BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OF DUKE ENERGY OHIO, INC.

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I. Introduction

The Public Utilities Commission of Ohio (Commission) has an opportunity to preserve important environmental and regulatory public policy in these proceedings. The questions raised by parties in these proceedings with respect to appropriate environmental remediation of Manufactured Gas Plants (MGPs), and recovery of costs for such work, are squarely before the Commission, and the Commission has ample authority to permit Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) to recover costs for MGP remediation expenses. The Staff of the Commission (Staff), the Office of the Ohio Consumers' Counsel (OCC), The Kroger Company (Kroger), and The Greater Cincinnati Health Council (GCHC) and Cincinnati Bell Telephone, Inc. (CBT) (collectively the Parties) object to the Company's recovery of its legitimate and necessary business expenses for responsible environmental remediation. In support of their positions, the Parties all seek to lead the Commission's analysis astray of its normal course.

The Commission appropriately recognized that the Company's remediation expenses were legitimate and necessary business expenses when it granted a deferral of these expenses. The Commission then explicitly directed the Company to seek recovery of such expenses in a rate proceeding. Thus, Duke Energy Ohio included a request to recover the remediation expenses in these proceedings. Deferred expenses, pursuant to the Commission's ratemaking authority, are normally reviewed for reasonableness and prudency. The Company met its burden of proof and has established that the remediation has been carried out in a cost-effective and prudent manner, with concern for proper stewardship of customer dollars and attention to appropriate management practices. The Commission should reject the arguments raised by the Parties and allow full recovery of Duke Energy Ohio's prudently incurred, deferred MGP remediation expenses.

II. Argument

A. The MGP remediation expenses stem from the Company's current status as a real property owner (and its status as a past owner of the MGP plants), and are a current cost of doing business and providing utility service.

Despite the Parties' persistent efforts to try and make this case about whether certain property is "used and useful," neither the facts nor the law support such an outcome. In fact, the "used and useful" concept is irrelevant in this case. Neither the fact that the MPG plants themselves are no longer used and useful, nor even the fact that the real property being remediated is currently used and useful,[1] are controlling here – the liability and obligation to remediate stems from Duke Energy Ohio's current status as an owner of the real property at issue, as well as a past operator of the MGP plants. The key questions the Commission must decide here are not whether the property is used and useful, but rather is environmental remediation of this real property properly considered a cost of providing utility service? And secondarily, as is discussed later in this Reply Brief, have the remediation expenses been prudently incurred?

Both the record and logic support a conclusion that environmental remediation of this real property is a current cost of doing business and providing utility service. First, the record demonstrates that these remediation expenses stem from a legal obligation imposed upon Duke Energy Ohio by federal law and they were incurred in accordance with state law. Second, the

[1] As was discussed at length in Duke Energy Ohio's Initial Post-Hearing Brief, the MGP sites have been continuously used by the utility, and continue to be used today, albeit not for MGP purposes. Rather, they are used by both the natural gas distribution and electric divisions of the company for a variety of purposes. See Initial Post-Hearing Brief of Duke Energy Ohio, at pp. 15-22. On this point, Staff's argument in its Initial Brief that certain portions of the sites – the parking lot and clean fill sites – have stopped being used, is quite disingenuous. The Company has temporarily stopped using portions of the sites for these purposes precisely because the Company is remediation the sites. *See, for example*, Transcript Vol. II, at pp. 420; 468-469.

record shows that current customers will benefit from remediation,[2] through, for example, resolution of liability and mitigated exposure to future claims and litigation. In addition, MGP remediation provides "a societal benefit, a cleaner environment, that increasingly is viewed as being a necessary and ongoing cost of doing business."[3] Finally, although current ownership of the MGP sites should not be a requirement in order for a utility to recover remediation costs, Duke Energy Ohio continues to own and use these sites for utility purposes. Thus, cleanup of these sites is necessary in order to maintain the usefulness of these properties, and is therefore quite directly related to the Company's ongoing provision of utility service.

1. The Commission's previous deferral orders correctly recognize that remediation expenses are necessary business costs, without regard to the "used and useful" status of the properties being remediated.

The Staff, OCC, and Kroger continue to argue incorrectly that the Company's expenses resulting from necessary and prudent remediation of MGP sites must be directly tied to capital investment and/or must directly relate to utility plant that is currently used and useful in providing utility service to existing Duke Energy Ohio customers. These Parties overlook the Commission's authority and precedent with respect to the treatment of legitimate and necessary business expenses (as opposed to capital investments).

As noted in the Company's Initial Post-Hearing Brief, the Commission granted authority to Duke Energy Ohio to defer MGP expenses for investigation and remediation, and specifically recognized that the request was for authority "to defer, on its books, environmental investigation and remediation costs in those situations where Duke no longer owns the site in question, or

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[2] *See* Transcript, Vol. II, at p. 357 (cross-examination of Company witness Bednarcik).
[3] *In the Matter of the Petition of Public Service Electric and Gas Co.*, 94 N.J.A.R.2d (BRC) 1, 1993 WL 557635 (N.J. Adm.), at p. 13 (Sept. 15, 1993).

where the site is owned by Duke but is no longer used and useful in the rendition of [manufactured][4] gas service to customers."[5] The Commission further explicitly stated that, "these environmental investigation and remediation costs are *business costs* incurred by Duke in compliance with Ohio regulations and federal statutes."[6] Thus, the Commission correctly recognized that deferral was appropriate, without regard to the current ownership or even the current use of the MGP sites.

The Commission's conclusion as to Duke Energy Ohio was entirely consistent with findings it made in an earlier case concerning a request by Columbia Gas of Ohio, Inc., (Columbia) for accounting deferral authority for MGP remediation expenses. In the *Columbia* proceeding, the Commission recognized in its Entry that Columbia was requesting to defer costs "in those situations where Columbia no longer owns the site in question, or where the site is owned by Columbia but is no longer used and useful in the rendition of gas service to customers."[7] Importantly, as in the Duke Energy Ohio deferred accounting case, the Commission recognized in the *Columbia* proceeding that the environmental investigation and remediation costs are *necessary business costs* incurred by Columbia in compliance with Ohio regulations and federal statutes.[8] Significantly, in the ongoing *Columbia* proceeding, Staff noted that it had *no objection* to the creation of deferrals for remediation costs for the five sites that

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[4] Note that Duke Energy Ohio made clear in its application, and the Commission recognized Duke's position in its order, that "[a]ccording to Duke, these sites are still involved in the provision of utility service as they include a propane cavern and vaporization plant, gas operations district office, substation, parking lot and office building." *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM, Finding and Order, at pp. 1-2 (November 12, 2009).
[5] *Id.* at p. 1.
[6] *Id.* at p.2 (emphasis added).
[7] *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 08-606-GA-AAM, Entry, at p. 2 (September 26, 2008).
[8] *Id.* at p.4.

were no longer owned by Columbia and *no longer used and useful* in rendering gas service.[9] Thus, the *Columbia* proceeding indicates that both Staff and the Commission believed that the Commission could and should consider recovery of costs related to property that was no longer used and useful.

2. Staff's and OCC's "matching" argument is without merit.

Now, in this case, Staff has created a new (and misguided) concept allowing for recovery of expenses only when they can be "matched" to used and useful property. Staff's argument, suggesting that costs must be so related, is inconsistent with the law and the Commission's long-standing policy and practice. Adoption of such an unsubstantiated concept would result in legitimate costs of providing service going unrecovered. Significantly, there is no statute or Commission regulation that requires expenses to be "matched" to used and useful plant. Instead, as is provided for by R.C. 4909.15(A)(4), recoverable expenses are those related to the rendition of service. In some cases, those expenses are tied to service that was previously rendered, such as when deferred costs are amortized and recovered through rates.

In any rate proceeding, there are many cost items included for recovery that do not "match" with plant in service, but are recoverable as legitimate business expenses incurred by a utility. For example, a utility is authorized to include, in rates, costs for labor, pensions and benefits, payroll taxes, uncollectible expenses, customer service, legal services, accounting services, corporate compliance, and Commission and OCC maintenance fees. None of these allowable costs are associated with any particular plant in service, but all are considered allowable expenses as they are reasonably incurred for the provision of utility service. Indeed,

[9] *See* Staff Objections dated Jan. 1, 2013, in Case No. 08-606-GA-AAM.

both the law and Commission precedent recognize that these allowable costs support the ability of the Company to remain in business and to continue to provide utility service to its customers.

The cases that Staff advances as support for its "matching" argument are distinguishable from the case at hand, and thus unpersuasive. In the *Ohio Edison* case,[10] for example, at issue was the question of whether operation and maintenance costs, directly related to maintaining an existing plant that was not in service for the benefit of customers during the test period, should be reflected in rates. The *Ohio Edison* decision does not contain a broad pronouncement that all utility expenses must be directly related to (or matched with) plant in service in order to be recoverable. Nor does this case relate in any way to legally required environmental remediation expenses, costs associated with real property, or costs that had been previously deferred pursuant to Commission authorization. Similarly, at issue in *In re Ohio Edison II*,[11] also cited by OCC as support for its matching argument, was the recoverability of expenses directly associated with maintaining a generating plant that was no longer providing service to customers. In the *Ohio Edison II* case, the Commission questioned the prudence of the utility's seemingly elective expenditure of funds for a generating plant that was not being used, let alone being used to provide electric distribution service (*i.e.*, the utility service for which rates were being established that case). In contrast, in the case at hand, the Commission is presented with legally required environmental cleanup costs, associated with real property as opposed to a specific plant, and for which deferral authority has already been granted. In citing these cases, OCC fails to recognize the difference between possibly unnecessary maintenance costs for plants not providing service, on the one hand, and legally required environmental remediation expenses

[10] *In the Matter of the Application of Ohio Edison Co.*, 89-1001-EL-AIR, 1990 Ohio PUC LEXIS 912 (PUCO; 1990).
[11] *In re Application of Ohio Edison Co.*, Case No. 07-551-EL-AIR (Jan. 21 ,2009).

related to real property, on the other. And OCC fails to recognize the difference between recovery of such plant maintenance costs versus the recovery of environmental remediation costs deferred pursuant to specific previous Commission authorization.

Similarly, in arguing that the MGP remediation expenses should be disallowed because they are not "matched" to used and useful MGP property, OCC ignores the critical fact that the MGP remediation expenses stem from contamination of real property, not the typical operation or maintenance of utility plant. Equally detrimental to their argument (and curiously in conflict with their "used and useful" argument), neither OCC nor any other party sought to have any of the real property that gives rise to the Company's MGP remediation obligations disallowed from rate base in these rate proceedings.[12] To support its position, OCC illogically relies upon a case wherein the Ohio Supreme Court determined that a utility's nuclear power plant, which was not yet operational, could not be included in rate base.[13] It is curious that OCC and OPAE would make such an argument in these proceedings, since the Company does not seek to include any MGP plant or MGP equipment in rate base, and the real estate properties at issue have been in the Company's rate base for many years. OCC and OPAE, by not disputing the inclusion of the properties themselves in Duke Energy Ohio's rate base either previously or in these proceedings, tacitly admit that the used and useful concept is either satisfied or does not apply here. Fundamentally, MGP cleanup is an expense of doing business stemming from ownership of this real estate and should be examined for prudency and reasonableness, not for any direct tie to operation and maintenance of plant.

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[12] Although, to be clear, Duke Energy Ohio has not proposed to include in utility rate base any of the repurchased property discussed herein at pp. 16-17 of this Reply Brief.

[13] OCC and OPAE Initial Brief at p.19, citing *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 58 Ohio St. 2d 449, 453, 391 N.E.2d 311 (1979).

3. OCC's argument that only test year expenses are recoverable through rates is unsupported by law or Commission practice.

In arguing that recovery of the Company's remediation costs should be rejected because at least some of the expenses fall outside the test year,[14] OCC fails to recognize that deferrals are, by definition, costs incurred outside of a test year. Indeed, Commission precedent is replete with cases in which utilities have been permitted to recover costs outside of the test year. For example, in *Board of Commissioners v. Pub. Util. Comm.*,[15] the Ohio Supreme Court affirmed a Commission decision wherein the Commission allowed Dayton Power & Light Co. to recover additional out-of-test-year expenses for line clearance. In that case, the Court noted that R.C. 4909.15(D) provides for adjustments in a utility's rates when they are "insufficient to yield compensation for the service rendered."[16] Similarly, in *Consumers' Counsel v. Pub. Util. Comm.*, [17] the Court stated that R.C. 4909.15(D) gives the Commission the authority to smooth out anomalies in the ratemaking equation that tend to make the test year data unrepresentative for ratemaking purposes.

In *Office of Consumers' Counsel v. Pub. Util. Comm.*,[18] the Court affirmed an order of the Commission allowing amortization and recovery of a depreciation deficiency through a ten-year amortization schedule. In that case, precisely as it is doing in this case, OCC argued that the prior depreciation miscalculation equated to a "past loss" that was not a cost of rendering utility service during the test year. The Court noted that a depreciation reserve is an expense item and a

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[14] *See* OCC's Brief, at p. 23.
[15] *Board of Comm'rs v. Public Utilities Comm.*, 1 Ohio St. 3d 125 (Ohio 1982).
[16] *Id.* at p. 127.
[17] *Office of Consumers' Counsel v. Public Utilities Com., 67 Ohio St. 2d 372, 376 (Ohio 1981).*
[18] *Office of Consumers' Counsel v. PUC*, 6 Ohio St. 3d 412, 414 (Ohio 1983)

cost to the utility of rendering the public utility service, and held that the Commission could allow recovery of the cost outside of the test year.[19]

Thus, the test year concept is wholly appropriate when used to evaluate operation and maintenance expenses directly related to plant in service (although even then the Commission can and should depart from test year levels of expenses if the test year levels are unrepresentative). However, when considering expenses that are not directly related to the operation or maintenance of utility plant – for example, environmental remediation expenses that have been deferred pursuant to Commission order – the Commission need not limit itself to either expenses that can be "matched" to plant in service or expenses that strictly fall within the test year. Rather, consistent with R.C. 4909.15(A)(4), the Commission must more broadly consider all costs of providing utility service.

4. The MGP remediation expenses are not capitalized and as such, are not subject to the "used and useful" test.

OCC and OPAE argue that the property is not used and useful and customers should not be charged for expenditures related to MGP remediation because, as they contend, the expenditures were not incurred during the test year. Thus, OCC and OPAE seek to commingle and simultaneously apply two different ratemaking theories to these expenses – R.C. 4909.15(A)(1) and 4909.15(A)(4). However, these ratemaking statutes deal with different elements of the ratemaking process. To conflate these two sections is to misconstrue the ratemaking process and the Commission's statutory responsibility.

[19] *Id.* at p. 415.

R.C. 4909.15(A) requires the Commission to make a series of determinations – the valuation of the utility's property in service as of a date certain pursuant to R.C. 4909.15 (A)(1), a fair and reasonable rate of return on that investment under R.C. 4904.15(A)(2), and, separately, the expenses incurred in providing service during the test year as directed in R.C. 4909.15(A)(4).[20] To suggest that expenses incurred in connection with providing a service, such as the MGP remediation expenses at issue here, be evaluated under two different statutory provisions at the same time is illogical and inappropriate. Further, had the General Assembly intended that expenses, to be recoverable, be incurred directly with regard to property that is used and useful during the test year, it would have included language to that effect. But, for obvious reason, it did not. Instead, the General Assembly provided for three-part ratemaking formula that is comprised of separate and distinct considerations. Valuation of property is examined to determine if it is used and useful. Expenses are examined to determine if they were prudently incurred. The only potentially logical way for an expense to be examined under the used and useful lens is when a Company seeks to capitalize that expense[21] (although even in this case, the better view is that expenditures, capitalized or not, should be recoverable in rates if prudently incurred). Duke Energy Ohio made no request to capitalize these expenses. The accepted purpose of R.C. 4909.15(A)(4) is to take into account the prudent expenses incurred by utilities in the course of rendering service to the public.[22] The expenses that Duke Energy Ohio incurred for remediation of MGP sites fall squarely within this category of expenses. As previously recognized by the Commission, the MGP remediation expenses are legitimate and

[20] *Columbus S. Power Co. v. Public Util. Comm.*, 67 Ohio St. 3d 535, 537 (Ohio 1993).
[21] *Cincinnati Gas & Elec. Co. v. PUC, 86 Ohio St. 3d 53, 58 (Ohio 1999).*
[22] *Office of Consumers' Counsel v. Public Utilities Com., 67 Ohio St. 2d 153, 164 (Ohio 1981).*

necessary business expenses incurred in order to comply with federal and state environmental laws, and the Company should be permitted to recover them under R.C. 4909.15(A)(4).

5. There are no subsidies related to the recovery of current costs of doing business.

The West End MGP remediation involves real property that is used for current gas facilities as well as for electric distribution infrastructure. Staff maintains, incorrectly in the Company's, that current gas customers would be subsidizing electric customers by paying for remediation of electric facilities. Staff overlooks the critical fact that the remediation of the MGPs stems from the Company's status as a real property owner and a former MGP owner and operator. For this reason, the Company believes it is reasonable to seek recovery in a gas rate case, as it has done.[23]

Likewise, contrary to Staff's assertions, current gas customers will not be subsidizing prior generations of Duke Energy Ohio customers should the Company's request be approved. The contamination exists and must be remediated today. The rules and events necessitating the need for remediation did not exist when the MGP plants were in operation, but they do exist today. The remediation costs are current expenses the Company is incurring today. These expenses are related to environmental remediation in compliance with current environmental law and regulation that did not exist in prior generations. There would have been no basis for seeking recovery of the prior generations of customers; the expense is a cost of providing utility

[23] At least one other state commission has concluded, as the Company has, that recovery from gas customers as opposed to both gas and electric customers, is appropriate in this situation. *See, In the matter of the Request of Interstate Power Company*, Minnesota Public Utilities Commission DOCKET NO. G-001/GR-95-406; 1996 Minn. PUC LEXIS 27 at p. 38 (Minn. PUC 1996)("[I]n the April 13 Order, the Commission rejected the Company's request to allow allocation of MGP costs between the Company's gas and electric ratepayers. The Commission stated that 'MGP costs are associated with the provision of gas service. There is no nexus between costs of remediation of MGP sites and provision of electric service.' Order at p. 5.")

service today for current customers. Moreover, the Staff's argument in this regard must fail because it would result in there being no possible scenario in which the Commission could ever grant a deferral of an expense for future rate recovery. By definition, a deferral of an expense for future recovery results in a situation where future ratepayers are paying for costs that were previously incurred or services previously provided.

Similarly, current customers will not be subsidizing future generations of customers by paying for these current, legally required property remediation costs. As explained above, the costs of remediation are current costs of doing business. Just as a utility's investment in its current employees through training and development expenditures are considered to be a current recoverable cost for ratemaking purposes, so should the Company's environmental remediation costs be considered. Both investments will presumably redound to the benefit of both current and future customers, but both investments are current expenditures that should be recovered in current rates.

B. Duke Energy Ohio has a present legal liability and responsibility to remediate these sites.

Kroger is the only party that has disputed the liability that is imposed upon Duke Energy Ohio to remediate the two MGP sites. Kroger misstates the record in this regard and misapplies Ohio and federal environmental law. As explained by Duke Energy Ohio witness Kevin Margolis, the waste products and contaminants at the former MGP sites contain hazardous substances, as defined by the federal Comprehensive Environmental Response, Compensation and Liability Act, as amended (42 U.S.C. §9601, *et seq.*)(CERCLA).[24] Duke Energy Ohio is a liable party under CERCLA as the current owner and operator of the two sites where it has been

[24] Direct Testimony of Kevin Margolis, at p. 6.

determined that there has been a release of hazardous substances, and as the owner and operator at the time the MGP plants were operating and waste materials and byproducts were generated and deposited at the properties.[25] It is CERCLA that imposes the liability on Duke Energy Ohio and not Chapter 3746 of the Ohio Revised Code, as claimed by Kroger in its brief. Chapter 3746 of the Ohio Revised Code establishes a mechanism to investigate and remediate contaminated sites outside of the context of formal enforcement by U.S. EPA and/or Ohio EPA.[26] Thus, Chapter 3746 does not impose the liability, but rather provides a federally sanctioned, state mechanism for addressing the liability.[27]

Duke Energy Ohio witness Margolis, an experienced environmental attorney in Ohio, explained that liability for the investigation and cleanup of sites such as the MGP sites is: (1) strict, regardless of fault; (2) joint and several; (3) retroactive; and (4) extends to a number of types of responsible parties.[28] Although a responsible party may have some control over the timing of the remediation work when it is not the subject of an enforcement order by the regulatory agency, such liability exists nonetheless and it is prudent for the responsible party to resolve that liability in an appropriate and cost-effective manner.

Thus, contrary to Kroger's assertion, there is nothing voluntary about the obligation to remediate an MGP site where liability exists for the conditions present at the site. As described in the testimony of several witnesses, discussed below, the only "voluntary" aspect of this is the decision as to how to address the obligation. The law and regulations, set forth in the Voluntary

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[25] 42 U.S.C. § 9607(a)(1), (a)(2).
[26] Direct Testimony of Kevin Margolis, at pp. 8-9.
[27] *See* O.R.C. § 3746.12 (Ohio EPA covenant not to sue); 42 U.S.C. § 9628(b)(no enforcement under CERCLA where cleanup being performed in compliance with a state program that specifically governs response actions for the protection of public health and the environment).
[28] Direct Testimony of Kevin Margolis, at p. 6.

Action Program (VAP) (R.C. Chapter 3746, and O.A.C. Rule 3745-300), provide a set of rules, regulations, guidance, and other directives from the Ohio EPA that establish a process by which contaminated sites may be investigated and remediated to Ohio EPA standards as a means of addressing the liability that exists at the contaminated property.[29] The VAP limits Ohio EPA's direct involvement and maximizes remediation expertise in the private sector.[30] It is a more cost-effective means by which to engage in remediation and it removes legal barriers and facilitates such remediation,[31] thereby reinforcing state policy in favor of such environmental responsibility by proactively addressing contaminated properties in accordance with state standards.

The VAP is designed to allow remediation on a proactive basis and in a manner that is more cost effective than performing work under traditional governmental orders. Kroger's characterization of this responsible corporate action is contrary to state policy and contrary to good corporate conduct. Although there may be a difference of opinion on the scope of the work performed at the two sites pursuant to the VAP, the Duke Energy Ohio witnesses and OCC's expert witness both agree that the VAP is the appropriate and prudent mechanism to address the environmental conditions at the properties.[32]

OCC and OPAE likewise argue that the Company's remediation was undertaken voluntarily.[33] It is simply incorrect to suggest that compliance with the law and protection of

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[29] Direct Testimony of Kevin Margolis, at pp. 8-9; Direct Testimony of Shawn Fiore, at p. 5.
[30] Direct Testimony of Shawn Fiore, at p. 6.
[31] *Id.*
[32] Direct Testimony of Kevin Margolis, at p. 9: "In my opinion, the VAP was the best choice for such an environmental investigation and remediation; it was the most efficient and effective method to address the Company's statutory obligation and environmental liabilities at these sites." *See also*, OCC witness Campbell's testimony concerning use of the VAP and the prudency of hiring a VAP Certified Professional to perform work pursuant to the VAP. Transcript Vol. IV, at pp. 952-955. See also, Post-Hearing Brief of OCC and OPAE, at p. 40, stating that OCC witness Campbell "has endorsed the VAP approach."
[33] OCC and OPAE Post-Hearing Brief, at p. 22.

public health and the environment, on a prudent, proactive, cost-effective basis, is voluntary. The VAP provides a process that is characterized as voluntary, but only as to how applicable standards are achieved, the choice of a VAP certified professional (CP), and timing. Liability imposed upon a business as a result of the enactment of CERCLA is not voluntarily assumed, and action taken to comply with applicable environmental standards and to protect public health and the environment should be encouraged.

Moreover, Duke Energy Ohio witness Margolis testified that in light of changing conditions at both sites, Duke Energy Ohio had a duty under the law to conduct environmental investigations at the two sites in order to protect human health and safety and the environment.[34] Further, as Duke Energy Ohio witness Margolis testified "(h)ad Duke Energy Ohio not proceeded with this environmental investigation, it would have been at risk for third party law suits as a result of the potential for contamination to affect receptors that previously had not been at risk and for costly and inefficient governmental enforcement activities that would have produced no different result than the cost effective and efficient VAP environmental investigation path it chose."[35]

Further, as explained by Duke Energy Ohio witness Jessica Bednarcik, the Company's decision to undertake further remediation of the East End and West End sites was not purely voluntary, but was necessitated by a change in use at and adjacent to the properties.[36] Kroger, OCC and OPAE suggest that the sale of the small strip of land on the west side of the East End site triggered such change in use. That is incorrect. Residential development was in the process

[34] Direct Testimony of Kevin Margolis, at pp. 9-11.
[35] *Id.*, at pp. 10-11.
[36] Direct Testimony of Jessica Bednarcik, at p. 8.

of occurring adjacent to the east of the East End site and also to the west of the East End site. The small strip of property that was sold was simply a piece in the overall larger planned residential development on the western side of the East End site.[37] Thus, the sale was not the trigger of a change in use. Moreover, Duke Energy Ohio's liability follows the MGP waste materials and is not tied solely to ownership and operation of the property.[38] The sale did not change the Company's liability or the scope of work that was and is required to address the MGP contamination that exists at the East End site. Kroger's discussion about the timing of the Company's decision and action to investigate and remediate is irrelevant to the matters in these proceedings. Regardless of when the conditions existed, and when the Company initiated its investigation, the investigation of the East End site began in 2007 and the West End site in 2010. Remediation plans were then designed and implemented after the nature and scope of the impacts were determined. It is the cost of this remediation that the Company is currently incurring, in compliance with current environmental law and policy.

OCC and OPAE further argue that although Duke Energy Ohio has responsibility to remediate these properties, its customers do not and, therefore, they should not be forced to pay for this work. This argument is akin to arguing that because the Company (rather than the customers) has the obligation to pay taxes, tax expense should be excluded from rates; or that because the Company has the contractual obligation to pay employees, or vendors, and customers do not, those expenses should be excluded from rates. Duke Energy Ohio has never claimed that its customers are a liable party under CERCLA's federal liability scheme and the

[37] Transcript Vol. II, at pp. 306-307.

[38] Similarly, Duke Energy Ohio did not increase its liability by acquiring the small strip of land and other property from the developer. In addition to addressing the third party liability for off-site impacts from the MGP operations, acquiring the land allowed Duke Energy Ohio more control over the timing and scope of the cleanup, which will likely save costs in both the short- and long-term.

Company has not filed an action against its customers under CERCLA.[39] Rather, Duke Energy Ohio is seeking to recover its environmental cleanup costs, as it is permitted to do, under the statutory authority of the Commission and in the context of a rate proceeding, as it was instructed to do.

C. The record in these proceedings thoroughly documents appropriate management practices that reflect prudent stewardship of customer dollars.

The OCC and OPAE argue that the Company has not met its burden in demonstrating the prudence of its investigation and remediation of the MGP sites. It is interesting that in so arguing, OCC and OPAE themselves cite to numerous references in the record that undeniably establish a prudent course of action. Duke Energy Ohio witnesses Middleton, Margolis, Bednarcik and Fiore collectively provided a comprehensive picture demonstrating the history of the MGP sites, the Company's legal liability for and duty to clean up these sites, the Company's management of the cleanup process, and the Company's compliance with Ohio environmental law and policy under the direction of a VAP CP. Duke Energy Ohio witness Bednarcik, a Senior Engineer providing oversight of these projects, testified at length concerning her management and oversight of Duke Energy Ohio's remediation projects and in particular MGP sites. Ms. Bednarcik is an expert in the investigation and cleanup of MGP sites and participates on several national groups and committees wherein MGP issues are discussed.[40] Ms. Bednarcik explained that she has responsibility for coordination with senior leadership within Duke Energy Corp. and she essentially provides executive management and oversight for these projects. She has

[39] OCC's and OPAE's suggestion that Congress somehow intended to preempt state utility rate proceedings through enactment of CERCLA is without any basis or support. Their citation (see OCC and OPAE Post-Hearing Brief, at p. 13) to general testimony concerning Congress' desire to ensure that taxpayers do not have to fund all environmental cleanups has no applicability whatsoever to whether it is appropriate for a utility's rates to reflect environmental remediation costs. Seeking recovery of environmental cleanup costs in a rate proceeding is a complete separate and different statutory process under Ohio law, unrelated to the federal CERCLA law.

[40] Direct Testimony of Jessica Bednarcik, at p. 1.

responsibility for contracting and budgeting and manages and consults with outside consultants. In short, Ms. Bednarcik has global responsibility within the Company for the MGP sites.

In written testimony and at the hearing, Duke Energy Ohio witness Bednarcik established that the Company initiated its investigation into these sites at East End and West End in 2007 and 2010, respectively. The investigations were initiated at these times due to changes in site conditions and possible exposure pathways.[41] Ms. Bednarcik explained the initiation of the investigations of these sites, and that risk assessments were conducted, in order to determine potential risk to human health from various sources on these sites.[42] In 2009, the Company developed a Remedial Action Plan for the East End site with the assistance of consultants experienced in MGP cleanups, including a VAP CP, and the process thereafter is explained in detail in Ms. Bednarcik's Direct Testimony.[43] The Company obtained all required environmental permits and engaged in community outreach to explain the work it would be undertaking and to allow the public to ask questions and provide input into the process.[44]

At each step of the process, as explained by Duke Energy Ohio witness Bednarcik, tests and samples were taken, and the Company consulted with environmental firms and its VAP CP in order to ensure that it would be compliant with Ohio environmental law and policy. The paramount concern was with complying with the VAP and protecting human health and the

[41] *Id.* at p. 8.
[42] *Id.* at p. 11.
[43] *See* Direct Testimony of Jessica Bednarcik, at pp. 9-14; 20-28. *See also*, Initial Brief of Duke Energy Ohio, at pp. 35-54.
[44] *Id.*

environment, as it should be.[45] As explained by Duke Energy Ohio witness Bednarcik, the Company considered additional factors, including:

> Q. Make sure I understand, in your testimony on page 20 when you're talking about when deciding upon the most prudent course of action of investigating and remediating action scopes of work, the company worked with Ohio EPA, CPs, and environmental consultants to evaluate different options based on various criteria including but not limited to the compliance with environmental regulations, best practice, feasibility, constructability, safety, prior experience, and cost, and you – is that the process you went through when you were trying to determine which was the best approach at the East End site in analyzing the technologies that appear on your response to [OCC Exhibit 2, Interrogatory 11-441]?
>
> A. Those factors, of course not specifically in that order but all of those factors are used including the constructability, implementability, the long-term, short-term impacts to the community, the other short-term, long-term impacts, how long, whether it will manage the liability in a short- and long-term basis, all of those things were used in order to determine what went forward as part of the chosen remedial options.[46]

Neither OCC nor its witness Campbell is able to contend that consideration of these factors is "imprudent."[47] Thus, Duke Energy Ohio considered a number of factors in determining the appropriate remedial standards to be achieved and the reasonable and prudent course of action to take at these two sites.

OCC complains about the absence of written documentation on the consideration and investigation of alternative remedies considered by the Company.[48] However, OCC fails to identify any statute, regulation, or other authority requiring Duke Energy Ohio to have created such a document. Not only is such documentation not required, but engaging in the suggested

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[45] Transcript Vol. I, at pp. 206-208, 211-212.
[46] Transcript Vol. I, at p. 212; *see also* pp. 206-208.
[47] Transcript Vol. IV, at pp. 954-959; Bednarcik Direct Testimony at pp. 20-21.
[48] OCC and OPAE Initial Post-Hearing Brief, pp. 56-67.

rote exercise would have done nothing more than incur additional, significant costs[49] to record what Duke Energy Ohio's experienced MGP remediation team already knew based on the conditions identified at the sites. As indicated by Duke Energy Ohio witness Shawn Fiore, under the VAP, the oil-like material (OLM) and tar-like material (TLM) identified in substantial amounts at the both the East End MGP and the West End MGP properties required removal, containment or treatment.[50] Thus, in order to meet the criteria of compliance with applicable VAP standards, only a couple of remedial alternatives were actually available, *i.e.*, excavation, *in situ* solidification and containment.[51] The containment option was deemed likely not feasible due to the depth to bedrock and was much more expensive than the other two options.[52] Although there is no piece of paper listing each remedial alternative considered, the risks involved, and the associated costs, the Company's process was both comprehensive and reasonable when it made a determination based on numerous discussions with experienced environmental consultants, a VAP CP, and Company personnel who brought their vast, collective experience to the table.[53] Moreover, the Company made its decision making available for significant scrutiny by the Commission and parties to this case, through discovery, testimony, and evidentiary hearings. Thus, while OCC witness Campbell would have liked to have a

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[49] Transcript Vol. I, at pp. 213-215. Duke Energy Ohio witnesses Bednarcik and Fiore testified that similar documents required under CERCLA can cost more than a quarter of a million dollars to a half million dollars. Transcript Vol. I, at p. 216; *see also*, Transcript Vol. III, at p. 641.

[50] Direct Testimony of Shawn Fiore, at pp. 17-18.

[51] Duke Energy Ohio witness Bednarcik testified that in her experience in six different states, and based on the recommendation of the VA CP, the Ohio EPA VAP requires the removal or treatment of TLM and OLM that is technically practical or feasible to be removed or treated. Transcript, Vol. I, at pp. 265-267. Duke Energy Ohio witness Fiore concurred and described excavation and *in situ* solidification as "presumptive remedies." Transcript Vol. III, at pp. 642-644. Presumptive remedies are proven technologies that have been determined to be cost effective. The VAP encourages excavation and disposal of contaminated materials at a landfill as a means of addressing source material (*e.g.*, TLM and OLM) by allowing landfills to provide a discount on the disposal cost of the work being done under the VAP. Transcript Vol. III, at p. 643. Duke Energy Ohio was able to reduce costs by using this approach.

[52] Duke Energy Ohio not only considered containment for both sites, but went so far as soliciting bids for both containment and solidification for the West End MGP property. Transcript Vol. I, at pp. 218-219.

[53] Transcript Vol. I, at pp. 217-219.

Feasibility Study to review, as his familiarity is with CERCLA and not the VAP, such a Feasibility Study was not legally or technically required given the conditions present at the site and the remedial standards to be achieved, and the Commission has had adequate ability to assess the Company's decision making through the testimony in these proceedings. Moreover, the OCC and OPAE attempt to further complicate the evaluation of Duke Energy Ohio's work by offering the testimony of James Campbell, who has no experience with and who has not performed any work under the VAP. This has resulted in OCC witness Campbell offering opinions on other approaches that he believes would be appropriate, but which would not meet applicable VAP standards.

The issue is not really the lack of a written document describing the evaluations Duke Energy Ohio conducted and the conclusions that were reached as to the selected remedial activities, but rather that the OCC disagrees with the work that was required to be performed at the two properties. In particular, the focus is on what remedial work was required to meet applicable VAP standards, protect human health and the environment, and achieve the other stated goals for remediation of the two former MGP sites, as described in Duke Energy Ohio witness Bednarcik's testimony above. Duke Energy Ohio offered the testimony of Shawn Fiore, a Certified Professional under Ohio's VAP for over 17 years, the testimony of Dr. Andrew Middleton, who has been involved in MGP sites for over 30 years, the testimony of Kevin Margolis, (as previously explained, an experienced environmental attorney who has advised many clients on the VAP and cleanup of contaminated sites), and the testimony of Jessica Bednarcik, Duke Energy's Manager of Remediation and Decommissioning (who managed both projects and who has substantial experience both with Duke Energy as well as within the industry generally in regard to the investigation and remediation of MGP sites). All of these

witnesses testified to the prudency of Duke Energy Ohio's approach to addressing the two MGP sites.

The OCC's focus is that they believe that there were other, less expensive ways to remediate the sites under the VAP.[54] Instead of offering testimony on the VAP by an Ohio EPA CP, the OCC offered the testimony of an individual who has no experience with the VAP, other than reading the regulations and looking at Ohio EPA's website.[55] As acknowledged during the hearing, OCC witness Campbell is not a VAP CP, nor does he possess any environmental certifications in Ohio.[56] He has not taken any training under the VAP and he has not discussed the VAP or his opinions with anyone at Ohio EPA or any CPs.[57] OCC witness Campbell has never been involved in cleaning up a manufactured gas plant under the VAP and, in fact, has never worked on a project under the VAP.[58] He did not review any information on the cleanup of any other MGP sites under the VAP, and this is the first time that he has analyzed VAP requirements and whether properties meet applicable standards such that an NFA letter can be issued.[59]

Duke Energy Ohio believes that highly technical issues concerning compliance with applicable VAP standards should be made by VAP CP and the Ohio EPA – not by witnesses who are not CPs under the VAP and who have no experience in interpreting the VAP except for reviewing regulations and information on the website. As explained in the testimony of Duke Energy Ohio witness Margolis and Duke Energy Ohio witness Fiore, one does not learn the VAP

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[54] Transcript Vol. IV, at pp. 945-946.
[55] *Id.* at p. 949; *see also* Direct Testimony of Shawn Fiore, at p. 4.
[56] Transcript, Vol. IV, at pp. 946, 951.
[57] *Id.* at p. 948.
[58] *Id.* at p. 949.
[59] *Id.* at pp. 946-949.

from simply reading the rules and looking at Ohio EPA's website.[60] Such experience is only acquired by becoming a CP, attending training and CP sessions, talking with Ohio EPA VAP personnel, interacting with other CPs, and actually performing work under the VAP.[61] OCC witness Campbell has done none of this.[62] Moreover, the Commission does not need to enter into the highly technical inquiry of whether the VAP standards have been met, or what these standards require, in order to answer the question of whether Duke Energy Ohio acted prudently in investigating and remediating the East End and West End sites under the guidance of a qualified VAP CP and consultants who specialize in addressing MGP sites. These are highly technical issues that are addressed by environmental professionals that have been certified to work in this area and to render such opinions.

Testimony during the hearing evidenced OCC witness Campbell's lack of understanding and familiarity with Ohio's VAP, as well as other state programs.[63] Simply put, OCC witness Campbell does not have the experience or qualifications to render opinions concerning what would be required to meet applicable standards under the VAP, or identify what the applicable standards are in the first place. The Commission should not give any weight to OCC witness Campbell's testimony concerning how he interprets the technically complex VAP or how he believes the VAP should apply to the Duke Energy Ohio sites when he has no experience with the VAP.

OCC, in its brief, goes to great lengths to claim that OCC witness Campbell's testimony establishes that Duke Energy Ohio was imprudent and that other remedial alternatives existed to

[60] Transcript Vol. I, at p. 166.
[61] Transcript Vol. III, at pp. 632-639.
[62] Transcript Vol. IV, at pp. 946-949.
[63] *Id.* at pp. 948-950.

meet VAP standards. The fact that OCC witness Campbell would have recommended a different remedy for these MGP sites is inapposite. As explained above, OCC witness Campbell is not a VAP CP and, consequently, not qualified to make such recommendations in Ohio, nor does he have any past experience working under the VAP. While OCC witness Campbell has many years of experience in the environmental field, he has no experience under the VAP, a program that is considerably different than other states' cleanup programs.[64] OCC witness Campbell's personal opinion of the appropriate remedy in this case is based on an incomplete understanding of the VAP requirements, an incomplete understanding of the status and scope of the investigations and remediation, and appears to be based in part on the incorrect belief that Duke Energy Ohio could have received a variance to leave the TLM and OLM that was technically feasible to treat or remove in the ground.[65] OCC witness Campbell never personally observed any of the TLM and OLM present throughout the two sites.[66] OCC witness Campbell was also unaware of the status of the investigatory and remedial work and what remains to be done at the properties.[67] It is uncontroverted that it was technically feasible to remove or solidify the TLM and OLM material that was removed or solidified by the Company. Moreover, as Duke Energy

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[64] *See, e.g.*, Direct Testimony of Shawn Fiore, at p. 10; Transcript Vol. I, at pp. 54-55, 166; Transcript Vol. III, at pp. 591-593, 637, 650-652.

[65] It became clear during the hearing that OCC witness Campbell's opinion concerning leaving the TLM and OLM in place was based, at least in part, on PowerPoint slides that he found on Ohio EPA's website. These slides were from an Ohio EPA training program that he did not attend nor had any knowledge of the background or context of the examples cited. Transcript Vol. IV, at pp. 977-983. Had he actually spoken with the Ohio EPA or the CPs who authored the PowerPoint slides, he would have learned that the circumstances at the example site differed substantially from the two Duke Energy Ohio sites and did not actually support his argument, including the fact that the free product that was not removed was located under a building (not technically feasible to remove) *and* the product was not mobile (as it is at the Duke Energy Ohio sites). As Duke Energy Ohio witness Fiore testified, the regulatory mechanisms that would permit leaving product in the ground are very limited and very infrequent and do not apply to the East End or West End sites. Direct Testimony of Shawn Fiore at pp. 18-19; Transcript Vol. III, at p. 615. Moreover, it was apparent that OCC witness Campbell has no experience with variances under the VAP and was not aware of the process or Property Revitalization Board which considers applications for variances. Transcript Vol. IV, at pp. 973-976.

[66] Transcript Vol. IV, at pp. 971-973.

[67] *See, e.g.*, Transcript Vol. IV, at pp. 970-971.

Ohio witness Fiore testified, engineering and institutional controls do not in and of themselves meet VAP applicable standards with regard to achieving this remedial objective.[68] As testified to by Duke Energy Ohio witness Fiore, the approach advocated by OCC witness Campbell, sometimes referred to as "pave and wave" or "pave and pray," would not meet applicable VAP standards at these sites.[69]

Duke Energy Ohio prudently removed or solidified in place the OLM and TLM at the East End and West End sites, as required by the VAP. The Company engaged in a process that considered remedial options that first, and foremost, met the threshold requirements of complying with Ohio environmental law and policy under the applicable VAP standards and protecting human health and the environment. The Company also considered factors such as best practice, feasibility, constructability, safety, prior experience, and long-term and short-term impacts to the community and the Company's operations, as well as costs. Based upon all these considerations, the Company chose the remedial actions it did as the prudent, cost-effective method of addressing contamination at the East End and West End sites.

The Company undertook a number of processes to ensure that implementing the work would be cost effective as described in Duke Energy Ohio witness Bednarcik's testimony and which was described in detail in Duke Energy Ohio's Initial Post Hearing Brief.[70] OCC witness Campbell confirmed that the process used by Duke Energy Ohio to competitively bid the work is what he would recommend if he were involved in managing a remediation project.[71]

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[68] Transcript Vol. III, at pp. 644-646.
[69] *Id.*
[70] Initial Post-Hearing Brief of Duke Energy Ohio, at pp. 44-54.
[71] Transcript Vol. IV, at pp. 961-962.

D. Deferred accounting is a valuable regulatory tool that has frequently been employed in Ohio, and such an authorization, while not a guarantee of recovery, is not meaningless.

Both OCC and Staff argue that the Commission's 2009 order authorizing the Company to defer its MGP remediation expenses is essentially meaningless. Although the Commission's deferred accounting authorization order by no means guarantees recovery of deferred costs, and Duke Energy Ohio does not claim such, a deferred accounting order issued by the Commission must mean something. Given that the utility being authorized to defer costs must conclude, for accounting and financial reporting purposes, that recovery of the costs is probable upon a showing of prudence prior to deferring such costs, the process of issuing deferred accounting authorizations is by no means a meaningless exercise on the part of the Commission. As Duke Energy Ohio witness Wathen explained on cross-examination, while a deferred accounting order provides no guarantee that the deferred costs will be deemed prudent and thus recoverable, it is reasonable to expect that regulators will not authorize deferred accounting for a category of costs that they believe is unlawfully includible in rates. If it is the practice of the Commission to issue orders authorizing accounting deferrals for costs that it knowingly will not allow recovery of as a matter of law, then such orders will, in fact, be meaningless. In such a case, utilities will not be able to conclude that recovery is "probable," and will not be able to defer the costs for accounting and financial reporting purposes, even with receipt of a deferred accounting order from their regulators. Following the logic advanced by the Staff and OCC, deferral orders would essentially become pointless administrative exercises, as the very assurance sought by the Company needed to create the deferral would be undermined by the inability of utility accountants to trust that the authority carries any meaningful weight when recovery of the deferred cost is ultimately sought. Another cascading implication would be that utilities would have to consider writing off existing regulatory assets that were created under prior deferral

authority, which would negatively impact earnings, and could possibly injure credit quality and increase financing costs, all to the detriment of utilities and customers alike. For this reason alone, the Commission should not treat its 2009 deferred accounting order leading up to this case as a meaningless order. Notwithstanding the pleas from the Staff and OCC to devalue the meaning of deferral orders, the Commission should reiterate that it appreciates what deferral stands for in terms of the accounting implications and the future recoverability of costs, and should provide utilities a basis for continued trust in the significance of the deferral authority.

OCC also makes the somewhat curious argument that, legal and prudence issues aside, MGP remediation expenses should not be recovered because they are nonrecurring costs.[72] This flies in the face of the rationale for deferred accounting – to allow the recovery of legitimate costs of service that may occur outside of test years and rate cases. The costs at issue are by their very nature significant and nonrecurring, precisely the description one would expect for costs eligible for such deferrals. As one recognized ratemaking treatise has noted, deferred accounting is a "powerful tool" for ameliorating the burden of one-time costs.[73]

Moreover, and contrary to the OCC's argument, deferred accounting is allowed by Ohio statutes and has been frequently utilized by this Commission. Under R.C. 4905.13, the Commission may establish a system of accounts to be kept by public utilities, or may classify said public utilities and establish a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. The Commission has allowed for modifications of

[72] *See* OCC Brief, at p. 24.
[73] *The Process of Ratemaking*, Leonard Saul Goodman, at p. 325 (Public Utilities Reports, Inc.; 1998)

accounting procedures.[74] The Supreme Court of Ohio has recognized the Commission's discretion under R.C. 4905.13 and has held that it "generally will not interfere with the accounting practices set by the commission."[75] Notably, deferred accounting authorizations have been a long-standing exception to the general rule that rates be set using test period expenses only.[76]

Deferred accounting is a valuable regulatory tool and the Commission has a long history of using the tool of deferred accounting authorizations in order to allow utilities to recover costs that are unexpected and/or non-recurring.[77] Thus, deferred accounting authorizations are recognized in Ohio (and elsewhere) as a common and useful regulatory tool: "[t]he use of the deferred cost account in a ratemaking context is so common and so fundamental a regulatory tool that no agency is likely to consider it necessary today to study whether as a matter of 'policy'

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[74] *In the Matter of the Application of Ohio Edison Co.*, PUCO Case No. 10-176-EL-ATA; 2010 Ohio PUC LEXIS 1196 at pg. 13 (Nov. 10, 2010). The Commission found that rehearing on this assignment of error should be denied, noting "In our March 3, 2010, Finding and Order, the Commission authorized FirstEnergy to modify its accounting procedures pursuant to the statutory authority granted to the Commission by Section 4905.13, Revised Code."

[75] *Elyria Foundry Co. v. PUC*, 114 Ohio St. 3d 305, 308 (Ohio 2007) *citing Consumers' Counsel v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 263, 271, 513 N.E.2d 243.

[76] *See, In the Matter of the Application of Columbia Gas of Ohio, Inc. to Increase Gas Sales and Certain Transportation Rates within its Service Area; In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Transportation Tariffs*, PUCO Case Nos. 91-195-GA-AIR; 88-1830-GA-ATA; 1991 Ohio PUC LEXIS 1367 at pp. 82-83 (Nov. 27, 1991). Columbia was authorized to resume deferred accounting for weatherization costs incurred outside of its test year. The Commission noted, "Columbia already has authorization to defer the amounts spent during 1989, with recovery provided through subsequent rate cases. Therefore, we will authorize the company's actual test period expense of $3,589,122 to be recognized in operating expenses in these cases and Columbia may continue to defer any amount in excess of that amount which is spent for weatherization costs during 1989."

[77] *See In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc.*, Case Nos. 12-530-GA-UNC, 12-531-GA-AAM; 2012 Ohio PUC LEXIS 855; (Dec. 12, 2012); allowing Vectren to continue deferred accounting treatment for its in service CEP investments; *see also In the Matter of the Application of Ohio Edison Co.*; PUCO Case No. 93-641-EL-AIS, 1993 Ohio PUC LEXIS 338 (May 6, 1993) the Commission allowed the company to defer the difference between the levelized interest and the actual interest expense on bonds. *In the Matter of the Application of Ohio Edison Company for Authority to Modify its Accounting Methods to Defer PIP Arrearages for its Electric Services*; PUCO Case No. 85-803-EL-AAM; 1985 Ohio PUC LEXIS 259 (July 9, 1985), Commission allowed for deferred accounting of PIP arrearages; *In the Matter of the Application of Consumers Ohio Water Company and Masury Water Company for an Order Approving Deferred Accounting for Merger Related Costs*; PUCO Case No. 99-703-WW-AAM; 1999 Ohio PUC LEXIS 218 (Sept. 2, 1999), The Commission authorized to defer the Company's merger related costs and amortize them over a ten-year period.

costs should be deferred; however, it will insist that a proper record be made pointing to the need for a specific cost deferral."[78]

The Commission should recognize in its decision in these proceedings that deferred accounting is a valuable regulatory tool, particularly when employed to allow deferral and subsequent recovery in cases where the utility would otherwise have to absorb the financial impact of a substantial cost of providing service. The Commission should reject OCC's and the Staff's positions, which could render deferred accounting orders meaningless and therefore useless.

E. The Commission should reject the OCC's alternative proposal that prudent MGP remediation expenses be "shared" between customers and shareholders; prudent business costs, such as these, should be fully reflected in rates.

The OCC also argues that, if the Commission allows recovery of the Company's MGP remediation expenses, it should arbitrarily require shareholders to pay 50% of such costs.[79] As support for this position, the OCC argues that shareholders benefitted from the past MGP gas plants and the past sale of MGP byproducts. This argument should be rejected for a number of reasons.

First, the OCC's argument as to past shareholder benefits is based on pure speculation. There is no evidence in this record as to whether, how, or to what extent past shareholders benefitted from the gas plants or the sale of byproducts; nor is there any evidence how or to what extent past rates reflected business risks[80] and insurance risks. For example, there is no evidence

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[78] *The Process of Ratemaking*, Leonard Saul Goodman, at p. 322 (Public Utilities Reports, Inc.; 1998)
[79] *See* OCC Initial Brief, at p. 92.
[80] Needless to say, it is highly unlikely that past rates for MGP gas service reflected risks associated with environmental liability and remediation laws that were not, and would not be, in existence for decades.

in this case of past earnings or returns on equity, and no evidence of whether the sale of byproducts[81] was factored into (credited) to rates charged to customers, or even how regulation took place many years ago (*e.g.*, state regulation versus franchise agreements). As Mr. Hayes admitted on cross-examination with respect to this precise issue: "There are many unknowns about past history and who paid and who profited. . . . We just don't know. . . ."[82] It is remarkable that OCC would acknowledge all of the "unknowns" about the past and yet attempt to convince the Commission to make decisions based on what "could have happened" in the past. The Commission cannot[83] and should not base its decision on pure speculation.

Additionally, GCHC's argument that these legitimate and necessary MGP remediation expenses should be disallowed because utility regulation at the state level did not commence until the early 1900s is likewise flawed. Not only is the record devoid of whether and to what extent utility regulation took place prior to the advent of state regulation, GCHC's argument totally misses the point. Duke Energy Ohio (and its predecessors in name) used MGP plants to provide important utility service to customers in the past, both before and after the commencement of state regulation. Further, the relevant environmental laws were not enacted until decades after natural gas companies in Ohio – including Duke Energy Ohio and its predecessors – were regulated by the Commission. And as demonstrated in these proceedings,

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[81] Indeed, to the extent that byproducts were removed from a site and sold, such byproducts presumably do not remain at the site and do not need to be remediated.

[82] Transcript Vol. III, at pp. 843-44. The Commission should likewise reject the OCC's proposal to exclude costs related to "time periods of MGP operation that predated PUCO regulation (prior to 1911)." Even if that were relevant – which it is not, as the Company's current ownership of property is the relevant fact -- the record is devoid of any evidence as to what predated PUCO regulation. For instance, did municipal regulation via franchise agreement predate PUCO regulation?

[83] *See, for example, In the Matter of the Application of FirstEnergy Corp,*. PUCO Case Nos. 99-1212-EL-ETP; 99-1213-EL-ATA; 99-1214-EL-AAM, 2000 Ohio PUC LEXIS 676, 102-103 (Ohio PUC 2000)(the Commission's decision must be based on evidence of record, *citing, AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 88 Ohio St. 3d [*103] 549 (2000) (which in turn cited with approval *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St. 3d 266, 268 (1988)).

the Company's legal obligation to remediate the property is a current obligation and one that must be met in the provision of utility service to its customers today.

More importantly, as is demonstrated by both the evidence in this case and the legal arguments contained in the Company's briefs, while the other parties attempt to make much of the argument that the MGP plants themselves are no longer used and useful in the provision of utility service, that fact is irrelevant. The environmental remediation costs at issue here are attributable to the Company's status as an owner of utility property (and its status as a previous owner)[84] and are thus a very real cost of doing business today and providing utility service today. As the Minnesota commission concluded in a similar case: "[n]either 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."[85] Similarly, that commission noted that "[t]here are valid state and federal statutes placing clean-up responsibilities on current landowners, whether or not they owned the land when the pollution requiring remediation occurred. These responsibilities flow from land ownership alone. To treat remediation costs differently from other costs related to current land ownership would be result-driven and contrary to general ratemaking principles."[86] These types of expenses are necessary for companies to remain in business and achieve compliance with current environmental laws and regulations, and are thus part of providing current service to customers. Accordingly,

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[84] *See, for example, In the Matter of California Edison Co.*, Decision No. 91-12-076, 1991 Cal. PUC LEXIS 911, 130 P.U.R.4th 97 (CA PUC; Dec. 1991)("[W]e note that hazardous waste cleanup costs are liabilities associated with ownership of utility property, and the costs are recovered entirely from ratepayers.")

[85] *In Re Peoples Natural Gas Co.*, 144 PUR4th 333, 1993 Minn. PUC LEXIS 104 ((Minn. PUC 6/11/93). *See also, In the Matter of the Request of Interstate Power Company*, 1996 Minn. PUC LEXIS 27 (Minn. PUC 1996), at p. 13 (emphasis added).

[86] *In the Matter of the Request of Interstate Power Company*, 1996 Minn. PUC LEXIS 27, at pp. 7-8.

assuming the incurred costs are prudent (which the Company has thoroughly demonstrated), all of the costs should be recoverable through rates.

While this case may be a case of first impression in Ohio, numerous state commissions and courts have already addressed this precise issue and have concluded that 100% of prudently incurred MGP remediation costs should be recoverable in rates. As a commentator noted several years ago:[87]

> A majority of the public utility commissions that have addressed this issue in contested cases have granted full recovery from ratepayers of costs prudently incurred in investigating and remediating MGP sites, net of any insurance or other third-party reimbursements (hereinafter "net MGP costs"). These commissions have done so by including projected net MGP costs in base rates, or more commonly, by amortizing the net MGP costs over a specified period and allowing the recovery of those costs, with carrying charges, through a special "rider" or "tracker."[88] A minority of commission that have addressed this issue in contested cases have ruled that utility shareholders and ratepayers must share in net MGP costs through amortization without carrying costs, while several jurisdictions have approved settlements that embody some aspect of sharing of net MGP costs between shareholders and ratepayers.[89]

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[87] *Recovery by Utilities of Expenditures on Manufactured Gas Plant Claims: Recent Developments Regarding Insurance Coverage and Rate Relief*, by Nicholas W. Fels, William P. Skinner, and Saul B. Goodman, Environmental Claims Journal, Vol. 9, No. 1, August 1996.

[88] *Id.* According to this article, state commissions granting full recovery of net MGP clean-up costs from ratepayers include: Connecticut, Florida, Illinois, Iowa, Maryland, Michigan, New Jersey, New York, and Washington, D.C. Since this article was published, several more states, such as Minnesota, Rhode Island, Montana, North Dakota, South Carolina and Montana have allowed full recovery through rates of prudently incurred MGP remediation expenses, and Colorado and Kentucky have allowed deferred accounting for MGP remediation. *See, In the matter of the Request of Interstate Power Company*, 1996 Minn. PUC LEXIS 27 (Minn. PUC 1996); *Re Providence Gas Company*, 2000 R.I. PUC LEXIS 47 (R.I. PUC 2000); *In the Matter of the Application of PSC of Colora*do, Decision No. R11-1311; DOCKET NO. 11A-646G; 2011 Colo. PUC LEXIS 1075 (Colo. PUC 2011); *Re Atmos Energy Corp.*, 2008 Ky. PUC LEXIS 969 (Ky. PSC 9/29/08) *Re Great Falls Gas Company*, 1995 Mont. PUC LEXIS 57 (Mont. PUC 5/30/95); *Re Northern States Power Company*, 211 PUR4th 44, 2001 N.D. PUC LEXIS 68 (N.D. PUC 6/27/01) ; *Re Piedmont Natural Gas Co.*, 223 PUR4th 497, 2002 S.C. PUC LEXIS 11 (S.C. PSC 11/1/02).

[89] These states include California, Delaware, Georgia, Kansas, Massachusetts, New Hampshire, North Carolina, and Wisconsin. As the article notes, even in the minority of states where regulators have determined that some sort of sharing of MGP remediation expenses is appropriate, that sharing has generally taken place through amortization of MGP costs without carrying costs, effectively requiring customers to bear 100% of the direct remediation costs and shareholders to bear the carrying costs. In California, for example, In *1991 Hazardous Substance Reasonableness Review Application of Southern California Gas Company*, 1994 Cal. PUC LEXIS 379 (Cal. PUC 1994) (CPUC 5/4/94) , the California Commission approved a settlement agreement among a number of California utilities and the

In sum, OCC's argument for sharing MGP remediation costs should be rejected. The basis for OCC's argument is pure speculation, and arbitrary speculation at that. The Commission cannot properly base its decision on conjecture. Moreover, a review of other states' practices shows that states generally allow full recovery through rates of all prudently incurred expenses.

F. Although Duke Energy Ohio agrees that net recoveries from third parties should be credited to customers, rate recovery should not be delayed while these other protracted processes are addressed.

OCC argues that any third party payments, from insurance carriers or other potentially responsible parties (PRPs), should be credited to customers. Assuming MGP remediation expenses are fully recoverable through customer rates,[90] Duke Energy Ohio wholeheartedly agrees that any net recoveries (net, for example of costs to obtain such third party payments) should be credited to customers promptly upon receipt of such. OCC goes farther, though, and

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Division of Ratepayer Advocates adopting a new procedure for recovery of hazardous waste cleanup program ("Hazwaste Program") expenses. Pursuant to the settlement agreement, Hazwaste Program expenses, including MGP remediation costs, are assigned 90% to ratepayers and 10% to shareholders. If total expenses are less than $5 million in an 84-month period, then the expenses are divided 95%/5% between ratepayers and shareholders. There is no Commission reasonableness review of the Hazwaste Program expenses, recoveries or activities. This procedure applies to all costs and recoveries whether or not they relate to a site owned by a utility and whether or not a governmental agency has ordered a cleanup of the site. In Wisconsin, the Commission stated that "Sharing will be achieved by means of deferred accounting, with recovery of deferred cleanup costs in rates over a period of five years, but with no recovery in rates of the carrying costs on the unamortized balances." *Wisconsin Power & Light Company*, No. 6680-UR-108, 1993 Wisc. PUC LEXIS 64 at p. 10 (Wisc. Pub. Serv. Comm'n, Sept. 30, 1993). The Commission in New Hampshire also adopted this unique "sharing" model, by allowing seven year amortization, but without carrying costs or rate base treatment. *Energy North Natural Gas, Inc.*, DE 93-168, 1993 WL733960 (N.H.P.U.C. Nov. 22, 1993) *See also Northern Utilities, Inc.*, 2004 Me. PUC LEXIS 217 (Me. PUC 2004), the Maine Public Utilities Commission approved Northern Utilities' proposed solution for environmental remediation of its former MGP sites, and approved a sharing mechanism whereby ratepayers would pay the full environmental remediation costs on a rolling 5-year amortization schedule capped at 4% of the utility's annual adjusted total firm revenues from gas sales and transportation customers, while shareholders would bear carrying costs on all deferred environmental recovery cost balances during the 5-year amortization schedule. In North Carolina utility shareholders were only held responsible for taxes and carrying charges. *Public Service Company of North Carolina*, 156 PUR4th 384 (N.C. 1994). The only state even close to the 50:50 mechanism proposed by the OCC is Kansas. See *Kansas Public Service*, 146 PUR4th 123 (Kan. S.C.C. 1993).

[90] If the Commission were to impose a cost sharing arrangement, recoveries from third parties should be similarly shared, on a *pro rata* basis.

argues that rate recovery should be delayed until any and all legal processes to seek such third party payments are concluded.[91]

The Commission should reject OCC's attempt to further delay recovery of amounts that have been incurred starting in 2008. The record reflects that the Company is appropriately pursuing both potential insurance carriers and other PRPs. However, as Company witness Margolis testified, those insurance and PRP processes are likely to be lengthy and protracted, and may not result in the recovery of significant funds, if any, particularly given the time period in question and the attendant challenges associated therewith.[92]

Given the prospect of delayed legal proceedings, combined with the challenges to achieving third party recoveries outlined by Mr. Margolis, it would be unreasonable to delay rate recovery of these costs. Moreover, as the 2009 deferred accounting order made clear, the next base rate proceeding was the appropriate time and place to deal with recovery of these costs through rates. This is the "next" rate case proceeding, and the appropriate time and place to deal with these costs, including instituting rate recovery, is this time and this case.

G. Recovery of the MGP remediation costs should take place over a reasonable time period.

OCC, the Staff, and Kroger continue to press for an unreasonably long amortization period for MGP cost recovery – ten years or more. If their proposal were to be adopted, Duke Energy Ohio would not achieve full recovery of its MGP costs until 2023 – fifteen years after

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[91] *See* OCC Brief, at p. 94.

[92] Margolis Direct Testimony, at p. 15 ("[I]nsurance recovery and cost recovery from PRPs are typically very costly, time consuming (and, as such, an efficient use of resources), and may not be likely to result in the recovery of significant funds, if any.").

first beginning to incur the remediation costs. This proposal for a ten-year amortization period should be rejected, for several reasons.

As the Commission itself has recognized, the following factors should be taken into account when determining an appropriate amortization period for deferred costs: "the amount of the deferral, the age of the deferral, the anticipation of additional deferrals being approved in the company's next round of rate cases, and the proximity of the next set of rate cases."[93] Additionally, the Commission has concluded that it is also reasonable, in fixing an amortization period, to look not only to the experience of a particular applicant, but also to the experience of the industry as a whole.[94]

The amount of the deferral – approximately $63 million (as of December 31, 2012) – combined with a 0% base rate increase per the stipulation reached in this case argues for an amortization period in line with the Company's proposal (and certainly far less than ten years), as there is no evidence that a shorter amortization period, such as the three-year period proposed by the Company, will result in any severe rate impacts or "rate shock" for customers.[95] Amortizing the December 31, 2012, balance of $63 million over three years results in an average rate impact to customers of approximately 3% on a total bill basis.[96] Admittedly, no customer wishes to see

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[93] *In the Matter of the Applications of Columbia Gas of Ohio, Inc.*, Case Nos. 88-716-GA-AIR; 88-717-GA-AIR; 88-718-GA-AIR; 88-719-GA-AIR; 88-720-GA-AIR; 88-1011-GA-CMR. 1090 Ohio PUC LEXIS 1069 (PUCO; Oct. 17, 1989), at pp. 79-81.

[94] *In the Matter of the Application of Ohio Suburban Water Company*, Case No. 77-1512-WS-AIR (PUCO; March 8, 1979), at p. 19; *citing In re Columbus & Southern Ohio Electric Company*, Case No. 77-545-EL-AIR, Opinion and Order dated March 31, 1978, at p. 24.

[95] Indeed, the Staff and Kroger witnesses who testified in favor of a ten-year amortization period conceded that their proposal was not based upon any analysis of rate impacts or rate shock. See Transcript Vol. III, at pp. 814, 827.

[96] Transcript Vol. III, at p. 747.

rates increase but it is difficult to conclude that a 3% increase falls within the category of rate shock.[97]

The age of the deferral – with costs having been incurred beginning in 2008[98] – also argues for a shorter amortization period, such as the Company's three-year proposal. The fact that these deferrals are anticipated to continue as the MGP site cleanup progresses also argues in favor of a shorter deferral period; if a longer period were adopted, future deferral recoveries would be layered on top of the deferrals approved for recovery in this case. Finally, the factor concerning proximity of future rate cases also argues in favor of a shorter amortization period, because the Company's last base rate case occurred about four years ago.[99] Even though Duke Energy Ohio's MGP remediation expenses will be recovered via rider instead of base rates, in order to avoid the potential for layering of costs upon costs, it would be appropriate to achieve recovery of current MGP costs before the Company's next base rate case.

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[97] Note that in a recent ESP case, the Commission capped the utility's rate increases at 12%, which also indicates that a 3% rate impact is not unduly burdensome for customers. *See, In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order, at p.70 (Aug. 8, 2012)("In order to ensure no customers are unduly burdened by any unexpected rate impacts, as well as to mitigate any customer rate changes, we direct AEP-Ohio to cap customer rate increases at 12 percent over their current ESP I rate plan bill schedules for the entire term of the modified ESP, pursuant to our authority as set forth in Section 4928.144, Revised Code. The 12 percent limit shall be determined not by overall customer rate classes, but on an individual customer by customer basis. The customer rate impact cap applies to items approved within this modified ESP. Any rate changes that arise as a result of past proceedings, including any distribution proceedings, or in subsequent proceedings are not factored into the 12 percent cap. Further, the 12 percent cap shall be normalized for equivalent usage to ensure that at no point any individual customer's bill impacts shall exceed 12 percent. On May 31, 2013, AEP-Ohio should file, in a separate docket, a detailed accounting of its deferral impact created by the 12 percent rate cap. Upon AEP-Ohio's filing of its deferral calculations, the attorney examiners shall establish a procedural schedule, to consider, among other things, the deferral costs created, and the Commission will maintain the discretion to adjust the 12 percent limit, as necessary, throughout the term of the ESP.")

[98] Particularly when coupled with the Commission's order in Case No. 09-712-GA-AAM, stating that carrying costs should end when rate recovery begins.

[99] *See* Transcript Vol. III, at p. 812.

The experience of the industry as a whole on this issue also supports a shorter amortization period for these MGP remediation costs, such as the three-year period proposed by the Company. A review of amortization periods for MGP costs approved by other state commission indicates that the average amortization period is closer to the Company's three-year proposal than the other parties' ten-year (or longer) proposals.[100]

Finally, any proposal to extend the amortization period beyond three years should come with the ability to continue accruing carrying costs on unrecovered amounts. There is a time value of money issue related to these expenditures as well. For example, assume the Company has a $100 deferral to amortize over ten years without any carrying costs. Using the carrying cost rate at the long-term debt rate included in the Company's application in this proceeding (5.32%) and applying a simple present value formula, the present value of the $100 expenditure is only $76. So, if the Commission were to extend recovery over ten years without allowing for

[100] The New York PSC has approved a three-year amortization period for such expenses. *See National Fuel Gas Distribution Corp.*, Op. No. 91-16, 1991 N.Y. PUC LEXIS 11 (N.Y. Pub. Serv. Comm'n, July 19, 1991)(MGP cleanup costs to be collected by amortization over three-year period). Note that in a recent New York case, the NY PSC rejected a proposed 3% annual rate impact cap on site investigation and remediation ("SIR") expenses, and reiterated that "we retain the discretion to set annual recovery rates and amortization schedules for SIR costs best suited to the concrete conditions presented in rate cases."). *In re Proceeding on Motion of the Commission to Commence a Review and Evaluation of the Treatment of the State's Regulated Utilities' Site Investigation and Remediation (SIR) Costs*, NY PSC CASE 11-M-0034, 2012 N.Y. PUC LEXIS 442, 17-18 (N.Y. PUC 2012) (Nov. 28, 2012). The commissions in Connecticut, Florida, Georgia, Maine, Minnesota, North Carolina and South Carolina have all allowed for recovery via five-year amortization; *see Yankee Gas Services Co.*, Docket No. 92-02-19, 1992 WL 333210 (Conn. Dept. Pub. Util. Control, Aug. 26, 1992); *Peoples Gas System Inc.*, Order No. 16313, 1986 Fla. PUC LEXIS 586 (Fla. Pub. Serv. Comm'n, July 8, 1986); *Atlanta Gas Light Co.*, No. 4167-U (Ga. Pub. Serv. Comm'n, Sept. 1, 1992); *Northern Utilities, Inc.*, 2004 Me. PUC LEXIS 217 (Me. PUC 2004) (7/7/04); *Northern States Power Co.*, Nos. G-002/GR-86-160; G-002/M-86-165, 1987 Minn. PUC LEXIS (Minn. Pub. Util. Comm'n, Jan. 27, 1987); *Re Carolina Power & Light Company*, 2006 N.C. PUC LEXIS 1226 (N.C. PUC 10/19/06); *Re Piedmont Natural Gas Co.*, 223 PUR4th 497, 2002 S.C. PUC LEXIS 11 (S.C. PSC 11/1/02). The Commissions in Massachusetts, New Jersey and New Hampshire have approved seven year amortization. *See Generic Investigation Into Ratemaking Treatment for Remediation of Hazardous Waste From the Manufacture of Natural Gas*, No. 89-161, Mass. D.P.U. (May 25, 1990); *Energy North Natural Gas, Inc.*, DE 93-168, 1993 WL733960 (N.H.P.U.C. Nov. 22, 1993); *South Jersey Gas Co., Order Adopting Stipulation*, Docket No. GR91071243J (Aug. 10, 1992). The Commission in North Dakota has approved amortization of MGP remediation over an eight year period. *see Re Northern States Power Company*, 211 PUR4th 44, 2001 N.D. PUC LEXIS 68 (N.D. PUC 6/27/01).The Commission in Maryland allowed for amortized cleanup costs over ten years, with unamortized amounts in rate base to cover carrying costs. *See Chesapeake Utilities Corp.*, Order No. 68462, 1989 Md. PSC LEXIS 81 (Md. Pub. Serv. Comm'n, June 9, 1989).

continued accrual of carrying costs on the unrecovered balance, the Company's shareholders would effectively lose one-fourth (~$24) of their investment due to the unnecessary and uncompensated delay in recovery of their costs.

For all of these reasons, the Commission should approve the Company's proposed three-year amortization period and, in any event, should reject the other parties' proposed ten-year (or longer) amortization period as being far outside the bounds of reasonableness.

H. The OCC was not prejudiced by the additional testimony filed in April 2013; and the OCC had the opportunity to file additional testimony itself if it so desired.

In its brief, OCC repeats its argument that it was prejudiced by the Company's filing of additional testimony in April 2013, pursuant to the Attorney Examiner's docket entry. As the record reflects, on April 4, 2013, the Attorney Examiner issued an entry that, among other things, directed that "Staff and all parties shall file any additional expert testimony" by an April 22, 2013 deadline. As opposed to "springing"[101] additional testimony on OCC, the Company and other parties (specifically, the Staff and Kroger) availed themselves of this opportunity and filed additional expert testimony by the April 22 deadline. OCC had ample opportunity to do so, as well, but apparently chose not to do so. Further, as the filings in this docket indicate, OCC and other parties had the opportunity to, and did, in fact, depose two of the three Company witnesses that had submitted additional testimony by the April 22 deadline.[102] The Company cooperated with OCC in making witnesses and documents available to allow for depositions to occur. OCC and other parties, of course, also had the opportunity to prepare for and did in fact cross-examine such witnesses at the April 29 through May 2 evidentiary hearing in this case.

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[101] *See* OCC Brief, at p. 7.
[102] *See also*, Transcript Vol. 1, at p. 12.

In response to OCC's motion to strike the Company's April 22 testimony, the Attorney Examiner appropriately denied that motion.[103] The Commission should uphold that ruling in its order. The Company's April 22 testimony was filed pursuant to, and consistent with, the Attorney Examiner's April 4 docket entry; OCC and other parties had the opportunity to, and did in fact, depose Company witnesses who submitted testimony on April 22; and OCC and parties had ample opportunity to prepare for and did in fact cross-examine such witnesses at the evidentiary hearing in this case. These facts compel a conclusion that neither OCC nor any other party was prejudiced by the filing of such additional expert testimony.

I. Rate design issues should be addressed in the first Rider proceeding.

Raising the issue for the first time in its Initial Brief, Kroger now complains about the rate design for MGP remediation costs, arguing:

> Additionally, as explained by Duke Witness Wathen, the Stipulation sets forth the appropriate allocation factors to be used when allocating the revenue requirement between the residential and non-residential classes. To ensure fairness within a rate class, Duke should recover the costs on an equal percentage basis. Given the unusual nature of these costs, there is no sound ratemaking reason for collecting these costs on a per bill basis. Therefore, the Commission should reject Duke 's proposal to first allocate the revenue requirement between classes based on the allocation factors agreed to in the Stipulation, and then "divide that by the number of bills" ("straight bill allocation").[104]

While on its face, Kroger's proposal may not appear to be unreasonable, Duke Energy Ohio believes that the Commission should address and decide this rate design issue in the first Rider MGP case, rather than here, because there is no evidence of record on this topic, and there could be unintended or unknown consequences that could result from this proposal in the absence of an opportunity for full customer group review and participation.

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[103] Transcript Vol. 1, at pp. 11-12.
[104] Initial Brief of Kroger, at p. 15.

III. Conclusion

For the reasons outlined above, as well as in the Company's testimony and Initial Brief, Duke Energy Ohio respectfully requests that the Commission approve the full recovery of its MGP remediation expenses, as proposed by the Company. Far from venturing into "dangerous legal terrain," as the Staff exaggerates,[105] a Commission decision approving full recovery of the Company's prudently incurred MGP remediation expenses will be in line with Ohio law and numerous other states' decisions in similar cases and align existing environmental and regulatory policies.

[105] See Initial Brief of Staff, at p. 3.

Respectfully submitted,

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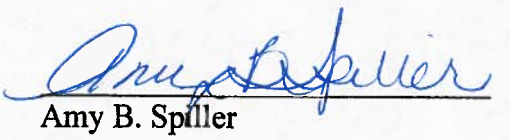
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 20th day of June, 2013, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.



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