BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.	)))	Case No. 12-1685-GA-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	))))	Case No. 12-1687-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-1688-GA-AAM

REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Larry S. Sauer, Counsel of Record
Joseph P. Serio
Edmund Berger
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: Sauer (614) 466-1312
Telephone: Serio (614) 466-9565
Telephone: Berger (614) 466-1292
sauer@occ.state.oh.us
serio@occ.state.oh.us
berger@occ.state.oh.us

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
Telephone: (419) 425-8860
cmooney@ohiopartners.org

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I. INTRODUCTION

On June 6, 2013, the Office of the Ohio Consumers' Counsel ("OCC") and Ohio Partners for Affordable Energy ("OPAE") jointly filed their Initial Brief ("OCC and OPAE Brief"), to protect approximately 380,000 residential consumers from the applicant's proposal to charge them for $62.8 million for clean-up of two long defunct manufactured gas plant ("MGP") sites. Initial Briefs were also filed by Duke Energy Ohio, Inc. ("Duke" or "Utility"), the Staff of the Public Utilities Commission of Ohio ("PUCO" or "Commission"), Kroger Company, Inc. ("Kroger"); and jointly by Greater Cincinnati Health Council and Cincinnati Bell ("Cincinnati Health/Cincinnati Bell Brief"). OCC and OPAE reply herein to the Initial Briefs of the other parties.

The history of the case is incorporated herein as presented in OCC and OPAE's Initial Brief.

II. ARGUMENT

A. Law And Policy Do Not Permit Recovery Of Remediation Costs Through Utility Rates, Contrary To Duke's Assertion.

1. Ratemaking law does not permit collection of MGP-related remediation costs from customers.

Duke argues in its Brief that utilities as a general rule should, under existing legal standards, be permitted to fully recover their environmental remediation costs.[1] In making this argument, Duke refers to the applicable PUCO ratemaking statute, R.C. 4909.15. And Duke refers to the prudence statute, R.C. 4909.154. However, Duke neglects to analyze either statute. And Duke does not explain how it can be concluded from these statutes that environmental remediation costs are costs associated with "rendering the public utility service during the test year period of these cases.[2]

Contrary to Duke's position, it is plain that MGP-related investigation and remediation costs are not recoverable under the statutory ratemaking formula because they are not costs associated with "rendering the public utility service for the test period.[3] Rather, they may be costs associated with the provision of service 50 to 150 years in the past, partly pre-dating the PUCO and its regulation.[4] Further, the remediation costs in some cases are associated with the sale of non-utility MGP-related products.

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[1] Duke Brief at 4 (June 6, 2013).

[2] R.C. 4909.15(A)(4) and R.C. 4909.15(B).

[3] R.C. 4990.15(A)(4).

[4] Tr. Vol. II at 413 (Bednarcik) (April 30, 2013).[4] In fact, the majority of manufactured gas production -- and in turn the pollution from that production -- also occurred prior to PUCO regulation of natural gas utilities.

The PUCO Staff, in its Brief, asserted similar opposition to the collection of investigation and remediation costs,[5] The Kroger Company[6] and Greater Cincinnati Health Council and Cincinnati Bell[7] asserted arguments against the collection of remediation costs from customers based on the statutory ratemaking formula. No party to this case, other than Duke, supported the notion of customers having to pay $63 million for MGP-related costs under Ohio law.

Duke, in its Brief, states that environmental investigation and remediation costs are recoverable under R.C.4909.154 because: "[t]he Commission has already settled this issue in its order allowing the deferral, in finding that the MGP remediation costs represent necessary costs of doing business."[8] First, the PUCO emphasized in its accounting Entry that the deferral order created no precedent for a Duke proposal to collect the deferred costs from customers.[9] The Commission in its Finding and Order stated: "the Commission is not determining what, if any, of these costs may be appropriate for recovery in Duke's distribution rates"[10] and "[s]ince the requested authority to change Duke's accounting procedures does not result in any increase in rate or charge, * * *. The recovery of the deferred amounts will be addressed in a base rate case proceeding should Duke ever seek to recover the deferrals."[11] Contrary to Duke's

[5] PUCO Staff Brief at 7-13 (June 6, 2013).

[6] Kroger Brief at 10-11 (June 6, 2013).

[7] Cincinnati Health/Cincinnati Bell Brief at 5-8 (June 6, 2013).

[8] Duke Brief at 9 (June 6, 2013).

[9] Duke Deferral Case, Case No. 09-7812-GA-AAM, Finding and Order at 3 (November 12, 2009).

[10] Duke Deferral Case, Case No. 09-7812-GA-AAM, Finding and Order at 3 Paragraphs 7 (November 12, 2009).

[11] Duke Deferral Case, Case No. 09-7812-GA-AAM, Finding and Order at 3 Paragraphs 9 (November 12, 2009).

arguments, the PUCO did not indicate it was resolving the issue of recovery in its Finding and Order.

Second, Duke claims that the investigation and remediation expenses are necessary for the Utility to stay in business and to comply with environmental laws and regulations and are, therefore, part of providing service to customers.[12] However, under the Ohio Supreme Court's interpretation of R.C. 4909.15(A)(4), remediation expenses do not qualify as recoverable costs.[13]

In *Office of the Consumer's Counsel*, the Court specifically addressed the types of costs that were contemplated by R.C. 4909.15(A)(4).[14] In that case, the PUCO had allowed a utility to treat its investment in four cancelled nuclear generating stations as amortizable (i.e. recoverable from customers).[15] The PUCO relied on R.C. 4909.15(A)(4).[16] R.C. 4909.15(A)(4) states, that the PUCO, when setting rates, shall determine "[t]he cost to the utility of rendering the public utility service for the test period."[17] In that case, the PUCO held that the plants' cancellation resulted not in a past loss but a current cost so R.C. 4901914 (A)(4) was applicable.[18]

Upon review, the Supreme Court dismissed the PUCO's holding, stating that under that rationale it was questionable whether there would be any "past loss" that

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[12] Duke Brief at 6 (June 6, 2013).

[13] *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 67 Ohio St.2d 153, 164 423 N.E.2d 820 (1981). See OCC and OPAE Brief at 18-20 (June 6, 2013).

[14] Id.

[15] Id. at *161.

[16] Id.

[17] R.C. 4909.15(A)(4).

[18] *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 67 Ohio St.2d 153, 161; 423 N.E.2d 820 (1981).

would not be recoverable.[19] The Supreme Court held that the statute the Commission relied upon contained no provisions insulating investors from the type of losses that occurred, and that absent explicit statutory authorization, the Commission "may not benefit the investors by guaranteeing the full return of their capital at the expense of the customers."[20]

2. MGP remediation costs do not fit within costs that customers pay under the ratemaking formula because they are not normal and recurring.

Duke incorrectly argues that the MGP remediation costs represent exactly such costs as are contemplated in the normal rate-making formula.[21] The Supreme Court further stated that the Commission is a creature of the General Assembly and cannot ignore statutes and legislate in its own right.[22] The Supreme Court held that R.C. 4909.15(A)(4) "is designed to take into account the normal, recurring expenses incurred by utilities in the course of rendering service to the public for the test period."[23] The Supreme Court stated that the costs contemplated under R.C. 4909.15(A)(4) include reasonable expenditures for repairs, maintenance, personnel-related costs, administrative expenses, and taxes. Finally, the Supreme Court stated that the "extraordinary loss sustained * * * in connection with the terminated nuclear plants cannot be transformed into an ordinary operating expense pursuant to R.C. 4909.15(A)(4) by commission fiat."[24]

[19] Id. at *164.

[20] Id. at *167.

[21] Duke Brief at 3 (June 6, 2013).

[22] Id. at *166.

[23] Id. at *164.

[24] Id.

In this case, Duke seeks to charge customers nearly $63 million in environmental investigation and remediation costs for the sites of former MGP plants. Duke argues that the remediation costs are a normal and necessary cost of doing business today.[25] These costs are not analogous to the list of ordinary, recurring costs the Supreme Court held are recoverable under R.C. 4909.15(A)(4). Instead, they are analogous to the significant expenditures the utility, in *Office of the Consumers' Counsel*, had sunk into the cancelled nuclear power plant but were not used to provide current public utility service. Similarly, environmental investigation and remediation costs of facilities that are no longer operating to provide utility service to customers are not ordinary operating expenses because they are not incurred in rendering current public utility service as required by the statute.

R.C. 4909.15(A)(4) is designed to allow utilities to recover normal, recurring expenses incurred in providing public utility service. Regardless of how the Commission characterized the environmental investigation and remediation costs when they authorized deferral of these costs for accounting purposes, the costs are neither not normal. And the costs are not nor are they recurring. They are extraordinary costs. that They are analogous to the sunken investment in the failed canceled nuclear plants in *Office of the Consumers' Counsel.* As the Court stated in that case, the costs "cannot be transformed into an ordinary operating expense by commission fiat."

[25] Duke Brief at 5 (June 6, 2013).

3. The used and useful standard is applicable to a PUCO determination of whether MGP remediation costs can be collected from customers.

In determining whether a cost incurred by a utility is eligible for cost recovery, there are two tests or thresholds that must be satisfied. The first threshold is whether the cost is incurred for providing utility service to current customers. That threshold is established where assets must be used and useful under R.C. 4909.15(A)(1) and expenses must be incurred rendering public utility service during the test period under R.C. 4909.15(A)(4). Only after this first threshold is met does the second threshold of prudence come into play, under R.C. 4909.154.

R.C. 4909.15(A)(1) states that:

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:
>
> (1) The valuation **as of the date certain** of the property of the public utility **used and useful** or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, **in rendering the public utility service for which rates are to be fixed and determined**. (Emphasis added).

The Court has expounded on the meaning of R.C. 4090.15 stating:

> In R. C. 4909.15, the General Assembly has provided a legislative formula for the commission to follow in determining the value of property to be included in a public utility's rate base for purposes of determining just and reasonable rates. R.C. 4999.15 (A)(1) expressly provides that, in determining the extent to which property of a utility may be included in its rate base, the commission [***7] shall determine '[t]he valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service' to the utility's ratepayers. **Incorporated in this statutory language is the generally accepted principle that a utility is not entitled to include in the valuation of its rate base property not actually used or useful in providing its public service, no matter how useful the**

> **property may have been in the past or may yet be in the future**.[26] (Emphasis added.)

R.C. 4909.15 (A)(4) states:

> (4) The cost to the utility **of rendering the public utility service for the test period** used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit. (Emphasis added).

In this case, through an Entry, the PUCO approved Duke's requested test year of January 1, 2012 ending December 31, 2012 with a date certain of March 31, 2012.[27] Thus, in order to meet the initial threshold, Duke must prove that the property in question (in this case the Manufactured Gas Plant facilities) was used and useful in the provision of natural gas service to customers as on March 31, 2012. Duke must also prove that the associated costs (expenses) related to the Manufactured Gas Plant facilities were incurred rendering public utility service during the test period. Only after Duke has made these showings would the prudence test come into play.

Rather than making these statutory showings, Duke argued that the two sections of R.C. 4909.15 are not related and that a different standard applies to each. Duke argues that:

> The "used and useful" standard contained in R.C. 4909.15 (A)(1) which applies to the valuation of rate base or utility plant in service is not applicable to an operating expense such as MGP remediation costs.[28]

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[26] *Office of Consumer's Counsel v. Pub. Util. Comm*. (1979), 58 Ohio St. 2d 449, N.E. 2d 311, 1979 Ohio LEXIS 457, 12 Ohio Op. 3d 378 citing *Denver Union Stock Yard Co. v. United States* (1928), 304 U.S. 470.

[27] Entry, (July 2, 2012) at 2-3.

[28] Duke Brief at 7 (June 6, 2013).

Duke offers no citation to any case law supporting this interpretation of the statute. In contrast with this dearth of support, the PUCO Staff correctly notes, in its brief that eloquently explains the customer protection of R.C. 4909.15, that the Commission has long applied the principle of matching expenses with property that is used and useful.[29]

Under the Duke interpretation of R.C. 4909.15, the two sections (A)(1) and (A)(4) are not connected and should be treated as two completely separate sections of the Revised Code.[30] Such treatment is contrary to how the PUCO has long viewed R.C. 4909.15 and also contradicts how the Supreme Court has directed that statutes are constructed and to be interpreted.

In *Seaman v. The State of Ohio* (1922), 106 Ohio St. 177, 183, the Court stated, "In giving construction to a statute all its provisions must be considered together." The Court further emphasized this point in *The State, Ex Rel. Cunningham v. Industrial Commission of Ohio* (1987), 30 Ohio St. 3d 73, 79 where it stated, "On the contrary, the rule of *in pari maeteria* requires that individual sections of a statute or rule on the same subject should be reconciled and harmonized if at all possible. More recently, the Court ruled:

> It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law. *Wooster Republican Printing Co. v. Wooster (1978), 56 Ohio St. 2d. 126, 132, 10 Ohio Op. 3d 312, 315, 383 N.E.2d 124, 128.* Statutes which relate to the same subject are *in pari material*. Although [***6] enacted at different times and making no reference to each other, they should be read together to ascertain and effectuate the legislative intent.[31]

[29] PUCO Staff Brief at 8, citing to In the matter of the Application of Ohio Edison Company, Case No. 89-1001-EL-AIR, 1990 Ohio PUC LEXIS 912 (Opinion and Order) (August 16, 1990) (June 6, 2013).

[30] Duke Brief at 4-5,7 (June 6, 2013).

[31] *The State of Ohio v. Moaning* (1996), 76 Ohio St. 3d 126, 196 Ohio 413, 666 N.E.2d 1115, 1996 Ohio LEXIS 440.

When these principles of statutory construction are applied to R.C. 4909.15 (A)(1) and R.C. 4909. 15 (A)(4), it is clear that the two sections should be read together and not a separate entities. It is even more applicable to R.C. 4909.15 (A)(1) and R.C. 4909.15 (A)(4), because those two subparts were enacted at the same time and the various subparts of R.C. 4909.15 do refer to each other. For Duke's interpretation to be viable, the two subparts would have to be totally separate statutes. However, even in that circumstance, the inter-related subject matter would require a harmonized reading which is consistent with the PUCO's matching principle, as noted by PUCO Staff.[32]

In support of PUCO Staff's argument is a 2007 First Energy Rate Case.[33] In that case, the PUCO denied FirstEnergy recovery from customers of expenses associated with securing and maintaining several retired plants. The Commission stated:

> FirstEnergy seeks recovery of certain expenses associated with securing and maintaining several retired OE generation facilities. FirstEnergy noted that, although these facilities were used for generation, the retired facilities remain assets of the distribution company, and OE continues to have expenses associated with the facilities. Staff explained that these facilities did not render any utility service during the test year. Thus, Staff argued that these expenses are not part of the cost to the utility of rendering public utility service for the test year and that there is no basis under law to allow recovery of these expenses. The record demonstrates that these generation assets were not used to provide generation service during the test year. Thus, the Commission finds that these expenses do not reflect costs to the utility of rendering public utility service for the test period in accordance with Section 4909.15(A)(4), Revised Code, and the expenses related to the assets are not recoverable.[34]

[32] PUCO Staff Brief at 8-13 (June 6, 2013).

[33] *In the Matter of the Application Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rate for Distribution Service*, Case No. 07-551-EL-AIR, et al. Opinion and Order (January 21, 2009).

[34] Id. at 14.

The linkage between expenses for rendering public utility service and facilities that are used and useful during the test period was an important factor in the PUCO's disallowance in the 2007 FirstEnergy Rate Case. A linkage that is explicitly missing in Duke's request in this case for customers to pay for remediation expenses for MGP facilities that were not used and useful for the test period.

Much of Duke's argument in favor of its disjointed interpretation of R.C. 4909.15 (A)(4) is premised on the Utility's claim that Duke has a legal obligation to remediate the manufactured gas plant sites.[35] Duke is arguing that its obligation or duty to remediate the MGP sites somehow transforms the remediation expenses into costs that may be recovered from customers. The Court previously considered this "duty" argument and rejected it, instead citing the used and useful standard in R.C. 4909.15,

> **Notwithstanding the provisions that impose a duty on utility companies** to plan for the future, **the question under *R.C. 4909.15 (A)(4)* remains whether the cancelled plant expenditures represent '[t]he cost to the utility of rendering the [*164] public utility service for the test period**.' [36] (Emphasis added).

The Court made this ruling when considering the applicability of cancelled nuclear plant costs under R.C. 4909.15 (A)(4). The Court also ruled:

> Test period considerations aside, what the company sought and what the commission granted was the amortization as service-

[35] Duke Brief at 30-31 (June 6, 2013).

[36] *Office of Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 163, 164, 423 N.E. 2d 820, 1981 Ohio LEXIS 563, 21 Ohio Op. 3d 96. See also *Citizens Action Coalition v. Northern Indiana Public Service Company*, 485 N.E.2d 610 (Ind. 1985), cert. denied, 476 U.S. 1137, 90 L.Ed.2d 687, 106 S.Ct. 2239 (1986) ("*NIPSCO*"). *NIPSCO* had rejected the recovery of the unamortized sunk costs of a canceled nuclear power plant that had never been placed in service. The NIPSCO decision was the precedent relied upon by the IURC to deny MGP-related cost recovery in the Indiana Gas Case discussed *infra*.

> related costs of an investment that never provided any service whatsoever to the utility's customers.[37]

In this case, although the manufactured gas plant facilities were allegedly used and useful in the provision of natural gas service at one time, that point in time is at least 50 to 85 years past.[38] Thus the manufactured gas plant at issue in this case never provided any utility service whatsoever to Duke's current or future customers, and any benefit to past customers is limited to customers that have taken service over 50 years ago.

In the same case, the Court further addressed R.C. 4909.15 (A)(4) by noting that:

> **We seriously question whether the General Assembly contemplated that the commission would treat [***22] the type of expenditures controverted herein as costs under R.C. 4909.15(A)(4).** * * * It is our opinion that R.C. 4909.15 (A)(4) is designed to take into account **the normal, recurring expenses incurred by public utilities in the course of rendering service to the public for the test period.** [footnote omitted] A non-exhaustive list of such expenses would include reasonable expenditures for repairs, maintenance, personnel-related costs, administrative expenses, and taxes.[39] (Emphasis added).

Clearly manufactured gas plant remediation costs are not included in the Courts list of normal and recurring expenses.

Finally, the Court addressed the concept of normal recurring expenses by concluding that:

> **The extraordinary loss [***23] sustained by CEI in connection with the terminated nuclear plants cannot be transformed into an ordinary operating expense pursuant to *R.C. 4909.15(A)(4)* by commission fiat**. The commission's statement that '[c]ancellation does not create a past loss, but gives rise to a current cost' is unpersuasive. Under this rationale we question whether there could ever be a 'past loss' the return of which would

[37] Id.

[38] Duke Ex. No. 20A (Supplemental Testimony of Andrew Middleton) at 2-5 (February 25, 2013); See also, Tr. Vol. I at 183 (Bednarcik) (April 29, 2013) (West End Site stopped manufacturing gas in 1928).

[39] Id. at 164.

> not be recoverable in future ratemaking proceedings notwithstanding the commission's assertions to the contrary. **The commission's characterization of the investment in the four terminated plants as 'costs' under *R.C. 4909.15 (A)(4)* in light of what we perceive to be the legislative intention underlying that section is unreasonable.** [40] (Emphasis added).

In this case, the MGP remediation costs are a one-time cost directly related to the need to clean up the contaminated sites. The remediation is not an ordinary or recurring event. Once the remediation is complete, there is no indication that there will be a need to continue to remediate the sites or that the sites will have to be remediated again on a recurring basis in the future. Moreover, there is no evidence in the record to dispute the notion that the issue of MGP remediation costs is a case of first impression. Thus, the MGP-remediation costs cannot be considered "normal" or "recurring" under the interpretation set forth by the Court.

Finally, the Court ruled that the PUCO could not transform an extraordinary loss into a normal and recurring expense. Inasmuch as the PUCO could not transform an extraordinary loss or expense into a normal and recurring expense, neither can Duke. For all the above reasons, the PUCO should determine that Duke has failed to meet the burden of proving that the environmental investigation and remediation costs in this case met the used and useful standard set forth in R.C. 4909.15 (A)(1) and R.C. 4909.15 (A)(4) and should deny Duke cost recovery from customers.

[40] Id.

4. The Utility's claim that the costs can be charged to customers because they were not "voluntary" has been rejected by the PUCO before and should be rejected again.

Duke claims that the environmental investigation and remediation costs have been incurred through the Utility's participation in the Ohio Voluntary Action Program ("VAP"). And Duke claims the same investigation and remediation would be mandated under the Federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Duke thus concludes that the investigation and remediation was not truly "voluntary" and therefore the costs should be recoverable.[41] However, Duke's website shows certain information that contradicts certain of Duke's evidence, including testimony, in these proceedings regarding the Utility's characterizations of these remediation actions as mandatory.[42] And the information seems to differ generally from what Duke provided to OCC on discovery. For example, certain FAQ responses state:

> Q. **Does the West End Site present a health risk to the community**?
>
> A. **No.** Investigative studies by environmental specialist and the Ohio Environmental Protection Agency (OEPA) shows that the West End site does not pose a health risk to neighboring properties, businesses or residents. And the OEPA is not requiring Duke Energy to perform any action at this site. Regardless, Duke Energy will complete the project in compliance with OEPA regulations.
>
> Q. **Does this site pose a risk to neighboring property?**
>
> **A.** **No.** Neighbors and their property will have no contact with the residual material or contaminates soil.

[41] Duke Brief at 6 (June 6, 2013).

[42] This information is provided subject to a Motion for Administrative Notice ("OCC Motion") that OCC filed on June 6, 2013. Attached to the Motion are Duke's FAQs regarding the East End and West End former MGPs. The Motion also contains the URL links to the applicable web pages on Duke's web site.

Q. **Has this site been a threat to the neighborhood all along?**

A. **No**. Environmental studies conducted at the West End site have shown that there is no threat to public health. (Emphasis added.)[43]

This information from Duke's web site is different than certain of the case information that Duke presented to the PUCO as justification for charging $63 million in cleanup costs to customers. For example, Duke's evidence includes testimony about dangers at the site.[44]

Duke further claims that these costs were incurred in complying with environmental regulations and to protect the public health and environment and as such were necessary costs of doing public utility business.[45] It has already been repeatedly shown that these costs cannot be characterized as necessary costs of doing business because of their extraordinary non-recurring nature. These costs are the consequence of past actions and have no place in current and future public utility rates. The costs do not represent ongoing normal expenses for the Utility. Additionally, the claim that the Utility's compliance with the program was not truly "voluntary" is of little consequence.

The PUCO has rejected cost recovery for expenses that were explicitly mandated. In contrast to Duke's arguments in this case where the Utility claims it was forced to make these expenditures) in the past. In *Ohio Edison*, a utility filed for a change in rates in order to recover a variety of costs, including an unrecovered amount spent on

[43] OCC Motion at Attachment A. (Emphasis added).

[44] Tr. Vol. II at 477 (Bednarcik) (April 30, 2013); see also Duke Ex. No. 27 (MGP Power Point Presentation).

[45] Duke Brief at 6 (June 6, 2013).

emergency purchases.[46] The utility incurred the expenses after the Governor of Ohio declared an energy emergency and the Commission directed each electric utility to "avert the decline of remaining fuel supply of those power production plants most threatened with fuel exhaustion by: * * * (b) (the) purchase of energy through the interconnected network of utilities."[47] The utility initially tried to recover the costs through an emergency purchased power cost adjustment but the Commission denied the request, citing insufficient evidence of emergency circumstances.[48]

The Commission offered a detailed rationale for its denial of the utility's request. According to the PUCO, its "objective is not to guarantee dollar-for-dollar recovery of past expenses, but, rather, to set rates which will afford the company the opportunity to earn the authorized rate of return."[49] To achieve that objective the Commission is concerned with "determining representative levels of expense, not in dealing with non-recurring costs such as those, as in *Ohio Edison*, brought on by the longest coal strike in American history."[50] The Commission then stated that they were not in the business of reimbursing past losses.[51]

Next, the Commission noted that the fact it directed the utility to make the purchases at issue should not have any impact on its decision.[52] The Commission held that precipitating conditions were extraordinary and that resulting expenses were not

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[46] *In the Matter of the Application of Ohio Edison*, Case No. 77-1249-EL-AIR, Opinion and Order at 21. (November 17, 1978).

[47] Id.

[48] Id.

[49] Id.

[50] Id.

[51] Id.

[52] Id.

representative of the utility's ongoing expense.[53] The Commission stated that "investors in the company should bear the risk of these extraordinary occurrences and the Commission will not transfer this risk to the utility's customers * * * ."[54] The Commission summarized its holding by stating that "the losses resulting from these purchases are in the past, and have no place in future rates."[55]

The PUCO should reach a similar result in this case. Under the *Ohio Edison standard,* these MGP-related remediation costs should not be included for recovery because they are extraordinary costs that are not representative of normal expenses. As the Commission stated in *Ohio Edison,* the utility's investors should bear the risks of these extraordinary occurrences not the customer. The Commission should not allow the recovery of any of the environmental investigation and remediation costs because they are non-recurring, extraordinary costs that do not represent the on-going future costs of providing utility service and under both PUCO and Ohio Supreme Court precedent these types of costs are not contemplated by R.C. 4909.15, and as such are properly borne by the investors.

5. Ohio law is controlling to protect customers in this case, regardless of what other states have done.

In its Brief, Duke rejects Ohio's century-old "used and useful" standard[56] that the General Assembly established as a requirement for costs to be included in rates.[57] The

[53] Id.

[54] Id.

[55] Id. at 22.

[56] House Bill 325 of 1911 section 25. (House Bill 325 of 1911 created the Public Service Commission of Ohio by changing the name of the Railroad Commission and creating and defining the powers of the newly minted Public Service Commission. Section 25 only authorized the inclusion of property "used and useful for the convenience of the public".)

[57] Duke Brief at 8 (June 6, 2013).

Utility then lists a myriad of states that have not followed a used and useful standard and have allowed recovery from customers of remediation expenses.[58] Duke claims that the issue before the PUCO is a matter of first impression and should be resolved with reference to the decisions in these other states. Although the specific issue of MGP-related cost recovery is new, the case of *Office of Consumers' Counsel* discussed above clearly addressed the recoverability of expenses related to facilities that are not currently used to provide public utility service. That issue in Ohio has been resolved and Duke's reliance on decisions specific to MGP environmental costs in other jurisdictions conflicts with that established Ohio precedent.

According to Duke, other state cases are instructive and should be followed for various reasons, specifically to avoid: (a)"the illogical concept that cleanup expenses must relate to plant in service,"[59] (b) questioning the validity of Commission decisions that previously granted deferral for costs;[60] (c) placing "Ohio in a distinct minority of states on this issue, and (d) potentially placing Ohio's reputation for constructive regulation at risk."[61] These arguments to avoid Ohio law are not arguments for a reasonable and consistent approach to regulation, but arguments that ask the PUCO to disregard Ohio statutes. But the PUCO, as a creature of Ohio law,[62] may not disregard that law. And the PUCO may not change its fundamental regulatory approach at the expense of customers in order to protect the Utility's shareholders.

[58] Id. at 6-8, 10-14.

[59] Id. at 14.

[60] Id. at 23.

[61] Id.

[62] *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St.3d 1, 647 N.E.2d 136.

Furthermore, the cases from other states cited by the Utility merely highlight that different states approach regulation differently, often based on laws and policies that are distinct and different from those provided in Ohio statutes and Ohio Supreme Court precedent. Many of these cases are also appropriately distinguished on their facts.

a. The concept that cleanup costs must relate to utility plant that is currently used and useful in rendering service is statutorily mandated to protect customers from having to pay for utility liabilities related to long ago service.

It has already been shown that Duke is misinterpreting Ohio law, when it claims the law authorizes cost recovery. Duke is missing that the law requires the costs to have been incurred in connection with providing current service.

R.C. 4909.15 directs the PUCO in calculating a utility's allowable rate to only include the value of property that is used and useful (or, for natural gas companies, projected to be used and useful) as of the date certain, in rendering the public utility service for which the rate is being calculated.[63] It also requires the Commission to consider the costs to the utility in rendering public utility service.[64] Both the property included and expenses related to service have to be tied to the rendition of public utility service. But Duke has not shown that these costs are in any way incurred in the provision of public utility service to current customers, nor can it Instead of recognizing that the General Assembly intended to allow recovery only for costs of rendering current service, the Utility argues that any costs incurred in the public interest are recoverable costs.[65] This is not, however, the legal standard for recoverability.

[63] R. C. 4909.15 (A)(1).

[64] R.C. 4909.15 (A)(4).

[65] Duke Brief at 21-22 (June 6, 2013).

In a 1978, Cleveland Electric Illuminating ("CEI") rate case, the Commission approved a rate increase for CEI that included collection from customers of certain advertising expenses and charitable contributions.[66] The City of Cleveland appealed that Commission order and the Ohio Supreme Court reversed the PUCO. The Court stated:

> This court is of the opinion that this same presumption must be applied by appellee, if operating expenses are truly to [*73] reflect "the cost of rendering the public utility service." Therefore, institutional and promotional advertising expenses are to be disallowed, unless the utility can clearly demonstrate a direct, primary benefit to its customers from such ads.
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> Applying this same standard to charitable contributions, this court finds that this item also cannot be sustained as a proper operating expense. While we recognize that this holding deviates from our decision in Cincinnati v. Pub. Util. Comm. (1978), 55 Ohio St. 2d 168, 173, this court is persuaded by the record in the instant cause and by Justice Locher's well-reasoned dissent in Cincinnati, supra, that such contributions are not a cost of rendering the public utility [***24] service.[67]

The Court went on to note:

> This Court does not doubt the laudable purposes served by such [charitable] contributions and we sincerely hope utilities will see fit to continue such efforts on their own accord. However, the benevolent nature of such activity should not obscure the fact that it is the Utility's management, not the ratepayers, which decides which groups shall receive this bounty.[68]

Just because a utility can demonstrate expenditures to be in the public interest, such as charitable contributions, does not relieve the legal requirement that the expense must be a cost

[66] *In re CEI Rate Case,* Case Nos. 79-1158-EL-AIR, et al, Opinion and Order (May 2, 1979).

[67] *City of Cleveland v. Pub. Util. Comm.* (1980) 63 Ohio St. 2d. 62; 1980 Ohio Lexis 773.

[68] Id. at 74.

of rendering public utility service. Therefore, even if Duke's environmental remediation is in the "public interest," it is the rendition of public utility service that makes costs recoverable, not that the Utility's actions are a good thing. The Utility's attempt to subvert the standard established by the General Assembly for cost recovery from customers should be rejected.

b. In its accounting Entry, the PUCO made clear to all involved, including the financial community, customers and the Utility, that authorization of a deferral is not an assurance of recovery.

Duke claims that the issue of cost recovery is moot because: "the PUCO has already settled this issue in its order allowing the deferral, in finding that the MGP remediation costs represent necessary costs of doing business."[69] This argument defies logic and the law. First, this argument ignores the Commission's explicit statement that "[b]y considering this application the Commission is **not determining what, if any of these costs may be appropriate for recovery** in Duke's distribution rates."[70] To accept Duke's argument on this point would be to ignore the plain language of the PUCO's Finding and Order. Second, if this issue were decided, then it would have made no sense for Duke to have requested cost recovery here and for the PUCO to hold a hearing to resolve the issue. Ohio law, not accounting, controls the PUCO's regulatory decisions.

c. The cases cited by Duke are not decided under Ohio law and the PUCO's concern must be to comply with Ohio law.

As noted above, Duke lists a number of cases where the commissions of other states allowed some form of MGP cost recovery from customers. However, those states have laws that are different than Ohio, and those decisions are based on different facts. If how other

[69] Id. at 9.

[70] *In the Matter of the Application of Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM, Finding and Order at ¶7 (November12, 2009). (Emphasis added).

states address an issue were a controlling factor, then the General Assembly would have included such a standard in Ohio law. No such standard or requirement appears in Chapter 4909.

For example, the first case the Utility references is a Michigan Supreme Court case.[71] The Utility states that the "Michigan Supreme Court emphasized that remediation expenses are a present business expense."[72] But Duke is mischaracterizing the decision. None of the language that the Utility quotes and attributes to the Michigan Supreme Court comes from the Court. Instead, the language comes from a concurrence of one Justice to the denial of leave to appeal a decision of the Michigan Public Service Commission. ("Michigan Commission")[73] The majority of the Court was only of the opinion that the questions presented should not be reviewed.[74]

As for the concurrence language that the Utility erroneously attributes to the full court, Duke highlights the language where the concurrence stated that because the remediation expenses were significant expenses and the costs were necessary for Peninsular to operate they were properly recoverable.[75] But Duke failed to also include the concurrence's statement explaining that the Michigan Commission had found these expenses to be "unusual and would probably force the utility into bankruptcy" if not recovered.[76] The concurrence affirmed the

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[71] Duke Brief at 6 (June 6, 2013). (Citing to *Attorney General v. Michigan PSC and Peninsular Gas Co.*, 463 Mich. 912, 618 N.W.2d 904, 2000 Mich. Lexis 2303 (November 22, 2000).

[72] Id.

[73] *Attorney General v. Michigan PSC and Peninsular Gas Co.*, 463 Mich. 912, 911 618 N.W.2d 904, 2000 Mich. Lexis 2303 (November 22, 2000).

[74] Id.

[75] Duke Brief at 6-7 (June 6, 2013). (Citing to *Attorney General v. Michigan PSC and Peninsular Gas Co.*, 463 Mich. 912, 618 N.W.2d 904, 2000 Mich. Lexis 2303 (November 22, 2000).

[76] *Attorney General v. Michigan PSC and Peninsular Gas Co.*, 463 Mich. 912, 618 N.W.2d 904, 2000 Mich. Lexis 2303 (November 22, 2000).

Michigan Commission's decision to consider the utility's solvency and inability to continue to provide service if it went bankrupt, when the Michigan Commission decided to allow cost recovery.[77]

The Michigan Supreme Court noted that the gas utility served less than 4,000 customers and would face bankruptcy if not allowed cost recovery.[78] Duke also fails to mention that the Michigan Commission found that the property where the MGP remediation occurred was currently needed in the ordinary course of Peninsular's service to its customers.[79] (In the current case, the PUCO Staff concluded this was not the situation with the majority of the two Duke sites.[80]) Finally, Duke also failed to indicate that when concluding that the utility could recover MGP-related costs the Michigan Commission gave Peninsular the option of deferring the environmental costs and amortizing them over 10 years or surcharging customers for only 75% of the costs[81] -- which meant that utility shareholders would have to absorb some of the costs.

Here, Duke has made no showing that, absent recovery, it would be financially impaired, let alone go bankrupt and be unable to provide utility service to its customers. Therefore, the balancing that was necessary in the cited Michigan case is not present and relevant to the decision before the PUCO in this case. Additionally, the Michigan Commission characterized the MGP costs as unusual (and since they were large enough to

[77] Id.

[78] Id.

[79] Id.

[80] Staff Ex. No. 1 (Staff Report of Investigation) at 45-47 (January 4, 2013).

[81] *Attorney General v. Michigan PSC and Peninsular Gas Co.*, 463 Mich. 912, 618 N.W.2d 904, 2000 Mich. Lexis 2303 (November 22, 2000).

bankrupt a utility, they may fairly be characterized as extraordinary), something that the Ohio Supreme Court has explicitly held does not constitute a public utility business cost.[82]

Next, Duke points to a New Jersey Board of Public Utilities ("New Jersey Commission") decision that held that remediation costs were necessary costs of doing business.[83] With regard to the New Jersey case, again Duke failed to mention certain key factors. First, the collection of MGP-related costs was part of a settlement signed by a number of parties.[84]

Second, the New Jersey Commission noted that the utility had already collected $8.3 million of insurance recoveries[85] -- something that Duke has not yet even began to pursue,, instead preferring to seek to bill Duke's captive customers. The New Jersey Commission stated, "The Company has been aggressively pursuing insurance recoveries whenever possible."[86]

Third, the New Jersey Commission noted that the costs being passed on to customers were lower than anticipated.[87] In Duke's case, not only has Duke already spent nearly $63 million, but Duke cannot even provide an estimate of how much more will be spent.[88] Obviously without shareholder dollars at stake, Duke has not demonstrated fiscal restraint.

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[82] Id.

[83] Duke Brief at 7 (June 6, 2013). (Citing *In Re Pub. Service Electric and Gas Co.*, BRC Docket No. ER91111698J, 1993 WL 505443 (N.J. Bd. Reg. Comm'rs, September 15, 1993). and *Citizens Util. Bd. V. Illinois Commerce Comm.*, 166 Ill. 2d 111, 651 N.E.2d 1089, at 1098 (Ill. 1995).).

[84] *In Re Pub. Service Electric and Gas Co.*, BRC Docket No. ER91111698J, 1993 WL 505443 (N.J. Bd. Reg. Comm'rs, September 15, 1993).

[85] Id at 2.

[86] Id at 11.

[87] Id at 3.

[88] Tr. Vol. I at 246 (Bednarcik) (April 29, 2013).

Duke also highlights a Wisconsin Public Service Commission ("Wisconsin Commission") case holding that remediation costs were recoverable.[89] Duke emphasizes the Wisconsin Commission's statement that the remediation costs are no different from costs incurred to ensure an existing plant is in compliance with current environmental regulations.[90] Although the Wisconsin Commission permitted cost recovery, it noted that the MGP-related expenses provided no benefit to current customers and that the costs were not related to current service.[91] Thus, under Ohio law (R.C. 4909.15) such costs are not recoverable despite what Wisconsin permitted. Also, the Wisconsin Commission did not allow carrying costs on the unamortized balance of MGP-related expenses.[92]

Duke also relies on a couple of cases out of Minnesota.[93] In the first case, Duke argues that the Minnesota Public Utilities Commission ("Minnesota Commission") allowed recovery of remediation expense because it interpreted used and useful to mean "if the property was used and useful at the time of pollution or is used and useful in the current provision of service."[94] Duke points out in the second case that the Minnesota Commission held that "neither logic nor precedent requires a direct link between the exact use of the property which caused the pollution and the present use of the property which renders it used and useful to the Company."[95]

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[89] Id. (Citing *In Re Wisconsin Power and Light Company*, No. 6680-UR-108, 1993 Wisc. PUC LEXIS 64 (Wisc. PSC, September 30, 1993).

[90] Id. at 8. (Citing *In Re Wisconsin Power and Light Company*, No. 6680-UR-108, 1993 Wisc. PUC LEXIS 64 (Wisc. PSC, September 30, 1993).

[91] Id. at 9.

[92] Id. at 10.

[93] Id. at 10-11.

[94] Id. at 11(Citing *In the matter of the Request of Interstate Power Company*, 1996 Minn. PUC LEXIS 27, at 49).

[95] Id. at 11-12 (Citing *In Re Peoples Natural Gas Co.*, 144 PUR4th 333, at 13 (Minn. PUC June 11, 1993).

The decisions in these other states are contrary to established Ohio law as interpreted by the Ohio Supreme Court. As discussed above, Ohio's Supreme Court has clearly stated that costs associated with property that is not used and useful in providing current service are not recoverable. Clearly, Duke's MGP costs are associated with facilities long retired and cannot meet Ohio's standard of being used to render service in the test year.

Additionally, in regards to the analogy offered by the Wisconsin Commission, there is a clear factual difference in remediation expenses incurred to clean up a former MGP and expenses incurred to ensure an existing plant is in compliance with the law. The latter is an expense that is directly connected with a plant that is currently used and useful and is incurred to ensure that the plant continues to be used and useful. This contrasts with the expenses incurred in remediating Duke's former MGPs, which offer no current service to customers and are therefore not properly recoverable.

Furthermore, the Minnesota cases are completely contrary to Ohio statutes and precedent. In *Interstate*, the Minnesota Commission allowed recovery because it interpreted "used and useful" to mean "used or useful".[96] However, there is no "or" in Ohio's R.C. 4909.15; instead it states "used and useful as of the date certain."

The language "as of the date certain" is a clear limit as to when the determination of the property's used and useful nature is to be considered. The Ohio Supreme Court has stated that R.C. 4909.15 incorporated the generally accepted principle, given by the United States Supreme Court, "that a utility is not entitled to include in the valuation of its rate base property not actually used or useful in providing public service, **no matter how useful the property**

[96] *In the Matter of the Request of Interstate Power Company*, 1996 Minn. PUC LEXIS 27, at 49.

may have been in the past or may yet be in the future."[97] Duke suggests that the PUCO should follow the holdings of the Minnesota cases but fails to recognize that Minnesota law used to reach those holdings is in diametric opposition to Ohio law. The plain language of the Ohio statute is unambiguous in its requirement that property included in rate base must be currently used **and** useful.

Duke's argument that Ohio should seek to emulate ratemaking law in other states -- the "wannabe" argument -- is unprincipled. The Ohio Supreme Court has previously rejected such arguments. In the previously discussed *Consumers' Counsel* case, the Court recognized that the "overwhelming weight of authority from other jurisdictions supported the position of the commission."[98] However, the Court rejected the PUCO's position and held that "[t]he construction of Ohio law is particularly the province of this court and we are no wise bound by the pronouncements of the regulatory regimes elsewhere in effect."[99] Similarly, regardless of differing approaches in other states, whether justified or not, the PUCO is bound to uphold Ohio law, and under Ohio law environmental investigation and remediation costs related to retired facilities cannot be recovered from customers.

However, if the PUCO is to consider decisions from other states, then the Commission should follow the Indiana Utility Regulatory Commission ("IURC") decision which disallowed the recovery of MGP-related remediation costs from utility customers.[100] Interestingly, Duke ignored the fact that Indiana rejected the recovery of

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[97] *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 58 Ohio St.2d 449, 453, 391 N.E.2d 311 (1979). (Citing to *Denver Union Stock Yard Co. v. United States*, (1938), 304 U.S. 470). (Emphasis added).

[98] *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 67 Ohio St.2d 153, 162 423 N.E.2d 820 (1981).

[99] Id. at *163.

[100] Tr. Vol. IV at 879 (Adkins) (May 2, 2013) ("The only case I'm familiar with is pointed to the State of Indiana that has not granted recovery at all.".

MGP remediation costs for past contamination. The Indiana Utility Regulatory Commission rejected an application by Indiana Gas to recovery MGP-related remediation costs it spent at numerous MGP sites.[101] Indiana Gas incurred these costs as a result of owning the land, not because it was a public utility.[102] The IURC found that environmental regulations regarding hazardous wastes were not utility-specific, but rather pertain to owners of land upon which the contaminants had been found.[103] Since it was determined that the remediation activities did not result in the provision of current service, Indiana Gas could not collect the remediation costs from its ratepayers.[104] The IURC found the costs to be non-recoverable from ratepayers because "these costs do not create the provision of gas service to current customers."[105] The IURC decision is essentially based on the same legal standard as contained in R.C. 4909.15(A)(4). The IURC's decision was upheld on appeal.[106]

Finally, Duke contradicts itself in its efforts to introduce decisions from other jurisdictions to the PUCO. In a Duke response to a Staff Data Request regarding cost recovery for remediation activities in North Carolina, South Carolina and Indiana, Duke provided the following response:

[101] *Petition of Indiana Gas Company* ("*Indiana Gas*")., *Inc., et al.,* Cause No. 39353 (May 3, 1995)

[102] Id. *at 45.*

[103] Id. at 51.

[104] Id at 46.

[105] Id. at 51.

[106] *Indiana Gas Co., Inc. v. Office of Utility Consumer Counsel*, 1997 Ind. App. LEXIS 12, 675 N.E.2d 739 (1997).

> The sites located in North Carolina, South Carolina and Indiana, have never been owned or operated by [Duke]. As such, [Duke] submits that the remediation – and related – activities occurring in foreign jurisdictions by utilities that are not regulated by this Commission are not material to the issues presented in these Ohio proceedings.[107]

As Duke itself pointed out, the decisions in the other jurisdictions are "not material to issues presented in these Ohio proceedings."

d. Ohio's reputation will in no way be at risk if the PUCO denies recovery and, indeed, its reputation will be enhanced by a principled protection of customers.

Much like Chicken Little, Duke sends out an alarmist warning, claiming that if the PUCO were to deny recovery of the costs at issue, then Ohio's reputation for "constructive regulation" could be at risk.[108] Duke offers nothing beyond its conclusory statement to justify this claim.[109] There is no evidence to support such a claim. Nor should concern about the perception of an unidentified community of people determining "regulatory reputation" change the principled basis upon which the PUCO makes its decisions. Indeed, Ohio's reputation will be enhanced by a dedication to a principled protection of residential, commercial and industrial customers against Utility requests for unwarranted charges on customers' bills. The PUCO is required, including by R.C. 4903.09, to make decisions based on the record before it and based on Ohio law. The Public Utilities Commission of Ohio should follow its mandate under Ohio law.

[107] PUCO Staff Ex. No. 6 (Direct Testimony of Kerry Adkins) at Exhibit KA-7 (April 22, 2013).

[108] Duke Brief at 23 (June 6, 2013).

[109] Duke Brief at 23 (June 6, 2013).

B. The Utility's Claim That Recovery Is In The Public Interest Is Wrong.

1. Duke's policy argument should be rejected.

Duke argues that recovery from customers of remediation expenses is in the public interest because it encourages utilities to conduct prompt and thorough investigations and remediation to protect the public health and the environment.[110] Duke claims that the Voluntary Action Program is "an alternative to the environmental cleanups conducted as a part of governmental enforcement activity, [and] is evidence of a clear expression of public policy in favor of private voluntary response action in connection with historical industrial contamination."[111]

Duke's policy argument is unpersuasive because it has no basis in the law. The statutes and the Ohio Supreme Court precedent are clear that costs are only recoverable when incurred in connection with rendering public utility service. The facts are clear that the environmental investigation and remediation expenses were incurred in connection with environmental regulations designed to ensure that parties who polluted are responsible for cleaning up the pollution, which is in no way connected to providing public utility service. The policy is clear that under both the Federal CERCLA and the Ohio VAP the only parties that are liable are those parties that were involved in the pollution and not taxpayers or utility ratepayers (customers).[112]

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[110] Duke Brief at 22 (June 6, 2013).

[111] Id. (Citing Duke Witness Margolis Direct Testimony at page 13).

[112] 42 U.S.C. 9607 (a) (imposes liability for the release or threatened release of hazardous materials on four categories of actors: the owner and or operator of a site where a release has or may occur, the owner and or operator of a site at the time of the release, any person who arranged for the disposal or treatment of hazardous materials at a site at which there was a release, and a transporter of hazardous materials who selected the site and there was a release at that site.). R.C. 3746.23 (B) and (G)(1) (Providing that a person who undertakes a voluntary action may institute a civil suit to recover the costs of the VAP from any person, who at the time of the release of a hazardous substance identified and addressed by the VAP, was an owner or operator of the site and any other persons who caused or contributed to the release but

The PUCO should reject Duke's policy argument and uphold the intent of the statutes under which the Utility recognizes its liability. The policy behind those laws, as expressed in the plain language of the statutes, is that the parties responsible for the pollution are the parties responsible for cleaning it up. Duke's current and future customers played no part in the pollution that occurred at Duke's MGP sites and they should not be held financially responsible for the cleanup.

2. The public interest would be served by sparing customers from paying for Duke's cleanup of the pollution it and others caused with its MGP operations.

Duke argues that recovery from customers of MGP expenses is in the public interest.[113] However, Duke's arguments do not pass muster, and a recounting of Duke's actions instead demonstrates its effort to circumvent the PUCO ratemaking process in a manner that is not in the public interest.

Duke's arguments are self-serving and unsubstantiated in law or fact. Duke argued in its Brief that:

> In addition to being consistent with the law, recovery of MGP remediation expenses is consistent with the public interest, by encouraging the utility to conduct **prompt** and thorough investigations and cleanups of environmental conditions at MGP sites to resolve liability and to protect public health and the environment.[114]

As argued above, the recovery of MGP remediation expenses is not consistent with the R.C. 4909.15(A) -- the current ratemaking law. In fact, if it was consistent with the

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excluding recovery from a person who neither caused nor contributed to in any material respect a release of hazardous substances on, in, or under the property).

[113] Duke Brief at 21 (June 6, 2013).

[114] Duke Brief at 21-22 (June 6, 2013) (Emphasis added).

current ratemaking law, Duke's actions as discussed below would have been unnecessary.

Any attempt by Duke to characterize its remediation actions to be "prompt" is without basis in fact. The dangers of the MGP processes or polluting byproducts were long known to the plant operators..

For example, there was an anti-dumping statute in Ohio as far back as 1896 intended to protect the environment from the dangers of MGP operations. Sec. 6925 states:

> Whoever intentionally throws or deposits or permits to be thrown or deposited, any coal dirt, coal slack, coal screenings,, or coal refuse from coal mines, or any refuse or filth from any coal oil refinery **or gas works,** * * * upon or into any of the rivers, lakes, ponds or streams of this state or upon or into any place from which the same will wash into any such river, lake, pond or stream; * * *.[115]

In light of the location of Duke's MGPs, along the Ohio River, the above law would have had applicability for the operations of those plants. It is disingenuous for Duke to characterize its remediation efforts as "prompt," considering the long history of its MGP's dating back to the 1800s Duke's plants ceased operations in 1928 and 1963 respectively, and despite the historical awareness of the dangers associated with their operations, the Utility shuttered them and essentially forgot them.

[115] Ohio General and Local Acts Sec. 6925 (January 6, 1896), Attached hereto as Exhibit A; See also The Annotated Revised Statutes Sec. 6925 (January 1, 1904), Attached hereto as Exhibit B; (Legislation that preceded R.C.3767.14). See also Allen W. Hatheway, Remediation of Former Manufactured Gas Plants and Other Coal-Tar Sites at 551, CRC Press, 2012.

Duke alleges it has strict liability for the environmental cleanup pursuant to CERCLA,[116] a law passed in 1980.[117] Duke's witness testified that Duke was aware of MGP-related environmental issues dating back to 1988.[118] The evidence further shows that Duke put insurance companies on notice of potential environmental claims in 1996,[119] and put shareholders on notice of potential environmental liability in 1997.[120] Yet Duke did not commence remediation at the East End Site and West End Site until 2006 and 2009, respectively.[121] Duke offered no explanation for these gaps of time of up to 26 years – and offered no explanation of how an action 26 years later (and even much later than the origins of the pollution) constitutes "prompt" action.

There are other issues with Duke's concept of the public interest. On April 2, 2013, a Stipulation and Recommendation ("Stipulation") was entered between Duke, the PUCO Staff, OCC, OPAE and other interested parties for resolution of all of the issues in these cases except for MGP-related cost recovery. As part of the Stipulation, the signatory parties agreed that the issue of MGP-related cost recovery would not be settled as part of the Stipulation, but instead would be litigated. The parties agreed to litigate their positions. OCC's and OPAE's positions relative to the MGP issues to be litigated were as stated in their Objections to the Staff Report.

While the ink on the Stipulation was still drying, Duke has been seeking from the General Assembly a change in the law that governs what the parties settled including the

[116] Duke Brief at 5 (June 6, 2013).

[117] Duke Brief at 29 (June 6, 2013).

[118] Duke Ex. No. 21A (Supplemental Testimony of Jessica Bednarcik) at 16 (February 25, 2013).

[119] Kroger Ex. No. 2 (OCC INT 17-667).

[120] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at BMH-3 (February 25, 2013).

[121] Duke Brief at 31 (June 6, 2013).

litigation of the MGP issue, as seen in Amended Substitute House Bill 59 (as passed by the Senate on June 6, 2013). If passed into law, the amendment could place in jeopardy the used and useful standard and other law relied on by PUCO Staff and parties.[122] Duke's approach could change the bargain in this case and could have a chilling effect on parties' willingness to enter into settlements with Duke in future cases. That is not in the public interest.

C. A PUCO Decision Denying Duke's Request To Collect $62.8 Million From Customers Will Not Have The Adverse Consequences Duke Alleges.

Duke argues that if the PUCO were to deny recovery of the MGP-related expenses, then the Utility would face financial difficulties, in addition to the potential long-term impact on how the investment community views Duke.[123] Duke argues that the investment community relies on the deferral orders when evaluating an investment.[124] To the extent that the investment community relies on a PUCO deferral order to evaluate Duke or any other utility, it is unreasonable to presume that the investment community accepts a deferral order without reading the entire order and recognizing that although the PUCO may grant the deferral, the PUCO always reserves its rights and obligations to apply the law with regard to any ultimate cost recovery.

[122] PUCO Staff Brief at 18-32 (June 6, 2013).

[122] OCC and OPAE Brief at 16-24 (June 6, 2013).

[123] Duke Brief at 23 (June 6, 2013).

[124] Tr. Vol. IV at 874-875 (Adkins) (May 2, 2013).

PUCO Staff witness Adkins emphasized this point throughout his cross-examination by Duke when he noted that the PUCO grant of deferral authority was separate from any rate review.[125] Mr. Adkins further elaborated on the distinction stating:

> My understanding is that deferrals in this context are not ratemaking, they are simply an accounting mechanism that provides a tax benefit to utilities and basically helps them look better for investors, so that's the purpose the deferrals are granted. The Commission has emphasized these are not ratemaking.
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> The tax benefit, my understanding of a tax benefit is basically that for financial reporting purposes the company can recognize in the current year and expense and they can defer any associated revenue for the future, so basically their expenses are greater, therefore, they -- it reduces their income for tax purposes and, therefore they get a temporary tax benefit that sort of reverses itself whenever the revenue starts to be captured.[126]

In fact, a review of how the PUCO handled both the Duke and Columbia requests for deferral of MGP-related investigation and remediation costs demonstrates that:

1. The PUCO did not make a ruling on the recoverability of the MGP-related costs;

2. The PUCO did not provide any guarantee or promise of MGP-related cost recovery;

3. The PUCO decisions were consistent with prior Commission decisions and Supreme Court precedent.

As part of Duke's deferral case, OPAE filed a Motion to Dismiss which the PUCO denied, noting that deferrals do not constitute ratemaking.[127] The PUCO cited an

[125] Id.

[126] Tr. Vol. IV at 873-874 (Adkins) (May 2, 2013).

[127] Id. at 3.

Ohio Supreme Court case, *Elyria Foundry Co. v. Pub. Util. Comm*. (2007), 114 Ohio St.3d 305, for this conclusion. The PUCO Finding and Order granting the Duke deferral noted:

> By considering this application, the Commission is not determining what, **if any**, of these costs may be appropriate for recovery in Duke's distribution rates.[128] (Emphasis added).

Thus, the investment community was put on notice at that time that there was no guarantee of recovery of MGP-related investigation and remediation costs from customers. The PUCO Finding and Order also noted that the environmental investigation and remediation costs were business costs incurred by Duke in compliance with Ohio regulations and federal statutes.[129] However, this statement was needed to create accounting deferrals and was not part of a PUCO ratemaking decision. Rather, the PUCO explicitly reserved its right to review all future costs:

> Since the requested authority to change Duke's accounting procedures does not result in any increase in rate or charge, the Commission approves tis application without a hearing. **The recovery of the deferred amounts will be addressed in a base rate case proceeding should Duke ever seek to recover the deferrals**.[130] (Emphasis added).

In addition to the PUCO's language, Duke's Application in the deferral case noted that the Utility was only requesting authority to change its accounting procedures and would not result in any increase in rates or charges.[131] Thus, to the extent that the investment community was relying on the deferral case to evaluate Duke, the investment

[128] Id.

[129] Id.

[130] Id. at 4.

[131] *Duke Deferral Case*, Case No. 09-712-GA-AAM, Application at 5 (August 10, 2009).

community was put on notice by Duke's own language that the deferral case was only for the purpose of creating an accounting mechanism and did not constitute ratemaking.[132]

In the Duke deferral case, OPAE raised the used and useful issue in its Motion to Intervene and Motion to Dismiss. Thus, again the investment community was put on notice that there could be a challenge to Duke's recovery of MGP-related investigation and remediation costs based on whether the MGP facilities and related costs met the used and useful standard set forth in R.C. 4909.15 (A)(1) and R.C. 4909.15 (A)(4).

Duke itself earlier understood the distinction between accounting and ratemaking. Both the OCC and OPAE filed Applications for Rehearing of the November 3, 2009 Finding and Order in the deferral case. Duke filed a Memorandum Contra the OPAE Applications for Rehearing responding to OPAE's used and useful argument by stating that, "as is typical in such situations, that it [the PUCO] was merely granting deferral authority and that no determination was being made as to the appropriateness of recovery."[133] Duke also argued that:

> Of course, there was no requirement that Duke prove the properties' used and useful nature or that it demonstrate that the properties are currently included in its rate base **in this proceeding.** This is not an application for recovery of these costs. This is merely a request for authority to defer the amounts so that their recovery can be assessed at a later point in time.
>
> **In addition, it is clear that the Commission does not require applicants to prove that costs will ultimately be recoverable, prior to granting requests for deferral authority**.[134] (Emphasis added).

[132] Id., Finding and Order at 3 (November 12, 2009).

[133] Id., Duke Memorandum Contra at 2 (December 18, 2009).

[134] Id. at 2-3.

In arguing that it did not have to make a showing of used and useful "in this case", Duke acknowledged that it would have to prove the used and useful nature of the MGP-related facilities in a future ratemaking proceeding. If instead Duke believed that it did not have to ever make a showing of used and useful, then the Utility would not have included the qualifier "in this proceeding" in its Memorandum Contra. It is only now, after the PUCO Staff made a finding that some of the MGP-related properties were not used and useful in proving natural gas service to current customers,[135] that Duke is changing its argument from having to prove the used and useful nature of the properties in a future case, to never having to make such a showing because the PUCO already made that decision in the deferral Finding and Order.[136] Again, Duke's own language should have been adequate to put the investment community on notice.

Duke is now attempting to rewrite history in a way that contradicts the language in the PUCO Finding and Order, Entry on Rehearing and Ohio Supreme Court precedent but also Duke's own language in is Memorandum Contra. In the face of explicit PUCO and Supreme Court language, Duke witness Wathen now argued that upon granting a deferral, the PUCO has to give a utility some assurance of recovery, because the utility relies on the deferral.[137] Mr. Wathen questioned how the PUCO could issue deferral authority "knowing that it was not going to ultimately grant -- the authority because of the condition that it knew at the time wasn't met would just undermine all deferral authority."[138] Among the obvious flaws in Mr. Wathen's argument is the belief that the

[135] Staff Ex. No.1 (Staff Report of Investigation) at 46 (January 4, 2013).

[136] Tr. Vol. III at 795-796, 799 (Wathen).

[137] Tr. Vol. III at 801-802 (Wathen) (May 1, 2013).

[138] Tr. Vol. III at 802 (Wathen) (May 1, 2013).

PUCO knew at the time of granting deferral authority that it would not ultimately grant cost recovery for any reason. In order for the PUCO to "know" that, the PUCO would have been required to review the issue in detail at the time of the deferral request. The PUCO has addressed this issue by repeatedly stating that it did not review the recoverability of the underlying cost when granting deferral authority.[139]

Despite his previous claims regarding assurances of cost recovery, Mr. Wathen acknowledged that he understood that cost recovery of deferrals was NOT guaranteed just because deferral authority was granted.[140] Thus both the Utility and the investment community understood, or should have understood, that the recovery of MGP-related investigation and remediation costs would be completely and exclusively reviewed in a future base rate case. That review and a decision on MGP-related cost recovery is part of the ratemaking process, and will not have the negative impact on the investment community that Duke threatens. In any event, Ohio law, not accounting and not the investment community, controls the PUCO's decision in this case.

D. Duke Did Not Prove That Its MGP-Related Investigation And Remediation Costs Were Prudently Incurred.

1. Duke provided no documentation that the MGP-related investigation and remediation costs were prudently incurred.

A significant portion of OCC's and OPAE's Brief was devoted to demonstrating that Duke could not meet its burden of proof, in these cases, because the Utility did not

[139] *Duke Deferral Case*, Case No. 09-712-GA-AAM, Finding and Order at 3 (November 12, 2009)

[140] Tr. Vol. III at 803 (Wathen) (May 1, 2013).

document its decision-making process.[141] Duke's Brief does not remedy the Utility's proof problem.

Duke agrees with OCC and OPAE's discussion of the standard the PUCO relies upon in making a determination of prudence

> A prudent decision is one which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made. The standard contemplates a retrospective, factual inquiry, without the use of hindsight judgment, into the decision process of the utility's management.[142]

The failure of Duke's case is exposed when the PUCO cannot put itself into Duke's shoes to decide if Duke's decisions are consistent with what a reasonable person would have done in light of the conditions and circumstances known, or reasonably should have been known, at the time the decision was made. That is because, **Duke did not produce a single written report documenting the analysis or evaluation of the remedial options that the Utility allegedly considered to support its decision making**.[143]

Basic information that the PUCO and interested parties would expect to be available for review simply does not exist. For example, Duke argues on Brief that: "[Duke] considered various approaches to remediating the East End and West End Sites to meet the applicable standards and to ensure the protection of human health and the environment."[144] However, there is no written analysis that discusses which of the

[141] OCC and OPAE Brief at 25-48 (June 6, 2013).

[142] Duke Brief at 26 (June 6, 2013). See also *Cincinnati Gas & Electric Company v. Pub. Util. Comm.*, (1999) 86 Ohio St. 3d. 53, 1999 Ohio Lexis 1887.

[143] OCC and OPAE Brief at 26 (June 6, 2013) (Emphasis added).

[144] Duke Brief at 35 (June 6, 2013).

various approaches to remediating the MGP Sites would meet all applicable standards, and which option(s) would not. There was no written documentation as to why the option(s) chosen met applicable standards and why the option(s) rejected did not meet applicable standards.

In an attempt to remedy Duke's evidentiary problem, the Utility mischaracterizes the position taken by OCC and OPAE. For example, in Duke's Brief it states:

> Note that while other parties have argued that the [Utility] should choose short-term least costly alternatives such as capping and institutional controls, the [Utility's] expert, the VAP CP, consistently opined that such short-term measures – often referred to colloquially as "pave and wave" or "pave and pray" by themselves will simply not meet the applicable VAP standards * * *.

However, OCC's expert, Dr. Campbell, never recommended that Duke place a cap over the sites and walk away from these MGP Sites. Duke's expert, the VAP Certified Professional ("CP"), admitted as much on cross-examination. Mr. Fiore stated:

> Q. Now, you indicated that engineering controls and institutional controls alone are not sufficient to meet VAP requirements, correct?
>
> A. At this site.
>
> Q. At this site.
>
> A. Yes.
>
> Q. Did Dr. Campbell suggest that engineering controls and institutional controls alone were sufficient to meet the requirements at this site?
>
> A. I think I already answered that, and my answer was no.
>
> Q. You talked about a pave and wave situation.
>
> A. Right.

> Q. In a circumstance where you waved, put a cap on it, wouldn't that generally involve continued monitoring of the site to determine if the site warranted further action in the future?
>
> A. Under the VAP if you go through the whole process and get a no further action letter, it would include that, correct. But in other instances where you are just paving over it, maybe not looking to achieve a no further action under the VAP or not participating in the VAP, it may not.[145]

It was inaccurate and contrary to the evidence on the record for Duke to suggest that OCC's expert witness, Dr. Campbell, had taken a position that he in fact had not taken. Duke's own witness confirmed on cross-examination that Dr. Campbell had not advocated for Duke to pave the sites and forget them. In fact Mr. Fiore admitted that it could be possible to cap the sites and as part of receiving a no further action letter the need for continued monitoring would be required. Such remedy is inclusive of the recommendation made by Dr. Campbell.[146]

2. Duke's legal liability does not mean its customers have liability.

Duke acknowledged in its Brief that it faces strict liability for remediating contamination at both the East End and West End MGP Sites under CERCLA. Duke argued that: "[t]he Company's ownership of these properties that contain waste products and contaminants from the operations of the MGP facilities creates liability pursuant to CERCLA; [Duke] witness Bednarcik testified that legal counsel has advised the [Utility] that [Duke] is liable under state and federal laws, for the environmental conditions existing at its former MGP sites."[147] CERCLA identifies four categories of actors upon

[145] Tr. Vol. III at 656-657 (Fiore) (May 1, 2013).

[146] OCC Ex. No. 15A (Direct Testimony of Dr. Campbell) at 27-28 (February 25, 2013).

[147] Duke Brief at 30-31 (June 6, 2013).

whom it imposes liability.[148] None of the four categories extend liability to actors uninvolved with the property, which means that, under CERCLA, strict liability does not extend to Duke's customers for cleanup costs.

Duke has failed in its efforts on brief to link the Utility's strict liability under environmental regulations to cost recovery from customers under PUCO ratemaking regulations. In these proceedings, Duke is voluntarily undertaking the remediation actions at the MGP Sites.[149] Duke has not faced an enforcement action from the U.S. EPA or the Ohio EPA.[150] Duke states: "[t]he [Utility] in addressing its liability through the VAP that is set forth in R.C. Chapter 3746, is taking a proactive and prudent approach to most effectively resolve its liability and to protect human health and the environment in a reasonable and cost effective manner." Of course Duke makes this statement without citation, because there is no written analysis to support the Utility's claim that the MGP-related investigation and remediation costs were prudently incurred.

3. The timing of Duke's remediation efforts does not equate to prudent decision-making by Duke.

According to Duke, the East End and West End Sites were initially prioritized low, but were reprioritized in 2006 and 2009, respectively, because of changes in site conditions and potential exposure pathways in and around the properties.[151] Duke stated that, at the East End Site, planned residential development of adjoining properties (to both the west and east of the property) and a related easement across a western portion of

[148] OCC and OPAE Brief at 12 (June 6, 2013).

[149] Duke Ex. No. 21 (Direct Testimony of Jessica Bednarcik) at 6-7 (July 20, 2012).

[150] Tr. Vol. I at 139 (Margolis) (April 29, 2013).

[151] Duke Brief at 31 (June 6, 2013).

the property would have altered the exposure controls on the site.[152] The West End site was reprioritized due to a proposal by the Ohio Department of Transportation and the Kentucky Department of Highways to build a new bridge in Cincinnati that would directly cross the West End Site.[153]

According to Duke, the East End site was reprioritized after a developer approached Duke and indicated that he planned to use adjoining property for residential development.[154] As argued in OCC and OPAE's Brief, the fact pattern behind that alleged trigger, the proposed residential development, for the East End investigation and remediation is problematic for Duke's case.

With regards to the residential development to the west of the East End Site, despite knowing that the parcel was formerly an MGP site,[155] and knowing the developer intended to acquire the parcel to construct residential housing,[156] and without conducting any investigation to ascertain if contaminants related to MGP operations had affected the parcel,[157] Duke nevertheless proceeded with the sale of the parcel to the developer.

Subsequent to the sale, Duke made attempts to enter the parcel to conduct investigations and make findings with regards to the extent of contamination on the parcel that Duke had sold.[158] Duke's attempts to investigate were denied by the

[152] Duke Brief at 31 (June 6, 2013).

[153] Duke Brief at 32 (June 6, 2013).

[154] Duke Brief at 31 (June 6, 2013).

[155] Tr. Vol. II at 308 (Bednarcik) (April 30, 2013).

[156] Tr. Vol. II at 310 (Bednarcik) (April 30, 2013).

[157] Tr. Vol. II at 361 (Bednarcik) (April 30, 2013).

[158] Tr. Vol. II at 313 (Bednarcik) (April 30, 2013).

developer who refused to allow Duke to enter the property, despite Duke's promises to remediate the site of any contaminants found on the parcel.[159]

The developer then made threats of a lawsuit for the environmental damage to the parcel sold by Duke.[160] Duke, in an effort to avoid litigation and associated potential for payment of damages, agreed in a confidential settlement agreement to buy back the parcel, plus buy other parcels acquired by the developer in the vicinity of the East End site. Duke paid the developer a significant premium for the property.[161] Duke's payment to the developer was $4.5 million, or $2.3 million[162] in excess of the fair market value of property acquired by the developer. A commercial real estate appraiser described the sale as "not an arms-length transaction."[163]

Duke could have avoided the entire situation by not selling the parcel to the developer in the first place. Because of Duke's imprudence surrounding the transaction pertaining to the Purchased Property adjacent to the East End Site, Duke's expectations that its customers pay the premium purchase price, as well as, investigation and remediation costs necessitated by this alleged change in use, is misplaced. Such investigation and remediation costs plus the premium paid for the Purchased Property should not be authorized for collection from customers.

The East End Site was investigated and remediated because of alleged residential development adjacent to the former MGP Site. However, Duke's own contribution to the change in use caused by the transaction surrounding the parcel referred to as the

[159] Id.

[160] Id.

[161] OCC Ex. No. 9 (Summary Appraisal Report) (October 28, 2011).

[162] Staff Ex. No. 1 (Staff Report of Investigation) at 43, 51 (January 4, 2013).

[163] OCC Ex. No. 9 (Summary Appraisal Report) (October 28, 2011).

Purchased Property demonstrates the lack of prudence relating to Duke's investigation and remediation expenditures.

Duke bought property that it had never previously owned and had not used for MGP operations. It should also be recognized that had Duke not purchased the property, to avoid being sued, any damages it paid in such a lawsuit would likely not have been recoverable from customers. In essence, Duke purchased property and seeks payment for related remediation from customers when, had it not bought the property and been sued, it likely could not have obtained reimbursement from customers. The PUCO should consider Duke's actions in the transaction as another reason why Duke's request is not based on reason or prudence.

4. Duke's brief does not address the extensive evidence presented by OCC Witness Dr. James Campbell showing Duke's failure to assess alternatives and the imprudent spending that has resulted from the absence of appropriate cost controls.

In its Brief, Duke does not address the extensive testimony presented by OCC's environmental expert, James Campbell, Ph.D., as to the imprudence and excessive expenditures associated with Duke's remediation. In fact, Duke does not even acknowledge Dr. Campbell as a witness in this proceeding, or address his testimony in any regard. Perhaps Duke believes that if Duke turns a blind eye toward Dr. Campbell's impeachment of its remediation activities, the PUCO will do so also. But the PUCO cannot ignore the imprudent spending engaged in by Duke. Nor can the PUCO ignore the facts that Duke failed to seriously consider a range of remedial alternatives and failed to document its consideration of any remedial alternatives, or the costs associated with them. These failures led to Duke's imprudent remediation approach. Duke's apparent

belief that neither the PUCO nor any party would critically examine Duke's approach to remediation should not be the basis to have customers pay such expenditures.

Instead of addressing the law's specific requirements, Duke's case is based almost entirely on claims that its approach to remediation has been a prudent one. Indeed, Duke asserts that it has "executed a flawless remediation process to date."[164] It is this attitude -- that Duke and its personnel and contractors can do no wrong -- that unfortunately appears to have led to Duke's excessive spending on MGP remediation, which it now seeks to place on the shoulders of customers.

But, like Duke's remediation approach, the testimony and Brief that Duke submitted in this case,[165] reflect little analysis of cost-effective means of meeting applicable environmental standards. Instead, Duke's case, as presented in its testimony and Brief, is focused on the process it used to implement remediation, as follows:

1. Duke claims that it only undertook remediation when it did because change in use of each property required it to do so under existing law;[166]
2. Duke utilized Ohio EPA's Voluntary Action Program (VAP);[167]
3. Duke utilized VAP Certified Professionals to advise Duke regarding applicable standards;[168]

[164] Duke Brief at 54 (June 6, 2013).

[165] Duke's discussion of prudence-related issues is found at pages 26-54 of its Brief. Duke Brief at 26-54 (June 6, 2013). While Duke's discussion is lengthy, it is mostly a rehashing of Ms. Bednarcik's testimony regarding the process utilized in proceeding with Duke's investigation and remediation activities. *Id.* It provides almost no analysis of remedial alternatives available under Ohio EPA's Voluntary Action Program (VAP), provides no references to VAP Rules to support its witnesses' claims, and does not respond to the testimony of OCC witness Campbell. In all of these respects, Duke's Brief falls far short of addressing the evidence required to meet its burden of proof. The reason for these shortcomings is apparent: the evidence produced by Duke its inadequate to meet its burden of proof.

[166] Duke Brief at 31-33, 37-38, 45 (June 6, 2013).

[167] Duke Brief at 33-35, 45-46 (June 6, 2013).

[168] Duke Brief at 33-35, 45 (June 6, 2013).

4. Duke employed "technologies typically considered for MGP remediation" and the work being performed was "consistent with general industry practices in this area."[169]

5. Duke has "a very knowledgeable and responsible internal team" and has employed qualified and experienced consultants and contractors to perform investigation and remediation;[170] and

6. Duke utilized a competitive bid process for obtaining consultants and contractors.[171]

Duke's emphasis on process, to the exclusion of any significant analysis of remediation alternatives, reflects its problematic approach to remediation. Duke's approach presumes that if you hire qualified people to perform the work, you will have a prudent remedy. But even qualified people have to be given the right plan of action and managerial oversight.

Duke's plan of action was to spend, spend, spend -- because Duke believed its customers would reimburse its costs. Duke's contractors followed Duke's lead and Duke showed little regard for cost. As discussed in the OCC and OPAE Brief, Duke's remediation, far from being "flawless," reflected Duke's commitment to remediate at any price and without adequate consideration of more cost-effective alternatives -- because customers will pick up the tab.[172] This is in addition to the fact that, with respect to the East End site, it was Duke's own actions in selling a portion of the property that led to the need for remediation for which Duke now demands customers pay.[173]

[169] Duke Brief at 35-37, 53-54 (June 6, 2013).

[170] Duke Brief at 46-54 (June 6, 2013).

[171] Duke Brief at 46-54 (June 6, 2013).

[172] Duke Brief at 25-48 (June 6, 2013).

[173] OCC and OPAE Brief at 58-60, 89-91 (June 6, 2013).

And Duke cannot simply shift responsibility to its contractors for failing to analyze and present alternatives or develop a cost-effective remedy. Duke's managerial oversight includes its oversight of contractors. It was Duke that failed to direct the performance of a rigorous alternatives analysis or feasibility study.[174] It was Duke that failed to direct its consultants and contractors to seek the most cost-effective remedy or balance cost with other considerations.[175] Indeed, it was Ms. Bednarcik's expression of Duke's viewpoint that spending for an alternatives analysis would have been an "imprudent use of money" that best reflected Duke's commitment to overspending on remediation.[176] However, the $250,000 that Ms. Bednarcik was familiar with for other feasibility studies for MGP Superfund sites pales in comparison to the $62.8 million already spent by Duke at the MGP sites, and the untold millions Duke appears poised to spend in remediating these sites.[177]

Even short of spending $250,000 for a formal feasibility study, it is difficult to fathom how Duke could have conducted an alternatives analysis of any sort -- as it claims to have done -- without documenting that analysis in any respect, as it has admitted it did not do.[178] Moreover, it is hard to imagine how the mere documentation of the analysis that Duke actually performed -- if any -- could have cost another $250,000.[179]

Instead, Duke established the scope of the remediation itself with little regard to cost. Indeed, although the primary objective of environmental remediation is to protect

[174] Tr. Vol. I at 213-15 (Bednarcik) (April 29, 2013).

[175] Id.

[176] Tr. Vol. I at 213, 215 (Bednarcik) (April 29, 2013).

[177] Tr. Vol. I at 216-17 (Bednarcik) (April 29, 2013).

[178] *See* OCC and OPAE Brief at 25-27 (June 6, 2013).

[179] Id.

human health and the environment, Duke's own witnesses' testimony suggests that cost was, in Duke's eyes, a negligible consideration. This begins with Ms. Bednarcik's testimony that it was imprudent to document Duke's alternatives analysis and the costs associated with different alternatives. It proceeds with the viewpoints of Dr. Middleton and Mr. Fiore that cost, while it is an "appropriate," "reasonable," and even "important" factor to consider,[180] clearly falls lower on the scale than other factors.

Thus, Dr. Middleton, for example, when asked where his clients place cost in a list of considerations, stated:

> Q. In your experience working with clients, you've had, you know, numerous clients, has it been your experience that the clients find cost to be an important factor generally or that they don't?
> A. Cost is one of many factors that enter into these decisions.[181]

Thus, to Dr. Middleton, cost is just one of many factors clients consider in making their remediation decisions. While cost may be only "one of many factors," though, he admitted that clients don't "intend" or "seek" to spend more than is necessary to meet applicable standards.[182] And the PUCO should not allow Duke to recover more than is necessary to meet applicable standards.

Mr. Fiore admitted that while he is currently the CP for the East End site, he has never been "asked to look at the reasonableness of the costs associated with any of the remediation efforts that are being done at the East End site."[183] Neither Mr. Fiore nor his firm participated in the Phase 1 investigation of either site that led to the selection of a

[180] Tr. Vol. I at 39-41 (Middleton) (April 29, 2013).

[181] Tr. Vol. I at 90 (Middleton) (April 29, 2013).

[182] Tr. Vol. I at 50 (Middleton) (April 29, 2013).

[183] Tr. Vol. II at 555 (Fiore) (April 30, 2013).

remediation remedy.[184] Mr. Fiore did not review any "documentation that showed an analysis of different options that Duke had available as far as remediation techniques."[185] And he was not aware of any "sufficient documentation" of such options.[186] Furthermore, he did not know either the options that his own firm -- Haley & Aldrich -- had suggested for the East End site or the options that had been put forth by Burns & McDonnell for the West End site.[187]

As emphasized in the OCC and OPAE Brief, Duke elected not to call as witnesses either of the consulting firms or either of the CPs involved in the actual remediation design at the East End or West End MGP Sites.[188] Further, the VAP clearly provides for variances where "cost substantially exceeds the economic benefits"[189] of remediation, and Mr. Fiore testified that the VAP rules are "flexible *** to allow remediating parties to really work on the cost end of what remediation might take place with the CP."[190] But Duke's approach did not consider or use that flexibility to manage costs because Duke already had decided it would dig, dig, dig, to 40 feet, even when it knew that contamination was as deep as 100 feet and that digging would never fully remediate this site except at some infinite cost measure. [191] And, more importantly, Duke did this when the VAP Rules provided for other remedial alternatives that were far less expensive.

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[184] Tr. Vol. II at 548-49 (Fiore) (April 30, 2013).

[185] Tr. Vol. II at 553 (Fiore) (April 30, 2013).

[186] Tr. Vol. II at 553.

[187] Tr. Vol. II at 556.

[188] OCC and OPAE Brief at 29-30.

[189] VAP Rule 3745-300-12(D).

[190] Tr. Vol. II at 554 (Fiore) (April 30, 2013).

[191] While a certain, limited amount of digging is required by the VAP even where soil covers are utilized (2 feet BGS), the fact that Duke dug to depths where the soil was not even stained with tar is indicative of the overreach engaged in by Duke. This was observed by Dr. Campbell at the time of his site visit at the West

If Duke considered alternatives, it gave so little consideration to them that the Utility did not even require alternatives to be documented or a cost of alternatives to be identified.[192] Duke did not place sufficient emphasis on cost. And Duke did not use the flexibility provided by VAP, under which it allegedly proceeded voluntarily..

5. Duke misrepresents the requirements of the VAP in its reliance on VAP rules and improperly indicates that VAP rules lack the very flexibility for which Duke claims it used the VAP.

In contrast to the OCC and OPAE Brief, Duke, in its Brief, does not cite to a single VAP Rule to support its position. Unlike the OCC and OPAE Brief, which methodically addresses the applicability of VAP standards and the manner in which they could have been cost-effectively addressed at Duke's MGP sites,[193] Duke does not discuss applicable standards, exposure pathways, points of compliance or other factors that determine how a remedy can be cost-effectively implemented under VAP.

Instead, Duke relies almost entirely on its witnesses' claims that, with respect to Tar-Like Material ("TLM") and Oil-Like Material ("OLM"), VAP "requires removal of source material if it can feasibly be removed or treated." This "material" is the "free product" (DNAPL or "Dense Non-Aqueous Phase Liquid") or mobile tar addressed by Dr. Campbell and in the OCC and OPAE Brief.[194] As discussed, DNAPL was identified

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End MGP site on November 27, 2012 and reflected in the photos he presented as evidence, which shows what "appears to be brown dirt, certainly not tarry stained.. OCC Ex. No. 16; Tr. Vol. IV at 991-92 (Dr. Campbell) (May 2, 2013). At the time, workers also did not see it necessary to utilize Personnel Protective Equipment (PPE) to guard against MGP vapors. Tr. Vol. IV at 992 (Dr. Campbell) (May 2, 2013).

[192] *See* OCC Brief at 25-29, *citing* Ms. Bednarcik's testimony specifically at Tr. Vol. I at 198-219 (Bednarcik) (April 29, 2013).

[193] OCC Brief at 60-78.

[194] OCC and OPAE Brief at 69-71(June 6, 2013), *citing* OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 22-23, 28, 31, 33 (February 25, 2013).

in 4 of 16 monitoring wells at the west parcel of the East End site, but it was not identified at the West End site, nor was it identified in the east parcel of the East End site.[195]

Duke incorrectly states that, under VAP, all free product (DNAPL) must be removed or treated "to the extent it is technically feasible to remove or treat it." This is simply incorrect, for two reasons. First, under VAP, free product must only be addressed to the extent that unrestricted potable use standards (UPUS) are applicable, as well as violated.[196] However, free product standards are not applicable in this case because groundwater under Duke's property or adjacent property is not used for potable purposes. OCC witness, Dr. Campbell, testified in this respect:

> The requirement [to remediate free product] under the VAP Rules applies only to the extent that groundwater beyond the property or USD area boundaries may be affected. As mentioned earlier in my testimony, groundwater quality may not exceed UPUS at the property boundaries and would not exceed UPUS at appropriate USD [Urban Setting Designation] boundaries. As such, under the VAP Rules the presence of free product does not require the extensive and imprudent soil remediation conducted by Duke.[197]

Because groundwater at Duke's MGP sites is not used for potable purposes (either at the property or beyond property boundaries), applicable standards for UPUS do not apply and free product need not be removed. Nonetheless, Dr. Campbell recognized that "as a practical matter remediation of tar wastes usually includes excavation of at least

[195] OCC and OPAE Brief at 70 (June 6, 2013), *citing* OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 22 & Attachment JRC-17 (DEO-MGP 007349-007499), Attachment JRC-14 (DEO-MGP 002997-002943), and Attachment JRC-13 (DEO-MGP 003604-003704) (February 25, 2013).

[196] VAP Rule 3745-300-08(B)(2)(c); VAP Rule 3745-300-09(C)(2)(c).

[197] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 22-23 (February 25, 2013).

some mobile tar." Consequently Dr. Campbell did provide for removal of 20 feet BGS from the former tar pit on the west parcel of the East End MGP site.[198]

In other words, the VAP requirement to remediate "free product" applies if UPUS standards are applicable, as well as violated. Since UPUS standards are not applicable because groundwater is not permitted to be used for potable purposes in accordance with Cincinnati City Ordinance, the free product standard would not be applicable. The only VAP Rules which specifically address free product clearly tie remediation of free product to application of UPUS standards.[199] VAP Rule 3745-300-8(B)(2)(c) states:

> (c) When ground water exceeds unrestricted potable use standards, ground water response requirements in accordance with rule 3745-300-10 of the Administrative Code must be met. Properties with free product exceed applicable standards for unrestricted potable use of ground water.

VAP Rule 3745-300-10, entitled "Ground water classification and response requirements" addresses the means through which groundwater violating UPUS may be addressed, including the use of Urban Setting Designations, and implementation of institutional and/or engineering controls that prevent human exposure. Those are the measures required to be implemented for Duke's MGP sites and which have been recommended by OCC witness Dr. Campbell as appropriate remedial options.[200] Thus, to the extent that VAP standards are applicable, they are appropriately and adequately addressed through these response measures.

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[198] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 23, 33 & Attachment JRC-5 (February 25, 2013).

[199] VAP Rule 3745-300-08(B)(2)(c); VAP Rule 3745-300-09(C)(2)(c).

[200] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 22 (February 25, 2013).

To the extent that Duke witnesses Ms. Bednarcik and Mr. Fiore suggest that free product must be remediated where UPUS requirements are not applicable, they misstate the VAP requirements. Further, to the extent they suggest that land use restrictions or a USD would not extend the point of compliance for free product to the same location as that required to meet UPUS standards for groundwater, they also misstate VAP requirements.[201]

Second, in addition to the fact that free product is not required to be remediated where UPUS is not applicable (as is the case here), the VAP Rules specifically provide variance procedures, including USDs, under which Ohio EPA may vary standards from otherwise applicable standards.[202] Dr. Campbell summarized the basis for granting a variance as follows:

> 1) technical infeasibility ***or*** if the cost substantially exceeds the economic benefits; 2) if the proposed remediation method (e.g. institutional controls and engineering controls) of addressing the issue will ensure that public health and safety will be protected; and 3) if the proposed remediation method is necessary to preserve, protect or enhance employment opportunities or the reuse of the affected property.[203]

Thus, even if it were determined that UPUS were applicable to either of Duke's sites, there is no reason to believe that Duke would not have been able to justify a variance. If UPUS were determined to apply, Duke could, and should have, sought a variance on the basis of technical infeasibility **or** that the cost substantially exceeds the

[201] OCC would emphasize that while technical professionals such as Ms. Bednarcik, Dr. Campbell and Mr. Fiore, may offer their opinions on the application and meaning of state regulations, ultimately the interpretation of regulations is a legal matter, as is well established in Ohio law.

[202] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 23 (February 25, 2013); VAP Rule 3745-300-12.

[203] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 23 (February 25, 2013); VAP Rule 3745-300-12(D) (emphasis added).

economic benefit of the remediation. Given that groundwater is not used as a potable source in this area, measures such as institutional and engineering controls, and/or a USD, would have been adequate to protect public health and safety and provide for reuse of each of the properties, including preservation or enhancement of employment at the sites.

The VAP Rules specify that the cost of filing a variance application is $23,810 (currently).[204] While there would also certainly be costs associated with preparing an application, when compared to amounts already expended by Duke and amounts that may well be expended in the future to meet Duke's costly remediation approach,[205] this would have been a small investment to potentially avoid such exorbitant costs.[206]

Duke witness Ms. Bednarcik testified that she was not familiar with VAP variance rules to address economic feasibility or financial hardship.[207] Mr. Fiore testified that a variance may still be needed to meet applicable standards, but that Duke would not be requesting one until further investigation had been done.[208] Nonetheless, even Duke has apparently recognized that it would not be feasible to remove all contaminants of concern ("COC") since contamination has been found 100 feet below ground service ("BGS") but Duke determined to excavate only to 40 feet BGS.[209] The question is - why

[204] VAP Rule 3745-300-03(B)(11).

[205] Mr. Fiore testified that the ultimate remediation costs could well be twice the amount already spent. Tr. Vol. II at 573-574 (Fiore) (April 30, 2013).

[206] While Duke witness Margolis, who is not an environmental professional, questioned the usefulness or practicality of variances in resolving site issues and didn't know that any of his clients had used one, he admitted that he was unaware of the extent to which variances had been granted. Transcript Volume I at 135-36 (Duke witness Margolis).

[207] Tr. Vol. II at 300-01 (Bednarcik) (April 30, 2013).

[208] Tr. Vol. III at 618-19 (Fiore) (May 1, 2013).

[209] Tr. Vol. III at 616-18 (Fiore) (acknowledging contamination to depths of 100 feet and that a variance may still need to be requested) (May 1, 2013).

was it necessary to dig to 40 feet BGS when, knowing there are COCs to 100 feet BGS, Duke could not remove all contamination anyhow. Dr. Campbell explained how Duke's excavation solution for free product did not make sense:

> It's very difficult to get it out once it's that deep. In fact, one of the issues about this site was the – even with all the excavation that was done, there's still contamination left in place. And that material will be in place for some time in the future.
>
> And so the site's not made like it was before the industrial revolution; there is contamination in place that will remain in place. And so if you've got to deal with those issues going forward anyways, it doesn't make sense to me to have completed such an extensive excavation.[210]

The simple fact is that Duke imprudently forged ahead with excavation as if it could eliminate any and all COCs when it knew that this was not possible, let alone economically feasible. Duke's spending was wasteful, excessive, and imprudent and should not be reimbursed by customers.

6. Duke's arguments for charging customers based on the potential of contaminated groundwater migrating off-site are without merit because effects on groundwater beyond property boundaries are addressed by the city ordinance and existing alternative water supply, as well as potentially by use restrictions or a USD. Further, there is no evidence surface water is or will be affected.

In its Brief, Duke suggests that it took its expensive remedial approach because groundwater might be affected beyond property boundaries.[211] Yet Duke completely fails to explain why the existing Cincinnati City Ordinance, use restrictions and/or a Urban Setting Designation ("USD"), would not adequately address Duke's concerns

[210] Tr. Vol. IV at 996 (Dr. Campbell) (May 2, 2013).

[211] Duke Brief at 40-41 (June 6, 2013).

about groundwater migrating beyond the property -- if indeed such migration were shown to occur. Moreover, as detailed in the OCC and OPAE Brief, there is no evidence that either groundwater or surface water is contaminated at or beyond the property boundaries of the MGP sites.[212] Thus, Duke's argument that it was reasonable to spend money to excavate to prevent groundwater contamination beyond property boundaries -- or to remove free product, as discussed above -- is without basis.

Likewise, Mr. Fiore's unsubstantiated claims that Duke's proposed remediation plan is designed to address long-term site risks, and that soil covers will not be adequate in the long run are without support.[213] Dr. Campbell's discussion of the appropriateness and adequacy of engineering controls, such as soil covers, together with institutional controls such as a Soil Management Plan, demonstrate a remedial approach that is clearly a prudent, as well as cost-effective, means of protecting human health and the environment.[214] It is also one that is consistent with VAP.[215]

7. Because VAP is a flexible program, does not prescribe remedial alternatives, and does not require or place emphasis on cost controls, then the use of VAP and the use of a VAP CP does not assure a prudent result.

Duke recognizes, and emphasizes, that VAP is a flexible program[216] that gives those complying through VAP different means of meeting applicable standards.[217] But the fact that VAP is flexible means that the VAP does not impose a requirement on

[212] OCC and OPAE Brief at 66-69 (June 6, 2013).

[213] Duke Brief at 36-37, n. 119 (June 6, 2013).

[214] OCC and OPAE Brief at 71-76 (June 6, 2013).

[215] Id.

[216] Duke Brief at 34, 45 (June 6, 2013).

[217] Id.

remediating parties to utilize a cost-effective remedy. Duke witness Fiore acknowledged VAP's limitations in this respect:

> Q. And the VAP rules don't have any guidance as far as any cost analysis or any review of costs that you use in order to achieve meeting the standards that they set forth, correct?
>
> A. The VAP rules are very flexible with respect to remediation and they were built that way **to allow remediating parties to really work on the cost end of what remediation might take place with the CP**. They don't themselves stipulate that, that's correct.[218] (Emphasis added.)

While Duke argues that the selection of VAP was a prudent decision, it is the implementation of a remedy, whether under VAP or under Superfund or any other compliance mandate, that is critical – and which in this case was imprudent. Without performing and documenting an appropriate alternatives analysis, mere use of the VAP does not ensure a cost-effective prudent solution.[219]

Duke failed to employ more cost-effective remedies that were available under VAP and that are detailed in Dr. Campbell's testimony. For soil remediation, as discussed in the OCC and OPAE Brief, these remedies included the construction of soil covers and fencing (engineering controls) and land use restrictions and a soil management plan (institutional controls).[220] For groundwater (and free product), Dr. Campbell determined that the relevant standard for groundwater is UPUS (Unrestricted Potable Use Standard) but that the point of compliance for this standard was the property

[218] Tr. Vol. II at 554 (Fiore) (April 30, 2013).

[219] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 11-14 (February 25, 2013).

[220] OCC and OPAE Brief at 62-63, 71-76 (June 6, 2013).

boundary or a point beyond the property boundaries where an Urban Setting Designation (USD) could be established.[221]

Alternatively, a reliable alternate water supply could be supplied to affected users.[222] Since an existing City of Cincinnati ordinance prohibits use of private wells, the City provides a reliable alternate water supply. Since groundwater at the MGP sites is not used for potable purposes, standards associated with groundwater have already been effectively met.[223]

These alternatives to extreme excavation are not mysteries under VAP, but are plainly set forth in the program. Duke had to take advantage of these remedial alternatives to act in a prudent manner from a cost standpoint. Duke failed to do so and its failure to do so was the measure of its imprudence.

8. Site-specific analysis of remedial alternatives and appropriate managerial oversight are needed even when employing standard practices and competitive bid procedures.

As noted above, Duke's brief also suggests that the employment of capable and qualified personnel and contractors and the use of competitive bid procedures are sufficient to assure that prudent decisions are made.[224] But that is not the case. When Duke sends an excessive remedy out for competitive bids, the result is to get bids for an excessive remedy. The result is comparable to getting the lowest-cost Maserati when the

[221] OCC and OPAE Brief at 65-69 (June 6, 2013).

[222] Id. and OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 17-18 (February 25, 2013).

[223] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 17-18 & Attachment JRC-16 (DEO-MGP 001261) (February 25, 2013).

[224] Duke Brief at 37-54 (June 6, 2013).

lowest-cost Ford would be adequate, reasonable and prudent. OCC witness Dr. Campbell testified in this regard:

> I didn't see where Duke really did alternative evaluations to look at different ways of meeting requirements. All the bidding stuff that we talked about earlier today happened **after** the remedy decision.
>
> So the difference of opinion we have is in the remedy selection and that's where I think the mistake was made. As far as bidding, that had already incorporated what I would consider to be where the mistake was made. So it's post, post remedy selection.[225] (Emphasis added.)

What Duke needed was to have analyzed and documented remedial alternatives and their comparative costs **before** it sent its engineered remediation plans for its MGP sites out for bid. Duke did not do that and the PUCO should not place the excessive costs resulting from Duke's imprudence on customers.

9. Duke's emphasis on its use of a VAP CP as a witness in this proceeding is misplaced when VAP does not require evaluation of cost-effective remedial alternatives and when Mr. Fiore made no such analysis.

In its Brief, Duke emphasizes Mr. Fiore's qualifications as a VAP CP.[226] However, while a VAP CP is a requirement to proceed with remediation under the VAP as discussed above, Mr. Fiore was not involved in the selection of remedial alternatives for either of the MGP sites. Furthermore, as also discussed above, VAP does not require the evaluation of the cost-effectiveness of remedial alternatives. That is the purview of the PUCO in a base rate proceeding. It is the analysis of remedial alternatives which are consistent with applicable standards, whether they be VAP standards or Superfund

[225] Tr. Vol. IV at 1000 (line 17) to 1001 (line 2) (Dr. Campbell) (May 2, 2013).

[226] Duke Brief at 34-35 (June 6, 2013).

standards, that is essential for the prudent evaluation of remediation in this case. That analysis has not been produced by Duke to support its allegations that its remediation expenditures were prudently incurred.

OCC and OPAE would also emphasize that VAP CP certification, with its minimal requirements, including an 8-hour training course,[227] does not give Mr. Fiore any greater ability to assess the prudence issues in this case.

Notably, in contrast, Dr. Campbell has significant experience with environmental statutes and regulations, and he extensively studied VAP requirements for purposes of his testimony in this proceeding. Dr. Campbell testified to the similarities between the VAP and other mandatory and voluntary compliance programs:

> Q. Okay. Now, you were asked a number of questions about what you knew about the VAP program and how the VAP program applied rules and things of that nature. Can you tell me what the differences are in your experience between a voluntary program and a mandatory compliance program such as the Superfund program you reference?
>
> A. The -- there are a lot of VAP rules for the specific requirements written down but the primary difference is really that the VAP is self-implementing and the Superfund is implemented over the oversight of EPA.
>
> But as I read through the VAP rules, what was written therein was very familiar to me. They didn't reinvent the rule when they wrote the VAP in the early '90s. It reflects the basic environmental regulatory practice across the country. There are some differences here and there, but everything I read there looked very familiar to me.[228]

[227] Other than the educational, experiential, and code of conduct requirements required to be a CP, all of which are met or exceeded by Dr. Campbell, the only substantive requirements for a CP are an 8-hour training course and the payment of a $2,500 annual fee, as Mr. Fiore admitted. Duke Ex. 26, Direct Testimony of Shawn S. Fiore at 9-11 (April 22, 2013); Transcript Vol. II at 564-70 (discussing CP qualifications, including educational, experiential, training, and code of conduct requirements) (April 30, 2013); Tr. Vol. III at 655 (discussing fees applicable to CP) (May 1, 2013).

[228] Tr. Vol. IV at 993-94 (Testimony of James R. Campbell) (May 2, 2013).

Dr. Campbell testified that the specific content of Ohio EPA's VAP is similar to other programs:

> Q. And do both voluntary programs and compliance programs require meeting of applicable standards to protect human health and the environment?
>
> A. Absolutely. I haven't seen an environmental program in my experience that doesn't have protection of the environment as a threshold requirement. That's the whole basis of the environmental base.
>
> Q. And are the rules applicable in both voluntary programs and compliance programs subject to interpretation?
>
> A. Yes, they are.
>
> Q. Are there typical -- are there regulatory decisions reflecting that interpretation both in the -- in the voluntary context and compliance context?
>
> A. There are
>
> Q. As a general rule, would you -- do both mandatory compliance and voluntary programs provide for use of similar remediation technologies, institutional and engineering controls and variances?
>
> A. Yes, they do.[229]

Finally, Dr. Campbell testified to his extensive review of VAP rules as part of his assessment in this case:[230]

> Q. How much time did you spend reviewing Ohio VAP requirements and related documentation associated with the expert opinions you provided in this matter?
>
> A. I don't remember the exact number but I spent a significant amount of time reviewing this information and I had been familiar with the VAP and my other work under compliance programs in Ohio. We had referenced the VAP

[229] Tr. Vol. IV at 994-95 (Testimony of James R. Campbell) (May 2, 2013).

[230] Tr. Vol. IV at 995-96 (Testimony of James R. Campbell) (May 2, 2013).

> from time to time as a reference point and so I was familiar with portions of the VAP through my other work.[231]

Thus, Dr. Campbell, in assessing the prudence of Duke's assessment and remediation activities, is fundamentally qualified to make that assessment. Moreover, while Mr. Fiore has been an Ohio EPA CP for many years, his effectiveness in this capacity has never been tested since he has only issued a sole No Further Action ("NFA") letter,[232] and none of his clients has ever obtained a Covenant Not to Sue,[233] the only point at which Ohio EPA performs any review of a voluntary clean-up. Finally, OCC and OPAE would emphasize that Mr. Fiore failed to perform the methodical assessment of remedial alternatives under VAP as was performed by OCC witness Campbell.

The PUCO should give no special consideration to Mr. Fiore's CP certification in assessing the prudence issue in this proceeding.

10. Duke offered no resistance to Dr. Campbell's remediation cost adjustments.

Duke took no exception to Dr. Campbell's analysis of Duke's remediation cost adjustments. In Dr. Campbell's testimony, he addressed the level of remediation expenditures for which Duke is requesting recovery. Dr. Campbell included the following tables in his testimony that summarized his calculations as to the appropriate remediation costs corresponding to his arguments regarding the imprudence of Duke's expenditures:

[231] Id.

[232] Tr. Vol. II at 562 (Fiore) (April 30, 2013).

[233] Id. at 563.

TABLE 1
A SUMMARY OF INVESTIGATION AND REMEDIATION COSTS FOR THE USED AND USEFUL PORTIONS OF THE TWO MGP SITES[234]

MGP	Duke	Staff	OCC (JRC-2)
East End	N/A	$5,757,023	$998,640
East End Property Purchase	N/A	$0	$0
West End	N/A	$0	$0
Test Year Estimate East and West End	N/A	$0	$0
Subtotal	N/A	$5,757,023	$998,640
Carrying Charges	N/A	$610,701	$165,504
Total	N/A	$6,367,724	$1,164,144

TABLE 2

A SUMMARY OF INVESTIGATION AND REMEDIATION COSTS FOR THE TWO MGP SITES IN THEIR ENTIRETY[235]

MGP	Duke	OCC (JRC-5)	OCC (JRC-7)	OCC Total
East End	$23,232,036	$3,765,403	$0	$3,765,403
East End Property Purchase	$2,336,460	$0	$0	$0
West End	$19,717,809	$0	$3,332,414	$3,332,414
Test Year Estimate East and West	$15,000,000	$0	$0	$0
Subtotal	$60,286,305	$3,765,403	$3,332,414	$7,097,817
Carrying Charges	$5,047,112	$607,171	$322,411	$929,582
Total	$65,333,417	$4,372,574	$3,654,825	$8,027,399

[234] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 32 (February 25, 2013).

[235] OCC Ex. No. 15A (Direct Testimony of James R. Campbell, Ph.D.) at 38 (February 25, 2013).

Dr. Campbell recommends that Duke be limited to between $1.2 million and $8 million in collection of MGP-related investigation and remediation expenses from customers. If the Commission accepts Dr. Campbell's recommendations pertaining to the prudence of Duke's remediation activities, Duke faces a significant disallowance. Yet Duke did not ask Dr. Campbell a single question about his calculations in deposition or at the evidentiary hearing, and did not make a single argument against any of his calculations contained in his testimony in the Utility's Initial Brief. Not only can Duke not meet its burden of proof to support its own prudence case, it has no basis to dispute the imprudence of its remediation activities as calculated by Dr. Campbell.

E. Other Issues Related To MGP Cost Collection.

1. If Duke is permitted to collect investigation and remediation costs from customers, then such collection should be contingent on the Utility demonstrating reasonable efforts have been made to recover contributions from third parties.

Duke, in its Brief, addresses the interest that Parties to this proceeding have in Duke seeking recovery from potential third parties for the MGP-related liability:

> However, based upon questions raised by parties related to the availability of insurance proceeds to cover the costs of remediation, it is clear that it is the expectation of the parties that the [Utility] pursue these possible sources of revenue and credit costs incurred to the extent any third-party recovery results. The [Utility] is completely in agreement with this view. The [Utility] is actively evaluating the potential recovery of costs from third parties and has so stated in testimony.[236]

[236] Duke Brief at 55 (June 6, 2013).

It is not clear how much action is involved in Duke's "active evaluation": of third-party liability. But in any event the facts do not echo Duke's assurances. In response to OCC INT-17-667, Duke stated:

> [Duke] states that notice of occurrence related to MGP sites has been provided to insurance carriers beginning in August 1996. As additional insurance policies that may provide coverage have been identified, the insurance carriers that sold the coverage have been sent notice. The most recent correspondence to insurance carriers was sent in early December 2012.[237]

It is unclear what Duke has been doing since 1996 besides providing insurance carriers notice, but that effort has not led to the collection of a single dollar. Again, Duke's "active evaluation" seems not to be producing much action.

Despite any difficulties Duke may encounter in collecting MGP investigation and remediation costs from insurers, the PUCO Staff recommended that the Commission direct **Duke to use its utmost efforts to collect all remediation costs available under its insurance policies**.[238] Especially given the magnitude of the costs involved just to date, $63 million, Duke already should have been protecting customers' rates by seeking compensation from insurance and other third parties with liability for the MGP-related remediation costs.

In addition, the issue of other non-insurance third parties should be addressed to reduce what customers are asked to pay. For example, Duke responded to OCC discovery that it is investigating whether Columbia Gas of Ohio, Inc. is potentially liable for MGP-related investigation and remediation expenses on the sites .[239] Columbia

[237] Kroger Ex. No. 2 (OCC INT-17-667).

[238] Id.

[239] OCC Ex. No. 7 (Duke Response to OCC Interrogatory No. 15-576).

owned Duke's gas operations from 1909 to 1946.[240] The PUCO should require Duke to use and document reasonable measures to collect site assessment and remediation costs for which any third party (including Columbia) is liable and for which any insurance carrier is responsible under the law.[241]

2. If Duke is permitted to collect investigation and remediation costs from customers, the amortization period should be 10-years.

Duke requested a three-year amortization period for collection of MGP-related investigation and remediation costs. However, OCC and OPAE argued for a longer amortization period because the MGPs ceased operation many decades ago. It is not reasonable to impose the collection of the costs of remediating the sites -- where those plants had operated many decades ago -- on present customers over a period of only three years. The whole approach lacks generational equity between current customers and customers that may have actually bought manufactured gas decades or a century ago. Therefore, if the PUCO allows certain MGP-related costs to be collected from customers, the PUCO should determine that a three-year amortization period is too short for customers in light of the age of the MGP contamination and the length of time that has passed since the MGP facilities have been operated and then retired. In addition, the Utility should not be authorized to collect carrying costs from customers as discussed below. The PUCO should impose a longer and more reasonable amortization period (e.g. ten-years, or longer) as recommended by OCC witness Hagans.[242]

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[240] OCC Ex. No. 7 (OCC INT No. 15-577).

[241] OCC Ex. No. 14 (Direct Testimony of Bruce Hayes) at 38 (February 25, 2013).

[242] OCC Ex. No. 13 (Additional Direct Testimony of Kathy Hagans adopting certain portions of the Direct Testimony of David Effron) at 10-14 (April 30, 2013). See also Kroger Brief at 13 (June 6, 2013).

3. If Duke is permitted to collect investigation and remediation costs from customers, then the rider mechanism should be implemented for collection of costs deferred through December 31, 2012.

Duke witness Wathen, in his April 22, 2013 supplemental testimony, contends that if a rider is implemented to collect MGP-related investigation and remediation costs ("Rider MGP") from Duke's customers, it should be implemented for those deferrals booked as of December 31, 2012. Duke further proposes to update the Rider MGP costs in each subsequent year, beginning with the calendar year 2013 balance.[243]

As argued in the OCC and OPAE Brief, Duke's proposal for continuing deferral of MGP costs and inclusion of such amounts in the Rider MGP in the future is contrary to the Staff Report and the Partial Stipulation in this matter. Therefore, Duke should be limited to collecting from customers through Rider MGP, if any, only those authorized MGP-related investigation and remediation costs, deferred on or before December 31, 2012.

The Utility agreed with the PUCO Staff's recommendation for implementing a rider mechanism for recovery of MGP costs.[244] However, the Staff Report recommendation with regards to Rider MGP also recommended: (1) the ongoing deferral of Duke's environmental monitoring costs, but not any other investigation or remediation costs, and (2) the future recovery (if any recovery is allowed) of such deferrals to be determined in a future rate proceeding.[245] Despite disagreeing with these two Staff Report recommendations,[246] Duke did not include either issue in its Objections to the

[243] Duke Brief at 57 (June 6, 2013), See also, Tr. Vol. III at 749-750 (Wathen) (May 1, 2013).

[244] Duke Brief at 57 (June 6, 2013).

[245] Staff Hearing Ex. No. 1 (Staff Report of Investigation) at 47 (January 4, 2013).

[246] Duke Brief at 57 (June 6, 2013).

Staff Report.[247] Duke did not object to PUCO Staff's recommendation to limit future deferrals, under the authority granted by the PUCO in Case No. 09-712-GA-AAM to ongoing environmental monitoring costs. Therefore, Duke is deemed to have accepted the Staff's recommendation. Therefore, Duke must now file a new application in order to receive PUCO authority to defer MGP-related future investigation (e.g. non-ongoing monitoring) costs, as well as, future remediation costs. And Rider MGP cannot be used by Duke to collect from customers future remediation costs which Duke does not currently have authority to defer.

The Stipulation does not rescue Duke's continuing deferral proposal either.[248] There is nothing in the Stipulation that envisions implementation of a Rider that would allow Duke to collect from its customers ongoing MGP-related investigation and remediation costs deferred on or after January 1, 2013. Therefore, the Staff Report and the Stipulation resolve this issue, and Duke's attempt to expand the intent of the Stipulating Parties with regards to the applicability of Rider MGP to costs deferred after December 31, 2012 should be denied by the PUCO.

As the Staff Report recommended, a future rate proceeding is where Duke may seek collection from customers of any future deferrals.[249] Rider MGP should not be considered an appropriate mechanism for the collection of any authorized MGP-related costs deferred after December 31, 2012 unless such authorization for collection comes

[247] See Duke Hearing Ex. No. 30, (Objections to the Staff Report) (February 4, 2013).

[248] Joint Ex. No. 1 (Stipulation and Recommendation) at 8 (April 2, 2013).

[249] Staff Hearing Ex. No. 1 (Staff Report of Investigation) at 47 (January 4, 2013). See also *Duke Deferral Case*, Case No. 09-712-GA-AAM, Finding and Order at 3-4 (November 12, 2009).

from a future rate proceeding. Duke's witness William Don Wathen testified that Duke anticipates its next rate case filing in the 2015-2016 timeframe.[250]

4. If Duke is permitted to collect investigation and remediation costs from customers, then the PUCO should not authorize Duke to collect carrying costs from customers.

Duke argued in its brief that: [t]he [Utility] proposes to begin recovery of Rider MGP costs based on actual expenditures and associated carrying costs as of December 31, 2012.[251] In the event the PUCO allows any cost recovery (which OCC and OPAE opposes), it should not authorize carrying costs. Any recovery of environmental investigation and Remediation carrying costs is inequitable, and unfair to consumers. If the PUCO authorizes Duke to collect carrying costs on their deferred investigation and remediation costs, then there is no incentive for the Utility to expedite the remediation process. To the extent the Commission finds decision from other jurisdictions persuasive in providing Duke recovery for MGP-related remediation costs, then the disallowance of carrying costs would be consistent with the decisions of other commissions which have allowed recovery of MGP-related remediation costs including some of the cases which Duke cites in their Brief as instructive.

In the previously discussed *Interstate* case, the Minnesota Commission overruled an administrative law judge's decision to allow carrying costs on unamortized balances of MGP costs.[252] The Minnesota Commission justified its decision based on its history of determining carrying charges on a case by case basis and stated that carrying charges are

[250] Tr. Vol. III at 747 (Wathen) (May 1, 2013).

[251] Duke Brief at 57 (June 6, 2013).

[252] *In the Matter of the Request of Interstate Power Company*, 1996 Minn. PUC LEXIS 27, at *66.

aimed at giving the utility the time-value of its money but given the ancient nature of MGPs it felt amortization alone was appropriate.[253] Additionally, the Wisconsin case which Duke relied on in its Brief also disallowed carrying costs.[254] The Wisconsin Commission held that denying carrying costs was an equitable means of providing for cost-sharing between customers and shareholders, as well as, an incentive for the utility to vigorously pursue other potential responsible parties and insurance claims.[255] In another case, the Idaho Commission declined to authorize carrying costs on the deferred account balance of remediation costs.[256] The Idaho Commission held that accruing interest on the deferred account was "unsupported and unacceptable."[257]

Finally, in a Delaware case carrying costs were denied on remediation expenses and offered additional rationale as to why.[258] The Delaware Commission held that carrying costs were inappropriate because the utility made no showing that without carrying charges its financial integrity was endangered.[259] The Delaware Commission also stated it was equitable for the shareholders to bear the burden of these environmental risks because the shareholders are routinely compensated for unforeseen risks, such as the remediation expenses, in their return on equity.[260]

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[253] Id. at *66-67.

[254] *Application of the Wisconsin Power and Light* Company, PSC of Wisc. Case No. 6680-UR-1081993, Wisc. PUC LEXIS 64, *10 (September 30, 1993).

[255] Id.

[256] *In the Matter of the Application of the Avista Corporation*, Idaho Pub. Util. Comm. Case No. AVU-G-00-1, 2000 Ida. PUC LEXIS 255, at *8 (September 2000).

[257] Id.

[258] *In the matter of the Application of the Delaware Division of Chesapeake*, PSC Docket No. 95-73, Order No. 4104, 1995 Del. PSC LEXIS 164, at *74-75 (April 4, 1995).

[259] Id. at *74.

[260] Id. at *75.

Similarly, if the PUCO were to grant Duke any cost recovery (which the OCC and OPAE opposes) there is no need to also authorize carrying charges. The sharing of costs between shareholders and customers, partially through the absence of carrying costs, will assist in balancing out the inequity that would result from the recovery of MGP-related remediating costs from customers. The environmental investigation and remediation expenses are extraordinary and non-recurring costs that are properly borne by shareholders in their entirety, so it is necessary that if cost recovery from only customers is authorized, then carrying charges should not also authorized. Furthermore, the absence of carrying costs should incent the Utility to perform remediation quickly and cost effectively, as well as pursue other potentially responsible parties and insurance claims.

III. COLUMBIA'S MOTION TO FILE *AMICUS CURIE* BRIEF SHOULD BE DENIED.

On June 6, 2013, 122 days after the deadline for parties to file a Motion to Intervene in this case,[261] Columbia Gas of Ohio, Inc. ("Columbia") filed a Motion for Leave to File Amicus Curiae Brief. Columbia attached its Amicus Curiae Brief to its Motion. Through the filing of this Motion and Amicus Curiae Brief, Columbia is attempting to influence the decision because of what Columbia perceives as the potential precedent that the current Duke case could have on a future Columbia rate case:

> Columbia's future ability to recover those deferred environmental investigation and remediation costs is now threatened by the extraordinary and erroneous legal positions that the Commission Staff has taken in this case.[262]

Columbia's justification for the Amicus Curiae Brief also includes the claim of:

[261] Entry at 3 (January 10, 2013).

[262] Columbia Motion at 3 (June 6, 2013).

> Columbia's **strong interest** in the Commission's determination of the recoverability of deferred environmental remediation expenses, (Emphasis added).[263]

The PUCO has previously ruled that the interest of protecting against precedent was not sufficient grounds for granting intervention in a case. Columbia filed a Motion to file an Amicus Brief in a Vectren Energy Delivery of Ohio ("Vectren") Gas Cost Recovery ("GCR") proceeding.[264] The PUCO denied a Columbia Motion to file the Amicus Brief.

Like the current case, the Vectren GCR Case (where Columbia filed the similar Motion) involved an argument of whether an issue had been resolved in a prior case and if the issue was ripe for review in the then-current case. In the Vectren GCR Case, Columbia argued that the issue of a propane sale, reserve margin and asset management should have been argued in an earlier Long Term Forecast Report ("LTFR") case. Columbia position was that absent a positive finding to the contrary, the PUCO must have found that Vectren's earlier LTFR cases were reasonable and thus addressed the propane, reserve margin and asset management issues.[265]

Columbia's position in the Vectren case is similar to the argument raised by Duke in this case that the PUCO's granting a deferral for MGP-related investigation and remediation costs in the Duke Deferral case meant that the issue had been resolved.) The PUCO denied Columbia's Motion in the Vectren GCR Case and rejected all of Columbia's arguments, in part, because of the late stage of the proceeding (at the

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[263] Columbia Motion at 4 (June 6, 2013).

[264] *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Delivery of Ohio, Inc. and Related Matters*, Case No. 02-220-GA-GCR, Entry on Rehearing at 3 (August 10, 2005) ("Vectren GCR Case").

[265] Id.

rehearing stage).[266] The same reasoning applies here, as this case has been pending over 12 months, and with Reply Briefs to be filed on June 20th will be ripe for a PUCO decision.

In the same Vectren GCR Case, the PUCO also denied two other Marketer parties' (Interstate Gas Supply and Shell Energy Service LLC) Motions for Limited Intervention and Motions for Leave to File for Rehearing, because they failed to state "just cause."[267]

The PUCO also denied parties intervention in an electric security plan case, ruling that even though resolution of Provider of Last Resort and environmental carrying cost issues might predetermine how the issues are handled in other cases, it was insufficient grounds for intervention.[268]

In a FirstEnergy standard service offer case, Duke filed for intervention. Duke included in its Motion that it was interested in the potential precedent.[269] In Duke's Reply to OCC's memorandum contra, Duke actually stated an additional interest in the case that warranted the PUCO granting Duke's intervention. While granting Duke's intervention, the PUCO Entry stated: "**Although OCC is correct that an interest in**

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[266] Id.

[267] Id. at 4.

[268] *In the Matter of the Application of Columbus Southern Power for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Entry at 2 (June 29, 2011). See also: *In the Matter of the Self-Complaint of Columbus Southern Power Company and Ohio Power Company Regarding the Implementation of Programs to Enhance Distribution Service Reliability*, Case No. 06-222-EL-SLF, Entry at 2 (March 21, 2007*); In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case No. 99-1729-EL-ETP, *et al*., Entry at 2-3 (March 23, 2000).

[269] *In the Matter of the Application of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply*, Duke Motion to Intervene at 3 (November 13, 2009).

potential precedent alone is insufficient grounds for intervention, Duke has stated a sufficient interest as a potential market participant in any auction resulting from this proceeding."[270] Similarly, Columbia is only appearing in these cases to protect precedent, and should not be allowed to participate as an Amicus filer.

In addition to this precedent that supports denial of Columbia's Motion, there are other reasons to deny Columbia's Motion. First, Columbia erroneously claims that its future ability to recover deferred environmental investigation and remediation costs is 'now' threatened. In making this claim, Columbia seems to be implying that its ability to recover those costs was somehow not previously at risk. Such an assumption is wrong because Columbia has always and will continue to be at risk for recovery of MGP-related environmental investigation and remediation costs until such time as the PUCO reviews their recoverability in a future rate case:

> (10) Since the requested authority to change Columbia's accounting procedures does not result in any increase in rate or charge, the Commission approves this application without a hearing. **The recovery of the deferred amounts will be addressed in Columbia's next base rate case proceeding**. As the Supreme Court has previously held, deferrals do not constitute ratemaking. See, e.g., Elyria Foundry Co. v. Pub. Util. Comm., 114 Ohio St.3d 305 (2007).
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> * * *
>
> ORDERED, **That nothing in this Entry shall be binding upon this Commission in any subsequent investigation or proceeding** involving the justness or reasonableness of any rate, charge, rule, or regulation. [271] (Emphasis added).

[270] *In the Matter of the Application of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply*, Entry at 3 (December 11, 2009). (Emphasis added).

[271] Columbia Deferral Case, Entry at 3 (September 24, 2008).

The PUCO should also deny Columbia's Motion because granting the Motion would prejudice OCC, OPAE, the PUCO Staff, and other parties in this Duke rate case. Granting Columbia's Motion would enable Columbia to participate in the proceeding without being subjected to the same scrutiny that other parties were subjected to. For example, while parties to the Duke rate case were subjected to discovery, including depositions of subject matter experts and witnesses, as a non-party Columbia was not. Had Columbia moved to intervene in a timely manner, then Columbia personnel would have been subjected to depositions where OCC and other parties could have elicited information. Information regarding Columbia's ownership of the Duke MGP sites from 1909 to 1946[272] could have been further explored., among other things

Columbia's Motion should be denied because Columbia has offered nothing new or different than the arguments made by Duke. Columbia argues that the Staff incorrectly interpreted R.C. 4909.15(A)(1) and R.C. 4909.15 (A)(4).[273] Columbia argues that R.C. 4909.15 (A)(1) is subject to a different standard than R.C. 4909.15 (A)(4). Columbia argues that expenses under R.C. 4909.15 (A)(4) only need be prudently incurred and that they are not subject to the used and useful standard.[274] These are the same argument that Duke makes in its Brief. Thus, Columbia adds nothing to the record and its participation should be denied.

[272] OCC Ex. No. 7 (OCC INT No. 15-577).

[273] Columbia Amicus Curiae Brief at 3-11. (June 6, 2013).

[274] Id. at 5.

The PUCO has denied a Motion to File Amicus Curiae Brief in a case where the party requesting the right to file the Amicus Curiae Brief raised no new issues that had not been raised by other parties.[275]

Further, as the PUCO noted in Columbia's Deferral Entry, the recoverability of its environmental investigation and remediation costs will be determined in Columbia's next base rate case and NOT IN DUKE'S RATE CASE. The fact that the PUCO Staff or any other party takes a position in Columbia's next rate case opposing recovery of MGP-related investigation and remediation costs based on the argument that the underlying MGP facilities are not used and useful in providing service to current customers as of the date certain, does not ensure that Columbia will or will not recover the costs. Rather, the decision will be made by the PUCO at that time, based on the facts and circumstances of that Columbia case, consistent with the Commission's Columbia Deferral Case Entry.

If the PUCO is inclined to permit Columbia to submit the Amicus Curiae Brief, then the Columbia Amicus Curiae Brief should be limited to the discussion of the deferral issue. Columbia's argument regarding the PUCO Staff position being inconsistent with other states' precedent regarding the used and useful standard -- which is based on the PUCO Staff's investigation conducted under Ohio Law and not the law of other states, is irrelevant and beyond the scope of topics cited by Columbia as a basis for the Amicus Curiae Brief.[276]

Finally, there should have been an amicus process open to all Ohio stakeholders interested in this issue, if amicus filings are to be allowed. There are a number of

[275] *In the Matter of the Application of Columbus Southern Power for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Order on Remand (October 3, 2011).

[276] Tr. Vol. IV at 879 (Adkins) (May 2, 2013).

customer organizations with concerns about MGP costs. They may have been interested in an opportunity to comment on the Duke case for purposes of affecting the outcome as that outcome may apply in Columbia's (or other utilities') future cases on MGP costs. That process didn't happen. And thus Columbia's motion to submit its amicus brief should be denied

IV. CONCLUSION

Duke believes it should collect nearly $63 million from its customers for costs to clean-up manufactured gas plants built in the 1800's. First, the MGP-related expenditures are not collectable from customers per the PUCO's ratemaking formula under R.C. 4909.15(A)(1) and (4). The facilities that caused the contamination are not currently used and useful. And, to the extent there are facilities on the MGP Sites that are used and useful, those facilities did not cause the contamination. Finally, the cleanup expenses are not incurred in the provision of utility service to customers. Because the MGP-related costs do not fall within the requirements of the PUCO's ratemaking formula, the PUCO should authorize no collection of MGP-related costs from customers.

In addition, the Utility failed to meet its burden of proof. The record demonstrates that there are numerous alternative remediation options that impose different costs. However, Duke failed to document any decision-making process (e.g. through a cost/benefit analysis) that would have illuminated the rationale behind the remediation options Duke has chosen. Duke instead offers only after-the-fact testimony that concludes its actions were prudent. It would be against PUCO precedent to allow the collection of $62.8 million from Duke's customers based upon Duke's testimony which is void of supporting documentation for the allegations and opinions contained therein.

For failing to meet its burden of proof, Duke should not be authorized to collect MGP-related costs from customers.

If the PUCO authorizes Duke to collect some MGP-related costs from customers, then the amount authorized should be significantly reduced from Duke's $62.8 million request. As Dr. Campbell testified, Duke's remediation costs were excessive and lacked common sense. Dr. Campbell estimated the costs of remediating the East End and West End Sites, taking a more conservative approach. He calculated a prudent level of expenditures would have been between $1.6 and $8.0 million.

If the PUCO does authorize collection of some MGP-related costs from customers, than the PUCO should ensure that: 1) Duke's shareholders be required to absorb some of the allowable costs for recovery; 2) Duke must be required to pursue contributions from insurance claims and third parties with liability for the remediation costs; 3) any costs collected from customers should be amortized over at least a 10 year period; 4) if Duke is authorized to collect MGP-related costs through the MGP Rider, then collection should be limited to MGP investigation and remediation costs deferred as of December 31, 2012 and 5) Duke is denied authority to collect carrying charges on the unamortized balance of the deferred MGP-related investigation and remediation costs.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Larry S. Sauer
Larry S. Sauer, Counsel of Record
Joseph P. Serio
Edmund Berger
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: Sauer (614) 466-1312
Telephone: Serio (614) 466-9565
Telephone: Berger (614) 466-1292
sauer@occ.state.oh.us
serio@occ.state.oh.us
berger@occ.state.oh.us

/s/ Colleen L. Mooney
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
Telephone: (419) 425-8860
cmooney@ohiopartners.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply Brief* has been served upon the below-named counsel via electronic mail this 20th day of June 2013.

/s/ Larry S. Sauer
Larry S. Sauer
Assistant Consumers' Counsel

SERVICE LIST

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

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

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

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

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

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

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

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

Kimberly W. Bojko
Mallory M. Mohler
Carpenter Lipps & Leland LLP
280 North High Street
Suite 1300
Columbus, Ohio 43215

Vincent Parisi
Matthew White
Interstate Gas Supply Inc.
6100 Emerald Parkway
Dublin, Ohio 43016

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

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

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

AEs: chris.pirik@puc.state.oh.us
Katie.stenman@puc.state.oh.us

THE STATE OF OHIO.

GENERAL AND LOCAL ACTS

PASSED

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

SEVENTY-SECOND GENERAL ASSEMBLY,

AT ITS REGULAR SESSION,

BEGUN AND HELD IN THE CITY OF COLUMBUS, JANUARY 6, 1896.

VOLUME XCII.

COLUMBUS, OHIO:
PUBLISHED BY STATE AUTHORITY.
J. L. TRAUGER, STATE PRINTER.
1896.

herein provided. Provided, however, that in a city of the second grade of the first class the aggregate debt for all purposes whatsoever shall not, after deducting the amount of the water debt and the par value of the sinking funds, exceed seven per cent. of the assessed value of all property returned for taxation within such city as shown by the county auditor's tax list; and any attempt or act by any board or officer to borrow money or issue bonds or notes or other evidence of indebtedness for the above or any other purpose, when said issue would cause said debt to exceed said seven per cent., shall be null and void, and of no effect; provided further, that nothing herein, or in section 2701 contained, shall be so construed as to prevent such temporary increase of indebtedness as may be incident to extending the time of payment of maturing indebtedness. Cleveland.

SECTION 2. That original section 2704, and as amended May 1, 1894, be repealed, and this act shall take effect from and after its passage. Repeals, etc.

CHARLES H. BOSLER,
Speaker pro tem. of the House of Representatives.

ASAHEL W. JONES,
President of the Senate.

Passed April 22, 1896.

194G

[Senate Bill No. 334.]

AN ACT

To amend section 6925 as amended April 28, 1890 (O. L., vol. 87, p. 351).

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, That section 6925 (as amended April 28, 1890 (O. L., vol. 87, p. 351,) be amended so as to read as follows: Offenses against public health:

SEC. 6925. Whoever intentionally throws or deposits, or permits to be thrown or deposited, any coal dirt, coal slack, coal screenings, or coal refuse from coal mines, or any refuse or filth from any coal oil refinery or gas works, or any whey or filthy drainage from a cheese factory, upon or into any of the rivers, lakes, ponds, or streams of this state or upon or into any place from which the same will wash into any such river, lake, pond, or stream; or whoever shall, by himself, agent or employe, cause, suffer or permit any petroleum or crude oil, or refined oil, or any compound, or mixture, or other product of such well, except fresh or salt water, or residuum of oil, or filth, from any oil well, or oil tank, or oil vat, or place of deposit of crude or refined oil, to run into, or be poured, or emptied, or thrown into any river, or ditch, or drain, or watercourse, or into any place from which said petroleum, or crude oil, or residuum, or refined oil or filth may run or wash, or does run or wash into Penalty for throwing, emptying, etc., certain refuse, oil or filth into lakes, streams or drains.

any such river, or ditch, or drain, or watercourse, upon indictment and conviction in the county, in which such coal mines, coal oil refinery, gas works, cheese factory, oil well, oil tank, oil vat, or place of deposit of crude or refined oil are situated, shall be fined in any sum not more than one thousand dollars nor less than fifty dollars; and such fine and costs of prosecution shall be and remain a lien on said oil, well, oil tank, oil refinery, oil vat and place of deposit, and the contents of said oil well, oil tank, oil refinery, oil vat or place of deposit, until said fine and costs are paid; and said oil well, oil tank, oil refinery, oil vat or place of deposit, and the contents thereof, may be sold for the payment of such fine and costs, upon execution duly issued for that purpose.

Fine and costs a lien; execution.

Repeals.

SECTION 2. Said section 6925, as amended April 28, 1890, be and the same is hereby repealed.

SECTION 3. This act shall take effect and be in force from and after its passage.

CHARLES H. BOSLER,
Speaker pro tem. of the House of Representatives.

ASAHEL W. JONES,
President of the Senate.

Passed April 22, 1896.

195G

[Senate Bill No. 350.]

AN ACT

To amend section 1235 of the Revised Statutes and repeal section 7379 of the Revised Statutes.

Sheriff:

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That section 1235 of the Revised Statutes be so amended as to read as follows:

Allowance for keeping and feeding prisoners; idiot or lunatic; prisoners for debt.

SEC. 1235. The sheriff shall be allowed by the county commissioners not less than forty-five (45c) nor more than seventy-five (75c) cents per day, for keeping and feeding prisoners in jail but in any county in which there is no infirmary, the county commissioners may if they think the same just and necessary, allow any sum not exceeding seventy-five cents per day, for keeping any idiot or lunatic, and the sheriff shall furnish at the expense of the county, to all prisoners confined in jail for debt only, fuel, bed, clothing, washing, and nursing when required, and such other necessaries as the court in its rules shall designate.

Repeals.

SECTION 2. That section 1235 of the Revised Statutes be and the same is hereby repealed.

Repeals.

SECTION 3. That section 7379 of the Revised Statutes of Ohio, be and the same is hereby repealed.

THE ANNOTATED REVISED STATUTES

...OF...

THE STATE OF OHIO

INCLUDING ALL LAWS OF A GENERAL NATURE IN FORCE
JANUARY 1, 1904,

BY

CLEMENT BATES
OF THE CINCINNATI BAR
EDITOR OF "BATES' NEW OHIO DIGEST," AND AUTHOR OF "BATES ON PARTNERSHIP."

FOURTH EDITION.

IN THREE VOLUMES—VOL. III

CINCINNATI:
THE W. H. ANDERSON CO.
1903.

the provisions of this section within twenty-four hours after having knowledge of the existence of such dead animals, or after notice thereof, in writing from the trustees of the township in which such dead animals may be found, it shall be the duty of said trustees to proceed to dispose of such dead animals as provided in this section, and such owner, so neglecting or refusing shall be fined in any sum not less than five dollars, nor more than twenty dollars, together with the cost of suit, and all necessary expenses incurred by said trustees in disposing of such animals. Action to recover fines, costs, and expenses as herein provided, shall be brought upon complaint of said trustees before any justice of the peace, in the township in which such owner resides. Provided, that the dead bodies of such animals may be removed to a fertilizing establishment, if removed in a water-tight tank. [88 v. 188.]

SEC. **6924.** [**Certain business and buildings are nuisances when near state benevolent or penal institutions.**] Whoever carries on the business of slaughtering, or tallow chandlery, or manufacturing of glue, soap, starch, or other article, the manufacture of which is productive of unwholesome or noxious odors, in any building or place within one mile of Longview asylum, or any of the state benevolent or penal institutions, or erects or operates within one hundred and twenty rods, of any state benevolent institution, or within four hundred feet of the administration department of any state penal institution, any rolling mill, blast furnace, nail factory, copper smelting works, boiler factory, petroleum oil refinery, or any other works which may generate unwholesome or noxious odors, or make loud noises, or which may annoy, or endanger the health, or prevent the recovery, of the inmates of any such institution, shall be fined not more than five hundred dollars nor less than one hundred dollars, and each week such business is conducted, or works operated shall constitute a separate offense. All property, real or personal, which is used with the knowledge of the owner thereof in violation of this section, shall be liable for the fines and costs assessed for such violation, without exemption. [62 v. 137, §§ 1, 2, 3; 63 v. 96, §§ 1, 2; 63 v. 57; S. & S. 53; S. & S. 54; R. S. of 1880; 95 v. 592.]

SEC. **6925.** [**Emptying of coal dirt, petroleum, etc., into lakes, rivers, etc., or permitting same; penalty.**] Whoever intentionally throws or deposits, or permits to be thrown or deposited, any coal dirt, coal slack, coal screenings, or coal refuse from coal mines, or any refuse or filth from any coal oil refinery or gas works, or any whey or filthy drainage from a cheese factory, upon or into any of the rivers, lakes, ponds, or streams of this state or upon or into any place from which the same will wash into any such river, lake, pond, or stream; or whoever shall, by himself, agent or employe, cause, suffer or permit any petroleum or crude oil, or refined oil, or any compound, or mixture, or other product of such well, except fresh or salt water, or residuum of oil, or filth, from any oil well, or oil tank, or oil vat, or place of deposit of crude or refined oil, to run into, or be poured, or emptied, or thrown into any river, or ditch, or drain, or watercourse, or into any place from which said petroleum, or crude oil, or residuum, or refined oil or filth may run or wash, or does run or wash into any such river, or ditch, or drain, or watercourse, upon indictment and conviction in the county, in which such coal mines, coal oil refinery, gas works, cheese factory, oil well, oil tank, oil vat, or place of deposit of crude or refined oil are situated, shall be fined in any sum not more than one thousand dollars nor less than fifty dollars;

[**Fine and costs a lien; execution.**] And such fine and costs of prosecution shall be and remain a lien on said oil, well, oil tank, oil refinery, oil vat and place of deposit, and the contents of said oil well, oil tank, oil refinery, oil vat or place of deposit, until said fine and costs are paid; and said oil well, oil tank, oil refinery, oil vat or place of deposit, and the contents thereof, may be sold for the payment of such fine and costs, upon execution duly issued for that purpose. [92 v. 287; 87 v. 351; 85 v. 286; Rev. Stat. 1880; 73 v. 87, § 1.]

A civil action also lies for injury by the above acts: C. H. & C. & J. Co. *v.* Tucker, 48 O. S. 41, 64.

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

Summary: Brief Reply Brief by the Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.