 look at that total number for what needed to occur on
19 the site and say what can we do in the next 12 months
20 calendar year and that is what is reflected in this
21 budget number.

22 Q. Are you given any instructions or
23 guidelines from management on how to compile your
24 budget?

25 A. I -- whenever I compile the budget,

1 management asks me what do I expect to be spent in
2 the next calendar year based upon the remediation
3 schedule.

4 Q. For example, does management provide you
5 labor cost adjustments or provide you inflation
6 factors?

7 A. No.

8 Q. Are there any special reporting
9 requirements if your budget increases by a certain
10 percentage from one year to the next?

11 A. No. When the budget is created, I
12 describe what I expect to complete in that next
13 calendar year to my management.

14 Q. Looking at the East End site budget for
15 2008 and 2009, that budget jumped from 200,000 to 2.5
16 million, over ten-fold increase. Did that
17 necessitate any reporting to management to justify
18 the year-to-year increase?

19 A. Specifically related to the 2008 budget
20 to 2009 budget East End, those dollars, of course,
21 had already been disclosed in the environmental
22 reserve in our 10-K. What that shows is that 2008 we
23 were just doing the investigation. In 2009 we were
24 starting the remedial action so, of course, that
25 remedial action costs more than an investigation.

1 Q. Would the answer to that question be "no"
2 that it didn't require any management reporting?

3 A. My management knew that was in the plan
4 to be carried out in 2009.

5 Q. At any point in your involvement with the
6 East End site, have you provided to management an
7 estimate of what you believe will be the total cost
8 to remediate that MGP site?

9 A. Every quarter I prepare and give to my
10 management and to the accounting personnel a new
11 probable and estimable based upon what is known at
12 that time. It's not necessarily a total cost to
13 complete the site because we have not investigated
14 the entire site yet, so it's only based upon what I
15 know at that time.

16 Q. And what's the most recent estimate that
17 you've provided to management that's known and
18 estimable? For the East End site?

19 A. For the East End site? I specifically
20 don't have the numbers. I don't remember the
21 specific numbers for East End and West End. I
22 believe that in the most recent annual report we gave
23 a number -- I can't remember because I would do the
24 reporting, of course, for the entire environmental
25 liability of the company.

1 I believe it was somewhere in the
2 ballpark of 16 million for the probable and estimable
3 based on what we know combined East and West End, but
4 that number would have to be verified with the annual
5 report. It's just based on my memory right now.

6 Q. And that -- that number is in addition to
7 the 65 million that's already been spent?

8 A. It is based upon, again, what I -- what
9 we believe we will have to spend going from
10 forward -- this point forward what we have liability
11 for known right now. Noted what we have, of course,
12 spent already.

13 Q. At any point in time in your involvement
14 with East End has management asked you for an
15 estimate that would provide them with a number in
16 terms of what the total investigation and remediation
17 costs would be going forward during the 2008 to 2012
18 timeframe?

19 A. I guess it sounds to me like you were
20 asking two totally different questions. Can you
21 restate the question for me, make it clearer, please?

22 Q. Certainly, certainly. At any point in
23 your involvement with the East End site, has Duke
24 management asked you for an estimate of what the
25 total remediation and investigation costs would be

1 for that site?

2 A. Again, we're continuing to do
3 investigations on the site and management knows that
4 I can only come up with a number that is probable and
5 can be estimated based upon what I know right now.
6 So they know that I cannot expound and make up a
7 number without any facts to back it up. When more
8 information becomes available on a quarterly basis, I
9 update that -- that amount that goes into the
10 environmental reserve what we know right now is
11 needed to carry us through to clean up the site based
12 upon what we know right now.

13 Q. In 2008 for the two sites you had a
14 \$210,000 budget. Sitting here now Duke is asking for
15 recovery of \$65.3 million, correct?

16 A. That is correct.

17 Q. Was there any point in time during this
18 timeline that you provided management with a
19 projection of what the total costs would be in terms
20 of what Duke would be seeking in terms of recovery
21 from customers during that timeframe?

22 A. I believe this is how I'm reading your --
23 or understanding your question. When we -- Duke
24 Energy filed for the rate case last March, I was
25 asked to project what the cost spend would be through

1 the end of 2012. Other -- I mean that's what we are
2 asking in this proceeding right now so I guess I'm a
3 little confused what exactly you're asking.

4 Q. If I understand your testimony, you have
5 no reporting requirements. Your budget in 2008
6 jumped from 200,000 to 2.5 million and that didn't
7 trigger any --

8 MR. McMURRAY: I am going to object. I
9 don't believe the witness testified that she has no
10 reporting requirements and so, you know, I think
11 that's mischaracterizing her testimony.

12 EXAMINER STENMAN: The objection is
13 overruled. The witness is always free to clarify.

14 Q. I'll rephrase.

15 A. Thank you.

16 Q. Was there any reporting requirement that
17 you provided to management as you were preparing the
18 2009 budget to justify the increase that went from
19 200,000 to 2.5 million?

20 A. Again, the 200,000 was the investigation.
21 The 2.5 million was the remediation. I have
22 quarterly updates with finance related upon the
23 environmental reserve and I also have meetings with
24 my management, with my direct supervisor, at that
25 time I had had a meeting with him on a monthly basis.

1 I also had meetings with a wide variety
2 of people within Duke Energy who are connected to the
3 MGP sites, including gas operation personnel,
4 finance, senior leaders, to describe what had
5 happened at the site in the previous -- I think we at
6 that time we were having quarterly meetings at a
7 minimum, what happened at the site, what we expected
8 to do on the site in the next couple of months going
9 forward, and when remediation was slated to begin.

10 So management was aware that the 2.5
11 million would be coming because they knew that the
12 remediation was going to begin in 2009.

13 Q. And then similarly from 2009 to 2010 the
14 budget goes from 2-1/2 to almost 7-1/2 similar
15 conversations, is that -- is that how the budget
16 process worked?

17 A. Since around 2008, 2009, I've had
18 quarterly meetings with, again, leaders within Duke
19 Energy, the gas department, within power delivery,
20 environmental services, to talk about what had been
21 completed on the site and what was expected to occur
22 on both of the sites going forward.

23 I also have meetings with my direct
24 managers on a minimum monthly basis, and any time
25 there was any changes in the field that would

1 necessitate a larger change order or something that
2 we found in the field that we didn't know about, of
3 course, I let my management know about it. It's a
4 lot of money. They want to keep track of what's
5 going on.

6 Q. At any point in time during the meetings,
7 was there a point where your analysis of the budget
8 changes was put into writing for management?

9 A. The budget year by year as to what we
10 expected to spend that following year?

11 Q. Quarterly.

12 A. On the quarterly updates we would have
13 what had been spent in the past, of course, we keep
14 track all the time. I constantly give my management
15 updates on what has been spent to date and I give
16 them a -- an idea of what we are doing next, and if
17 there is going to be any changes to the budget, of
18 course, I will talk to them based upon the new
19 information we found.

20 But, I guess I'm a little confused
21 exactly what you are asking. I talk to my management
22 all the time; if there's any changes year to year
23 it's -- they know what's expected in the following
24 year.

25 Q. I understand discussions with management.

1 I'm just trying to get an understanding of whether
2 any of this is put into writing and there are reports
3 or documentation of budget decisions that go on.

4 A. Well, I know when I create the budget,
5 again, for the spend in the following year on the
6 line item at the end, we have to put down this is for
7 the remedial action at East End, the soil excavation
8 East End, and so, therefore, when the budget is
9 approved, they see exactly what it's for.

10 Q. And if you look at the 15-156 on OCC
11 Exhibit No. 3, there's a response about actual versus
12 budget management reports were not generated. Do you
13 see that?

14 A. Yes.

15 Q. All discussions between project managers
16 and management concerning variances to the budget
17 were done verbally.

18 A. Yes, I see that.

19 Q. So there's no writing or no written
20 documentation to explain to management why you
21 overspent or underspent your budget.

22 A. Nothing written, but, again, I meet with
23 them on a quarterly basis at a minimum and I know my
24 management gets budget reports every single month and
25 they'll come by and ask me Jessica, why are we over

1 budget right now and underbudget, and I tell them,
2 well, it's because we found more material out there
3 or we were slowed down because of rain and we had to
4 go on -- we had to stop the work for a while. Or
5 that we haven't received our permits yet so we can't
6 start the work at the site. So we have discussions
7 all the time.

8 Q. But nothing in writing.

9 A. Nothing in writing.

10 Q. Okay. In 2012 between the two sites --
11 I'm sorry, let's look at 2011, there's almost a
12 \$35 million budget for the two sites. Do you see
13 that?

14 A. Yes.

15 Q. And there's no -- do you get monthly
16 reports in terms of what the actual versus the budget
17 items are? Do you get a report from management
18 documenting what those actual budget variances are?

19 A. My management gets that. I did not start
20 getting that until I became a manager. And for the
21 remediation sites because management knows there is
22 so much variability that happens at the sites, again,
23 did we receive a permit in time? Was it delayed?
24 Rain delays in sometimes things take longer.
25 Sometimes they don't take as long.

1 They know that there's a lot of
2 variability so they do not really focus in if we're
3 for that specific month over or not. They would --
4 they really look at the long-term liability on the
5 site and short-term liability and what the overall
6 costs.

7 Q. But to the extent you can potentially
8 exceed the overall costs, you're not required to put
9 anything in writing as to why that happened?

10 A. I'm not required to put it in writing but
11 we discuss it.

12 MR. SAUER: May I approach, your Honor?

13 EXAMINER STENMAN: You may.

14 (EXHIBIT MARKED FOR IDENTIFICATION.)

15 Q. Ms. Bednarcik, I believe you have been
16 handed what's been marked as OCC Exhibit 4. Can you
17 identify what that document is?

18 A. They are OCC-INT-11-495, interrogatory
19 17-662, and interrogatory 17-665.

20 Q. And do you recognize these documents? In
21 fact, you're the person responsible identified as
22 17-662 and 17-665 correct?

23 A. For those two. I was not identified for
24 the first one.

25 Q. That was prepared by Michael Covington?

1 A. That is correct.

2 Q. And do you know Mr. Covington?

3 A. I do not.

4 Q. And have you seen this response before
5 today?

6 A. No. This is the first time I'm seeing
7 it.

8 Q. And do you have any reason to doubt the
9 accuracy of the information contained on Duke's
10 response to OCC interrogatory 11-495?

11 A. Seeing that I have looked at a number of
12 10-Ks and 10-Qs in 1990s, yes, I believe with this
13 comment, this answer.

14 Q. You explain what you mean in the response
15 to OCC interrogatory 17-662 and 17-665 that Duke knew
16 that site remediation would be required once the
17 impacted material was confirmed on the site, during
18 the initial subsurface investigation in 2006 and 2010
19 respectively?

20 A. Duke Energy -- the fact that we owned
21 and/or operated historic manufactured gas plant sites
22 means that we -- we have that liability if there is
23 contamination on the property so, therefore, we do --
24 I have a list of all the manufactured gas plant sites
25 I look at every single month and look at it and go,

1 okay, how -- where are we with these sites and have
2 we started looking at them or not?

3 We don't know specifically if we truly do
4 have a liability until we find the contamination in
5 the ground. So specifically related to interrogatory
6 17-662 the first time we actually put the soil boring
7 into the ground at the East End site was 2006-2007
8 when we started the investigation and that had
9 confirmed knowledge that there really was
10 contamination on the property.

11 Q. You made a change to your supplemental
12 testimony I believe to change a date from 2006 to
13 2007?

14 A. Yes.

15 Q. Would that be applicable here?

16 A. It would. The subsurface investigation
17 actually started in 2007. 2006 I know that there was
18 some discussions around looking at do we start an
19 investigation or not. But the actual work I believe
20 began in 2007, the first time we took a soil sample.

21 Q. Are you suggesting that there was
22 something going on in 2006 that created the confusion
23 in the dates, or am I misunderstanding?

24 A. No. It was my confusion. I really did
25 not get involved in the sites until 2007. I do know

1 that there was some -- there was another project
2 manager who was involved in the site in 2006 and the
3 first part of 2007, and when I went back and looked
4 at the documents, I realized the actual first time
5 the soil sample was taken was 2007, although
6 discussions with the VAP CP and the environmental
7 consulting firm I believe did occur in the latter
8 months of 2006.

9 Q. Now, there was no budget amount for 2007,
10 the budgets we were looking at went from 2008 to
11 2012. So are there -- do you know what potentially
12 was spent in 2007?

13 A. When we -- in order to respond to the OCC
14 POD-15-156, I contacted our financial department and
15 asked them to pull the budget numbers and they only
16 had the budget numbers going back to 2008.

17 Q. Okay. If you could turn to your
18 supplemental testimony page 16, lines 15 to 18.

19 A. Can you repeat that, please.

20 Q. Supplemental testimony page 16, lines 15
21 to 18.

22 A. I'm there.

23 Q. You discuss since 1988, Duke Energy Ohio,
24 you just say Duke Energy has been systematically
25 reviewing all of its MGP sites. Do you see that?

1 A. Yes.

2 Q. Does your testimony include what was
3 formally Cincinnati Gas & Electric Company or does
4 that testimony only address Duke Energy outside of
5 Ohio?

6 A. I know specifically Duke Energy Carolinas
7 had been reviewing those MGP sites since 1988, Duke
8 Energy merged with Cinergy which is Cincinnati Gas &
9 Electric, and Public Service of Indiana in 2006. At
10 that time, of course, is when the projects merged.

11 I do not know exactly what date the
12 Indiana and/or Ohio sites were starting to be
13 reported in their 10-Ks and Q or when they started
14 looking at prioritizing their sites specifically, but
15 I do know Duke Energy as a whole has started since
16 1988.

17 Q. Do you know if the Duke in the Carolinas
18 was investigating their sites back in 1988 because of
19 the passage of CERCLA?

20 A. I was not part of Duke Energy until 2005,
21 but it is my understanding based upon discussions
22 with previous project managers that in the Carolinas
23 we had received a direct order from the State of
24 North Carolina to start looking at the North Carolina
25 MGP sites. I do not remember exactly when that

1 occurred but I believe it was around that time
2 period.

3 Q. Are you saying there was an enforcement
4 action or something going on in the North Carolina
5 area?

6 A. We were contacted by North Carolina,
7 actually I believe that there was one site that was
8 being developed and as they were excavating the site
9 to do a development, they came upon the tar-like
10 material, source like material. It's this big odor,
11 of course, come out of downtown Greensboro, North
12 Carolina, and Duke Energy was called and we showed up
13 at the site and we said we need to address this. We
14 have a problem, and that's really when the MGP
15 program started in North Carolina.

16 I do not know exactly when that
17 administrative order consent was signed between the
18 North Carolina Department of Environment Natural
19 Resources and the company, but it was all around the
20 same time period. Kind of went hand in hand.

21 Q. So if Duke did not know that site
22 remediation would be required until the initial
23 subsurface investigations took place in 2006 -- I'm
24 sorry, 2007, what type of information was CG&E
25 providing its shareholders beginning in 1997 as

1 indicating Duke's response to interrogatory 11-495?

2 A. I believe that the -- again, that was
3 Cinergy at that time, I don't know exactly when PCI
4 and CG&E combined and formed Cinergy but prior to the
5 merger of Cinergy and Duke Energy is my understanding
6 that they had already started on their Indiana
7 manufactured gas sites. They had performed
8 remediation on one site in Lawrenceburg, and those
9 were disclosed in the SEC documents. So that there
10 was some disclosures about the liability related to
11 the MGPs.

12 Q. Were they providing an estimate of what
13 potential exposure or liability would be for the MGP
14 sites?

15 A. It has been some time since I have
16 reviewed the quarterly and yearly reports from
17 Cinergy from like 1900 -- or 1990s. I don't remember
18 specifically what was disclosed.

19 Q. Do you know when Duke first established a
20 reserve to reflect the potential liabilities for the
21 East End site?

22 A. I don't know exactly when the reserves
23 was established. I believe that the accounting rules
24 that required the establishment of reserve were
25 promulgated I think in the early 1990s but I don't

1 know the specific dates because I'm not in
2 accounting.

3 Q. But you're involved in providing the
4 accountants the numbers or the estimate for the
5 reserve, correct?

6 A. I have since 2006.

7 Q. And there was a reserve established prior
8 to being involved in 2006?

9 A. Yes.

10 Q. Looking at page 28 of your direct
11 testimony. There you ask yourself a question
12 regarding the work done at the East End and West End
13 sites compared to the MGP sites owned by other
14 utilities. Do you see that?

15 A. Yes, I do, lines 15 through 17.

16 Q. Are the MGP sites you're referring to
17 sites owned exclusively by utilities?

18 A. Yes.

19 Q. And who else may have owned an MGP site?

20 A. There are some municipalities that own
21 MGP sites. Those -- actually municipalities are the
22 only other entities that I know of that own MGPs.
23 There may have been some private sectors but the main
24 ones I'm aware of are the utilities who own the
25 majority and a few municipalities.

1 Q. Do you know how many MGP sites are in
2 Ohio?

3 A. I believe that information is in
4 Dr. Middleton's testimony. I think this was a
5 radiant report that was published by USEPA or Ohio
6 EPA that said something around 90 but, again,
7 that's -- those are in those radiant reports
8 referenced in Dr. Middleton's testimony.

9 Q. And how many of those sites in Ohio are
10 in Duke's service territory?

11 A. Based upon our information thus far and
12 specifically in Ohio, we believe that East End and
13 West End are the only two MGP sites associated with
14 Duke Energy Ohio.

15 Q. Are there any MGP sites located within
16 Duke's service territory that weren't owned by Duke
17 or a predecessor of Duke?

18 A. Specifically within Ohio?

19 Q. Yes.

20 A. Not that I know.

21 Q. And of the 90 sites that you are aware of
22 or you think are in Ohio, do you know how many of
23 those are owned by investor-owned utilities?

24 A. I do not know.

25 Q. Are you familiar with the cleanup work

1 done at other MGP sites that are not owned by public
2 utilities?

3 A. Yes, in other states.

4 Q. And what do you know about their
5 remediation actions?

6 A. In North Carolina there's actually a
7 North Carolina MGP group that everyone who owns an
8 MGP in North Carolina we get together, we share
9 information, and I know that those municipalities are
10 conducting their remediations in the same exact way
11 that the utilities are.

12 Q. You say "the same exact way," what do you
13 mean?

14 A. They are conducting an investigation and
15 doing soil remediation based upon regulatory
16 guidelines and/or in order to meet all the applicable
17 standards in that state.

18 Q. Are the North Carolina -- well, let me
19 ask you, in North Carolina is there a program similar
20 to the VAP in Ohio?

21 A. Yes.

22 Q. And would you say the North Carolina VAP
23 is more stringent than the Ohio VAP?

24 A. Actually the cleanup of the manufactured
25 gas plants in North Carolina is conducted under an

1 administrative order. We have one specific regulator
2 in North Carolina whose whole job is to manage the
3 remediation of the MGP sites in North Carolina, so
4 it's a different type of program specifically for the
5 manufactured gas plants themselves.

6 Q. Are the requirements themselves in your
7 opinion more stringent than the requirements in Ohio?

8 A. Related specifically to what?

9 Q. To the remediation requirements.

10 A. In how tar-like material and oil-like
11 material are handled, it is very comparable. Related
12 to the cleanup of -- cleanup of soil that has
13 chemicals in it, chemical constituents like benzene,
14 naphthalene, very similar related that there are
15 standards we have to meet and we do risk assessments
16 related to groundwater.

17 I believe in some cases the groundwater
18 standards in North Carolina are more stringent than
19 Ohio and in other cases the groundwater standards are
20 less stringent. It's very state specific so in
21 general they are very similar.

22 Q. When you say -- the standards being what
23 the remediation requirements are, is that what you
24 are referring to?

25 A. The standards are the number that -- I'll

1 talk about groundwater specifically. And as you
2 monitor the groundwater, you get -- you figure out by
3 taking a sample, sending it to the lab, you will get
4 an actual number related to the amount of benzene,
5 for example, that's in the groundwater.

6 You can look at that number of benzene
7 and look in North Carolina you have to meet, and
8 these numbers are, off the top of my head, a
9 groundwater level of 5 micrograms per liter.

10 I don't remember exactly what the number
11 is in Ohio, it may be exactly the same because that's
12 the USEPA maximum contaminant level so those numbers
13 may be exactly the same to meet groundwater
14 benzene-wise in North Carolina and Ohio that's the
15 standard I'm talking about.

16 Q. But they may be different, you don't
17 know.

18 A. For groundwater specifically they are
19 never higher than the USEPA maximum contaminant
20 levels but different states have looked at different
21 constituents in the different groundwater at
22 different levels. Same way with soil. Not
23 necessarily with tar-like material and oil-like
24 material.

25 Most -- most states, actually every state

1 I've actually worked in would like to have you remove
2 it to the most amount that you can if it's
3 technically practical to remove it. Or treat it.

4 Q. What do you mean by "technically
5 practical"?

6 A. If it's not sitting under my building, if
7 you can -- if you can get to it in a way that is --
8 if it's sitting within the cracks of bedrock, USEPA,
9 most states will look at that and say I can't get
10 that tar out of those little fissures and cracks and
11 bedrock.

12 You really can't do anything with that
13 but the soil above that, if you can stabilize it or
14 treat it, they would like you to do that because that
15 takes care of the source material and limits the
16 impacts to the groundwater to the human health and
17 the environment and it also helps remove future
18 liabilities.

19 Q. But those are your decisions as an
20 operator in remediating a site. There may be other
21 methods that are less drastic that are options as
22 well, correct?

23 A. Specifically related to handling the
24 source like material that's in the ground. The
25 majority of the ways to handle that are excavate --

1 most places like you to excavate it or solidify it,
2 most states, based upon my knowledge and what I've
3 seen working in six different states --

4 Q. You say they like you to. Does that mean
5 they require you to?

6 A. If it's not technically practical to
7 remove it, then you work with them in order to
8 determine, well, how do we manage it, how do we
9 monitor it to make sure that it's not going to harm
10 anybody in the future? It's not going to continue to
11 be a source of contamination in the groundwater?

12 So we look at it very much a site by site
13 what can we get to -- what the site is going to be
14 used, who are the receptors, what receptors are
15 there, for example, a river or an adjoining property
16 owner, and how best to handle it. It's very site
17 specific.

18 Q. And when you -- when you use the term
19 "manage" and "monitor it," are you talking like
20 through engineering controls or institutional
21 controls as a way to manage it?

22 A. That's one option but, again, all of the
23 project managers I've dealt with in states, if you
24 can get it out or solidify it, that's what they want
25 you to do.

1 Q. You say the project managers want you to
2 do that?

3 A. The project managers that are hired by or
4 that work directly for the state regulatory bodies or
5 the USEPA.

6 Q. And when their desire is you get it out,
7 are they looking at what is the cost involved to get
8 that out, as you say?

9 A. No.

10 Q. Is that a consideration?

11 A. It's, as we stated -- as I stated
12 earlier, the two criteria that are always handled are
13 protection of human health and the environment and
14 meeting all applicable standards. Cost is one of the
15 secondary tier of things that are looked at.

16 For example, I'm working on a site in
17 Florida right now that the USEPA is telling us that
18 we need to demolish some buildings that are currently
19 used by -- by tenants that have businesses in it in
20 order to remove the tar that's in the ground.

21 Q. And that's a USEPA requirement, right?

22 A. At that site specifically it is led by
23 USEPA and they are requiring us to remove the tar in
24 the ground which involves taking out these buildings,
25 and they didn't look at the cost of removing the

1 people from the site or taking down the buildings in
2 making that determination.

3 Q. Are there -- are there soil impacts on
4 the East End or West End sites that are located under
5 buildings that are at the sites?

6 A. At the -- at the East End and West End
7 site we have not taken samples through the floor of
8 the buildings at either site. Right now, the way
9 that we are looking at those specific buildings is
10 that it is technically impractical to remove those
11 buildings mainly because at the East End site it's a
12 gas plant.

13 It's providing continual source of --
14 it's providing gas to our customers so what we would
15 do on that site is look at if there is anything under
16 the building, take -- manage, treat whatever we can,
17 but if there is some areas that we can't get to that
18 material, of course, we'll manage it in a different
19 way until a future time when maybe we're not using
20 that gas plant any more and we take it down.

21 For example, I have a site in North
22 Carolina that we have an agreement with our state
23 regulator that we told him it's an operations
24 building. If we have to demolish this operations
25 building, it's going to cause a huge economic impact

1 to the community because our line crews will have to
2 leave.

3 And he has agreed that we have to manage
4 it and monitor it until that building comes down and
5 then we have to excavate all of it and, of course,
6 excavating in years, we already have to put that
7 money aside because we know we have to do it.

8 Q. So you're putting in place an
9 institutional control or engineering control to
10 monitor that.

11 A. At that specific site, but every time
12 anybody goes out to that site to replace a fencepost
13 or to do anything on the property, they have to call
14 me and I have to send out a specialized crew to dig
15 out that small little area of the site in order to
16 make it protective for them.

17 And that specifically is right next to
18 that building so we manage these sites the same way
19 across the board. That site in North Carolina
20 actually has no residents around it either. That's
21 another big point.

22 Q. If you could turn to your supplemental
23 testimony page 4, line 7 to 10.

24 A. Could you repeat the page and lines
25 again, please.

1 Q. Page 4, line 7 to 10 of your supplemental
2 testimony.

3 A. Okay, I'm there.

4 Q. You state it to be your understanding
5 that Duke has liability for remediating contamination
6 of the entire site from such operations under federal
7 law, specifically CERCLA, correct?

8 A. I state that's upon advice from counsel
9 that that's my understanding.

10 Q. And is it your understanding this
11 liability exists because Duke or its predecessor was
12 an operator of the East End and West End MGP sites?

13 A. Owner and/or operator, yes.

14 Q. In fact, page 2 of your supplemental
15 testimony you state it's "undeniable that the
16 contamination of these two sites was due to the
17 existence and operation of MGPs, used in the
18 provision of gas utility service to customers in the
19 company's southwestern Ohio service territory,"
20 correct?

21 A. Are you talking specifically like page 2,
22 lines 13 through 16?

23 Q. Yes.

24 A. Yes.

25 Q. And by virtue of taking service from the

1 MGP plants, the federal regulation deems Duke to be
2 the responsible party, does not deem customers to be
3 a responsible party, does it?

4 A. As I am not a lawyer or in the ratemaking
5 business, my job is to look at the environmental
6 regulations and to clean up the sites per the
7 environmental regulations.

8 Q. Is your answer you don't know?

9 A. I'm not a -- on the rate side of the
10 company. I don't know.

11 Q. Looking at your supplement testimony page
12 5, lines 14 to 15 you state "Customers benefited from
13 the services provided by plants of this -- at this
14 location," for East End site. Do you see that?

15 A. Yes, I see that.

16 Q. And what customers are you referring to?

17 A. The customers who benefited from the
18 manufactured gas when it was actually manufactured.

19 Q. So you're talking about customers for the
20 East End site to be 1840s to the 1963 time period
21 when MGP stopped manufacturing gas?

22 A. Yes.

23 Q. And looking at your testimony, your
24 supplemental testimony again, page 6, lines 14 to 15,
25 I believe, you stated customers benefit from the

1 services provided at this location.

2 A. I see that.

3 Q. And, again, what customers are you
4 referring to?

5 A. Those are the customers that received the
6 gas during the time that it was in operation. Again,
7 cleaning up these sites because we have the liability
8 now is a cost of doing business for Duke Energy Ohio.

9 MR. SAUER: I would ask to strike the
10 response. That wasn't responding to my question.

11 EXAMINER STENMAN: Motion to strike will
12 be denied.

13 Q. I think I asked what customers are you
14 referring to? Are those the customers that were
15 served by the West End site between the time period
16 of like 1840 to 1928.

17 A. That's what I just responded to. It's
18 those customers who received the gas during the
19 operations of the plants.

20 Q. And I was just specifying the time period
21 was 1840 to 1928, somewhere around that time period?

22 A. I would have to check the exact dates but
23 around that time period, yes.

24 Q. And would you say that shareholders also
25 benefited from the operation of those plants?

1 A. As I do not know how -- how all of the
2 accounting works and how it works in the
3 shareholders, I don't know specifically but I would
4 assume so.

5 Q. Your understanding is that Duke is
6 attempting to recover from its customers \$65.3
7 million that has been expended investigating and
8 remediating East End and West End MGP sites?

9 A. It is my understanding that that is the
10 basis of these proceedings.

11 Q. And what's your understanding of the PUCO
12 ratemaking formula?

13 A. I have no understanding of the PUCO
14 ratemaking formula.

15 Q. Do you understand the concept of used and
16 useful?

17 A. I do not understand it except as it was
18 described in the Staff Report. That was the first
19 time I saw it.

20 Q. And, again the East End site ceased its
21 operation in 1963 and West End ceased its operation
22 in 1928, correct?

23 A. Specifically what ceased what operation?
24 The operation of the manufactured gas plants?

25 Q. Yes.

1 A. At West End, yes. At East End, as
2 Dr. Middleton explained earlier, that actually the
3 propane plant is still a form of manufactured gas so
4 technically it's still manufacturing gas. The
5 manufactured gas related to the coal carbonization,
6 oil carbonization, that is what we are cleaning up
7 right now.

8 Yes, it did stop operations in the
9 1960s, I believe.

10 EXAMINER STENMAN: I think as we are
11 approaching 6:00 o'clock, it might be a good time to
12 break for the evening.

13 MR. SAUER: Okay.

14 EXAMINER STENMAN: We will come back
15 tomorrow morning at 9:00 o'clock. Thank you.

16 (Thereupon, the hearing adjourned at
17 5:55 p.m.)

18 - - -

1 CERTIFICATE

2 I do hereby certify that the foregoing is
3 a true and correct transcript of the proceedings
4 taken by me in this matter on Monday, April 30, 2013,
5 and carefully compared with my original stenographic
6 notes.

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9

Karen Sue Gibson, Registered
10 Merit Reporter.

11 (KSG-72232)

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Summary: Transcript in the matter of Duke Energy Ohio hearing held on 04/29/13 - Volume I electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.