BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL,
KROGER COMPANY,
OHIO MANUFACTURERS' ASSOCIATION
OHIO PARTNERS FOR AFFORDABLE ENERGY

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

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

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

Kimberly W. Bojko, Counsel of Record
Mallory M. Mohler
Carpenter Lipps & Leland LLP
280 North High Street
Suite 1300
Columbus, Ohio 43215
Telephone: 614-365-4124
Fax: 614-365-9145
Bojko@CarpenterLipps.com
Mohler@CarpenterLipps.com

THE KROGER COMPANY

Robert A. Brundrett, Counsel of Record
33 N. High Street
Columbus, Ohio 43215
Phone: 614-629-6814
Fax: 614-224-1012
rbrundrett@ohiomfg.com

OHIO MANUFACTURERS' ASSOCIATION

Colleen L. Mooney, Counsel of Record
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45840
Telephone: (419) 425-8860
Or (614) 488-5739
FAX: (419) 425-8862
cmooney@ohiopartners.org

OHIO PARTNERS FOR AFFORDABLE ENERGY

December 13, 2013

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
KROGER COMPANY,
OHIO MANUFACTURERS' ASSOCIATION
OHIO PARTNERS FOR AFFORDABLE ENERGY

For the purpose of protecting the 420,000 natural gas customers of Duke Energy Ohio, Inc. ("Duke" or "Utility"), the Office of the Ohio Consumers' Counsel ("OCC"), Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA") and Ohio Partners for Affordable Energy ("OPAE") (collectively, "Joint Consumer Advocates") respectively apply for rehearing of the Opinion and Order ("Order") issued on a 3-2 vote by the Public Utilities Commission of Ohio ("PUCO") on November 13, 2013 in the above-captioned cases. The Joint Consumer Advocates submit that the PUCO's Order is unreasonable and unlawful in the following particulars:

A. The PUCO Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants That Are Not Used And Useful, In Violation Of Ohio Law Including But Not Limited To O.R.C. 4909.15.

1. The PUCO erred when it disregarded Ohio law that mandates only costs incurred from plant that is "used and useful" in rendering utility service may be collected from customers.

2. The PUCO erred when it authorized Duke to charge customers for costs that were related to plant that was not used and useful in the provision of natural gas service to Duke's customers as of March 31, 2012.

B. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not A Cost To The Utility Of Rendering Public Utility Service During The Test Year, In Violation Of R.C. 4909.15(A)(4) and (C)(1).

C. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not A Normal Recurring Expense, In Violation Of Ohio Law Including But Not Limited To ORC 4909.15(A)(4).

D. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not Expenses For Duke's Utility Distribution Service, In Violation Of Ohio Law Including But Not Limited To R.C. 4909.15 (And Contrary To The Opinion Of The Dissenting Commissioners).

E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, For Providing Specific Findings Of Fact And Written Opinions That Are Supported By Record Evidence.

1. The record evidence did not support the PUCO's Order that the used and useful standard under R.C. 4909.15(A)(1) is not applicable.

2. The record evidence did not support the PUCO's Order that the MGP-related investigation and remediation costs were costs of rendering public utility service under R.C. 4909.15(A)(4).

3. The record evidence did not support the PUCO's Finding that strict liability for Duke under CERCLA means Duke's Customers should be responsible for paying the MGP-related investigation and remediation expenses.

F. The PUCO Erred By Making The Remedy For The Utility's Pollution Of MGP Sites The Financial Responsibility Of Duke's Customers Instead Of Duke's Responsibility To Pay To Remediate Its Pollution.

G. The PUCO Erred In Finding That Duke Met Its Burden Of Proof To Show That It Was Necessary For It To Spend Approximately $55.5 Million In MGP Remediation Costs To Meet Applicable Standards And To Protect Human Health And The Environment, A Finding That Was Unreasonable And Unlawful And Against The Manifest Weight Of The Evidence.

1. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving recovery of $55.5 million in MGP remediation costs when Duke failed to produce a single written report documenting, or witness testifying, as to Duke's detailed consideration of alternative remedial options and their associated costs.

2. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's mere "consideration" of remediation alternatives and incorporation of "various engineering and institutional control measures mentioned by the intervenors," independent of a detailed analysis of far less costly remediation alternatives, made Duke's environmental remediation plan reasonable and prudent.

3. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's use of Ohio EPA's Voluntary Action Program (VAP), which "does not specify or prescribe remedial options" was a sufficient basis for the PUCO to find that Duke's selected remediation was reasonable and prudent for customers to pay.

4. The PUCO's reliance on the testimony of Duke witness Fiore was misplaced, as the witness admitted he had not independently assessed, or priced out, the alternative remedial options available

to Duke or the reasonableness and prudence of those alternative remedial options for reducing the costs of what Duke sought to charge to its customers.

5. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in relying upon the fact that Duke's expert witnesses were "subject to discovery, as well as extensive, and at times pointed, cross-examination" without examining whether their opinions regarding the prudence of Duke's expenditure of $55.5 million in MGP costs were reasonable, when their opinions lacked foundation and, in fact, did not stand up to cross-examination.

6. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving $55.5 million in charges to customers for MGP investigation and remediation when Duke is required by law to minimize charges to customers and when OCC produced uncontradicted evidence of a $7.1 million MGP remediation alternative (to Duke's expending of $55.5 million or more) that would also meet applicable standards.

7. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in disregarding the evidence that excavating to 2 feet and then applying a surface cap would have met applicable standards and protected human health and the environment across most of the MGP sites, rather than the 20 – 40 feet uniformly excavated by Duke, which resulted in significantly greater costs to Duke (and thus to customers that the PUCO has authorized Duke to charge for the remediation).

H. The PUCO Erred By Applying A Standard Which Discounted The Weight Placed Upon The Testimony Of Intervenor Experts (Who Presented Expert Opinions On The Record Consistent With the Ohio Rules of Evidence), Unlawfully Favored Utility Witnesses And Effectively Created A Presumption That A Utility's Actions Were Prudent, Contravening PUCO And Ohio Supreme Court Precedent.[1] The PUCO's Finding Was

[1] *Northeast and Orwell*, Order at 4 (November 13, 2013); See also *In re Duke Storm Damage Case*, 131Ohio St.3d 487, *CG&E v. PUCO*, 86 Ohio St.3d 53, citing *CG&E v. PUCO 67 Ohio St.3d 523;* and *Syracuse Home Util. Cos. v. PUCO*, Case No. 86-12-GA-GCR.

So Clearly Unsupported By The Record As To Show Misapprehension, Mistake Or A Willful Disregard Of Duty By The PUCO.

I. The PUCO Erred In Finding That Duke's Need To Investigate And Remediate The East End MGP Site Was A Result Of Changes In The Use Of The Property And Adjacent Properties When Such Changes In Use May Not Have Occurred But For Duke's Decision To Sell A Portion Of The East End Site To Adjacent Owner(s), A Decision Which Was Unreasonable And Imprudent.

J. The PUCO Erred By Failing To Comply With R.C. 4909.19, Which Required The PUCO Staff's Report Of Investigation To Include A Determination Of The Prudence Of The MGP-Related Investigation And Remediation Costs To The Utility.

K. The PUCO Erred In Finding That Duke Has Taken Reasonable And Prudent Actions To Pursue Recovery Of Investigation And Remediation Costs From Other Potentially Responsible Third Parties And Insurers, So As To Reduce What Customers Would Be Charged.

L. The PUCO Erred By Authorizing Duke To Collect The Deferred MGP Investigation And Remediation Costs From Customers Over An Unreasonably Short Five-Year Period.

M. The PUCO Erred By Unreasonably Granting The Utility The Authority To Collect (From Customers) MGP-Related Investigation And Remediation Costs Incurred By Duke After December 31, 2012 Through A Rider.

The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

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

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: Sauer (614) 466-1312
Telephone: Serio (614) 466-9565
Telephone: Berger (614) 466-1292
larry.sauer@occ.ohio.gov
joseph.serio@occ.ohio.gov
edmund.berger@occ.ohio.gov

OFFICE OF THE OHIO CONSUMERS' COUNSEL

/s/ Kimberly W. Bojko
Kimberly W. Bojko
(Counsel of Record)
Mallory M. Mohler
Carpenter Lipps & Leland LLP
280 North High Street
Suite 1300
Columbus, Ohio 43215
Telephone: 614-365-4124
Fax: 614-365-9145
Bojko@CarpenterLipps.com
Mohler@CarpenterLipps.com

THE KROGER COMPANY

/s/ Robert A. Brundrett
Robert A. Brundrett
(Counsel of Record)
33 N. High Street
Columbus, Ohio 43215
Phone: 614-629-6814
Fax: 614-224-1012
rbrundrett@ohiomfg.com

OHIO MANUFACTURERS' ASSOCIATION

/s/Colleen L. Mooney
Colleen L. Mooney, Counsel of Record

Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
Telephone: (419) 425-8860
Or (614) 488-5739
FAX: (419) 425-8862
cmooney@ohiopartners.org

OHIO PARTNERS FOR AFFORDABLE ENERGY

TABLE OF CONTENTS

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM IN SUPPORT

I. INTRODUCTION AND GENERAL SUPPORT FOR CLAIMS OF ERROR

Each of the Joint Consumer Advocates respectively files this Application for Rehearing asking the PUCO to modify or reverse its Opinion and Order that was adopted by a vote of three to two. On November 13, 2013, the PUCO issued its Opinion and Order authorizing Duke to collect from customers $55.5 million in environmental investigation and remediation costs for two MGP sites that began service in the 1800's and that have not been used and useful in providing utility service in over 50 years.[2]

[2] The West End site is located on the west side of downtown Cincinnati and it was constructed by the Cincinnati Gas Light and Coke Company in 1841. Gas for lighting was first produced at the plant in 1843, and the manufacture of gas ceased in 1928. The East End site is located about four miles east of downtown Cincinnati. Construction of the East End site began in 1882 and commercial operations began in 1884, with the manufacture of gas ceasing in 1963. Duke Ex. No. 20(A) (Supplemental Testimony of Andrew Middleton at 25 (February 25, 2013); See also Tr. Vol. I at 183 (April 29, 2013).

In reaching the decision to authorize this collection from customers, the PUCO contravened established Ohio ratemaking law as set forth in R.C. 4909.15[3] and in court decisions interpreting that law. Since public utility regulation in Ohio commenced in 1911, the ratemaking statute has protected consumers from paying test-year expenses that are associated with facilities that are not used and useful in the provision of current service to customers.[4] In addition, the PUCO went beyond its statutory authority by creating exceptions that do not exist in the law. The PUCO created an unlawful exception to authorize collection of expenses associated with plant that is not used and useful in rendering utility service to Duke's customers.

In reaching its decision, the PUCO failed to conduct a proper evidentiary review or to hold Duke to its burden of proof to show the prudence of its environmental investigation and remediation expenditures in accordance with R.C. 4909.154. The PUCO also unreasonably burdened customers with paying for these significant costs over only a five-year period when the presumed environmental liability causing those costs has accrued over nearly two centuries.

Finally, the PUCO improperly allowed the continuing deferral of MGP investigation and remediation expenses, only limiting such deferrals to the ten-year period from the date on which the PUCO incorrectly determined that Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") mandated their clean-up.[5] Such a continuing deferral and the ongoing collection of those future deferrals

[3] R.C. 4909.15(A); See also R.C. 4909.15(A)(4).

[4] 1911 vol. 102 549 1911(House Bill 325: Changing the name of the Railroad Commission of Ohio to that of the Public Service Commission of Ohio defining the powers and duties of the latter commission with respect to public utilities, and to amend sections 501, 502 and 606 of the General Code). General Code Section 606, Section 25 (1911).

[5] Order at 72-73.

from customers, for costs that cannot be properly charged to customers, is unreasonable and unlawful.

II. HISTORY OF THE CASES

On August 10, 2009, Duke filed an Application with the PUCO to defer environmental investigation and remediation costs.[6] The Commission granted Duke's Application on November 12, 2009.[7]

On June 7, 2012, Duke filed its Prefiling Notice for its request to increase natural gas distribution rates. As part of its Rate Case Application, subsequently filed on July 9, 2012, Duke sought the authority to collect from its customers investigation, remediation and carrying costs associated with the Utility's environmental concerns at its MGP sites.[8]

On January 4, 2013, the PUCO Staff filed its Staff Report of Investigation ("Staff Report"). On February 4, 2013, OCC, as well as other interested parties, filed Objections to the Staff Report as required by R.C. 4909.19. On February 25, 2013, interested parties filed testimony of its expert witnesses in support of Objections to the Staff Report of Investigation.

On April 2, 2013, a Stipulation and Recommendation ("Stipulation") was entered into among Duke, the PUCO Staff, OCC, OPAE, Kroger and OMA **for all of the issues except for MGP-related cost recovery**. As part of the Stipulation, the Signatory Parties bifurcated the issue of MGP-related cost recovery and collection, and instead agreed to litigate the MGP issues.[9]

---

[6] *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 (August 10, 2009). ("Duke Deferral Case").

[7] Duke Deferral Case, Entry at 3-4 (November 12, 2009).

[8] Duke Ex. No. 2 (Application, Schedule) at C-3.2 (July 9, 2012).

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

The evidentiary hearing was conducted on April 29 through May 2, 2013. And, as discussed above, the November 13, 2013 Order authorized Duke to collect approximately $55.5 million of previously deferred MGP-related environmental investigation and remediation costs from customers.

On December 2, 2013, the Joint Consumer Advocates filed a Motion for a stay to prevent Duke from charging MGP-related clean-up costs pending rehearing and any appeals, or in the alternative, a Motion to make Duke's impending rates charging manufactured gas plant clean-up costs to customers be collected subject to refund.

III. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after the PUCO issues an order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[10] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[11]

In considering an application for rehearing, Ohio law provides that the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[12] Furthermore, if the PUCO grants a rehearing and determines that "the original order or any part thereof is in any

[10] R.C. 4903.10.

[11] Id.

[12] Id.

respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same * * *."[13]

Joint Consumer Advocates meet the statutory requirements applicable to applicants for rehearing pursuant to R.C. 4903.10. Accordingly, Joint Consumer Advocates respectfully requests the PUCO grant rehearing on the matters specified below.

IV. ARGUMENTS ON ASSIGNMENTS OF ERROR

A. The PUCO Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants That Are Not Used And Useful, In Violation Of Ohio Law Including But Not Limited To ORC 4909.15.

1. The PUCO erred when it disregarded Ohio law that mandates only costs incurred from plant that is "used and useful" in rendering utility service may be collected from customers.

The Ohio Supreme Court has on numerous occasions reiterated the axiom that the PUCO is a creature of statute, and as such may only exercise the authority specifically set forth by statute.[14]

R.C. 4909.15(A)(1) specifically sets forth the mandatory criteria to be used in the establishment of valuation of utility property at date certain for the purposes of the fixation of reasonable rates that a utility may charge customers:

---

[13] Id.

[14] *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 330 N.E.2d 1, 1975 Ohio LEXIS 510, 71 Ohio Op.2d 33; *Dayton Communications Corp. v. Pub. Util. Comm*. (1980), 65 Ohio St.2d 302, 307 [18 O.O.3d 478]; *Consumers' Counsel v. Pub. Util. Comm*. (1981), 67 Ohio St.2d 153, 166 [O.O.3d 96]. *Montgomery County Bd. of Comm'rs v. Pub. Util. Comm*. (1986), 28 Ohio St.3d 171; 503 N.E.2d 167; 1986 Ohio LEXIS 818. See also, *Pike Natural Gas Co. v. Pub. Util. Comm*. (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Werlin Corp. v. Pub. Util. Comm*. (1978), 53 Ohio St.2d 76, 7 O.O.3d 152, 372 N.E.2d 592; *Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm*. (1975), 43 Ohio St.2d 175, 72 O.O.2d 98, 331 N.E.2d 730.

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges**, shall determine**:
>
> (1**) The valuation as of the date certain** of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, **in rendering the public utility service for which rates are to be fixed and determined**. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

R.C. 4909.15 provides **no exceptions** to the applicability of the used and useful standard in Ohio ratemaking. Instead, R.C. 4909.15(A)(1) sets forth the mandatory steps the PUCO is required to take when establishing a utility's property value. The statute requires the PUCO to determine valuation of utility property at a date certain, and that the property has to be used and useful in rendering public utility service. There is no question that the MPG sites are not used and useful in rendering public utility service.[15]

The statute does not list any exceptions to these requirements. Despite the fact that there is no exception in the statute, the PUCO created an exception, to allow Duke to collect from customers $55.5 million in MGP site investigation and remediation costs. In doing so, the PUCO exceeded its authority. The PUCO stated:

> Therefore, **in light of the circumstances surrounding the two MGP sites in question** and **the fact that Duke is under a statutory mandate** to remediate the former MGP residuals from the sites, the Commission finds that R.C. 4909.15(A)(1) and the used and useful standard applied to the date certain for rate base costs **is not applicable to our review** and consideration of whether

[15] During the pendency of this case, there was an amendment pending in the general assembly (ASC34689X1 for H.B. 59) that, in some cases, would excuse natural gas utilities from time-honored regulatory law, including R.C. 4909.15(A), that has protected Ohio utility consumers in the ratemaking process over the past hundred years. If indeed the used and useful standard is not applicable to the PUCO decision in these cases, this begs the question then as to why there would be legislation to change the law.

> Duke may recover the costs associated with its investigation and remediation of the MGP sites.[16]

The PUCO is wrong. While the used and useful standard has no applicability in the determination of a return on the MGP facilities, the used and useful requirement for valuation of property still applies because expenses associated with property that is not used and useful cannot be included as test-year expenses and collected from customers.

The PUCO rejected the statutory arguments presented by the Joint Consumer Advocates, other intervenors and even the PUCO's own Staff, that the used and useful standard is applicable to the recovery of expenses associated with plant that is not used and useful. The PUCO stated its view that a determination of the collection of MGP-related investigation and remediation costs from customers is "separate and unique from the determination of used and useful on the date certain utilized for defining what will be included in base rates for rate case purposes."[17]

The PUCO's effort to disregard the "used and useful" standard of R.C. 4909.15(A)(1) as a "separate and unique" issue is unsupported by statute, case law or the evidence in the record. There is no question that the MGP-related investigation and remediation costs at issue in this case were presented to the PUCO as part of a rate case application, and that the ratemaking formula under R.C. 4909.15 is applicable to the PUCO's decision making in this rate case.

In addition, in creating this exception for MGP-related expenses, the PUCO did not consistently disregard the "used and useful" standard in these cases. As part of its investigation, the PUCO Staff excluded the costs associated with leasehold improvements for a portion of the Holiday Park building. The PUCO Staff indicated that parts of that

[16] Order at 54. (Emphasis added).

[17] Order at 53.

building which contained the vestibule, the customer service section and the Atrium II building "were **no longer** being occupied nor leased by the Company."[18] The expenses associated with this plant that was not used and useful were NOT included in test-year expenses. The key to the PUCO Staff's disallowing the Atrium II building was that the parts of the building were no longer used and useful in rendering utility service.[19] In adopting the Stipulation without modification, the PUCO accepted the PUCO Staff's position of excluding from test-year expenses the costs associated with the Atrium II building.

The PUCO's rationale that federal and state rules and regulations require remediation does not over-ride or change Ohio's ratemaking law that facilities must be used and useful for a utility to collect from customers the costs associated with those facilities from customers. There is no basis in R.C. 4909.15 that permits the PUCO to create an exception and set aside the used and useful standard when the utility's expenses are not associated with plant that is used and useful. This is true even if the utility is under a statutory mandate to perform environmental remediation.

If there were such a mandate under CERCLA, then that mandate would pertain to the owner/operator of a site where contamination release occurred. But the customers of the utility do not fall within the categories of liable parties.[20]

Moreover, despite the PUCO's claims to the contrary, there was no specific statutory mandate that required Duke to undertake the level of MGP-investigation and remediation that Duke undertook. In fact, there is no finding by any environmental agency requiring or directing Duke to engage in remediation efforts at the MGP sites. If

[18] Staff Ex. No. 1 (Staff Report of Investigation) (January 4, 2013) at 5-6. (Emphasis added).

[19] Id.

[20] OCC/OPAE Initial Brief at 12-13 (June 6, 2013).

there were, then Duke could not have participated in the Voluntary Action Program. Instead, as noted throughout the proceeding, Duke entered into a voluntary program to address the issue.[21] Thus, the PUCO's reliance on this circumstance is in error.

The application of the used and useful standard in R.C. 4909.15 is not discretionary. Rather, it is mandatory, as evidenced by the use of the word "shall."[22] Thus it is clear that the legislature intended the used and useful standard to be applied to all property that a utility seeks to include as part of its rate base. The Ohio Supreme Court has held that:

> When interpreting a statute, a court must first look to its language and apply it as written if the meaning is unambiguous. *State v. Lowe*, 112 Ohio St.3d 507, 2007 Ohio 606, 861 N.E.2d 512, ¶ 9. "[T]he word "shall" shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive construction other than [its] ordinary usage. *Ohio Civ. Rights Comm. v. Countrywide Home Loans, Inc.*, 99 Ohio St.3d 522, 2003 Ohio 4358, 794 N.E.2d 56, ¶4, quoting *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus.[23]

Inasmuch as there is no "unequivocal legislative intent" for a different construction, the PUCO lacks the authority to disregard the "used and useful" requirement for expenses associated with plant that is not "used and useful" and to create an exception for the MGP-related investigation and remediation expenses.

The Ohio Supreme Court has reversed the PUCO's actions in numerous instances when the PUCO exceeded its statutory authority. In *Montgomery County*, the Court rejected an attempt by the PUCO to use its emergency powers in R.C. 4909.16 to permit the recovery of Percentage of Income Payment ("PIP") arrearages through the Electric

[21] Duke Ex. No. 21 (Direct Testimony of Jessica Bednarcik) at 6-7 (July 20, 2013).

[22] R.C. 4905 (A)(1).

[23] *State v. Smith* (2011), 131 Ohio St.3d 297, 299-300, 2012-Ohio-781, 964 N.E.2d 423, 2012 Ohio LEXIS 542.

Fuel Component ("EFC") because the PIP arrearages did not fall within the defined costs permitted for recovery under the EFC statute, R.C. 4909.191.[24] Given that the PUCO could not act beyond the limit of the statute even where it claimed emergency powers in a situation affecting the health, safety or general welfare of the general public,[25] the PUCO certainly cannot extend its authority beyond the statute in this case where there is not even a claim of emergency.

In *Columbus Southern Power Co.,* the Court reversed a PUCO decision to implement a phase-in of a rate increase over a two-year period because R.C. 4909.15 did not permit the PUCO to disregard the ratemaking formula simply because the PUCO simply did not agree with a result.[26] The Court pointed out that "R.C. 4909.15(A) requires the PUCO to make a series of determinations," including "the valuation of the utility's property in service as of date certain (R.C. 4909.15(A)(1)."[27] The Court noted that the ratemaking formula under R.C. 4909.15 has been construed by the Court as being a mandatory formula[28] that was meant to protect the interests of the public utility and their ratepayers alike.[29]

The Court also specifically noted that "the General Assembly undoubtedly did not intend to build into its recently revised [1976] ratemaking formula a means by which the

---

[24] *Montgomery County Bd. of Comm'rs v. Pub. Util. Comm*. (1986), 28 Ohio St.3d 171; 503 N.E.2d 167; 1986 Ohio LEXIS 818.

[25] Id. at 177.

[26] *Columbus Southern Power Co. v. Pub. Util. Comm.* (1975), 67 Ohio St.2d 535, 540, 620 N.E.2d 835, 1993 Ohio LEXIS 2265, citing *Gen. Motors Corp. v. Pub. Util. Comm*. (1976), 47 Ohio St.2d 58, 1 O.O.3d 35, 351 N.E. 2d 183.

[27] *Columbus Southern Power* at 536.

[28] *Columbus Southern Power Co. v. Pub. Util. Comm.* (1975), 67 Ohio St.2d 535, 620 N.E.2d 835, 1993 Ohio LEXIS 2265, citing *Gen. Motors Corp. v. Pub. Util. Comm*. (1976), 47 Ohio St.2d 58, 1 O.O.3d 35, 351 N.E.2d 183.

[29] *Columbus Southern Power* at 540.

PUCO may effortlessly abrogate that very formula."[30] Even in a situation where customers may have benefitted from the PUCO's actions, the Court held firm that the PUCO could not act beyond the jurisdiction and authority permitted by the statute. In the current proceedings, the PUCO did exactly that, as it abrogated the intent of R.C. 4909.15(A)(1) by creating an exception that would allow it to disregard the "used and useful" standard that MGP sites and their related expenses could not meet.

In *Cleveland Electric Illuminating Co. v. Pub. Util. Com*. (1975), 42 Ohio St.2d 403, 330 N.E.2d 1, 1975 Ohio LEXIS 510, 71 Ohio Op.2d 393, the Court noted that the PUCO erred when it extended its order to those matters not put in issue by the application for a rate increase.[31] In that case, the PUCO ordered changes in the Cleveland Electric Illuminating Company ("CEI") tariffs that went beyond the items included in the utility's application. Again, the Ohio Supreme Court concluded that the PUCO could not act beyond the parameters set forth by the General Assembly in the statute and could only review the issues that were the subject of the application.[32]

Based on the above precedent, the PUCO improperly exceeded its statutory authority in the Duke case by creating an exception that would permit it to disregard the "used and useful" requirement of R.C. 4909.15. The PUCO should reverse its decision and find that because the MGP-sites were not used and useful in the provision of utility

[30] *Columbus Southern Power* at 540, citing *Consumers' Counsel*, 67 Ohio St.3d. at 165.

[31] *Cleveland Electric Illuminating* at 420.

[32] *Cleveland Electric Illuminating* at 420.

service to customers, the associated MGP investigation and remediation expenses cannot be recovered from customers.[33]

2. The PUCO erred when it authorized Duke to charge customers for costs that were related to plant that was not used and useful in the provision of natural gas service to Duke's customers as of March 31, 2012.

In this case, through an Entry, the PUCO approved Duke's requested test year of January 1, 2012 ending December 31, 2012 with a date certain of March 31, 2012.[34] Thus, in order to meet the initial threshold, under the ratemaking statute, Duke must prove that the properties in question (in this case the Manufactured Gas Plant facilities) were used and useful in the provision of natural gas service to customers as of March 31, 2012. As discussed above, the PUCO unlawfully created an exception to support its decision that it was unnecessary to make such a finding for Duke to recover expenses associated with the property that was not used and useful.

In changing the statutory standard, the PUCO also turned the requisite burden of proof on its head. Duke had the burden to demonstrate that MGP-related environmental investigation and remediation costs were matched to or related to Manufactured Gas Plant facilities utilized in rendering public utility service during the test period. But Duke did not.

Instead, the PUCO attempts to justify its decision by making a comparison to the PUCO's rulings in two Ohio Edison cases, stating:

> Likewise, we find the Commission's decisions in *Ohio Edison I* and *Ohio Edison II* are not dispositive of the resolution of MGP cost recovery issue in these cases, as the facts of the Ohio Edison cases and the instant cases are distinguishable. As pointed out by

[33] *Indus. Energy Users-Ohio v. PUC* (2008), 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, 2008 LEXIS 559, where the Court held that the PUCO could not assert authority over the utility's application because the application did not include electric generation which had been removed from PUCO regulation.

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

> Duke, the issues in both the *Ohio Edison I* and *Ohio Edison II* cases pertained to the recovery of expenditures for the maintenance of an existing plant that was not providing service to customers and a generating plant that was no longer providing service to customers. Conversely, in the instant cases Duke is requesting recovery for environmental clean-up costs for real property that had been used and useful for the production of manufactured gas for the benefit of the customers of Duke and its predecessors, in compliance with both federal and state rules and regulations.[35]

The PUCO's comparison between the instant case and *Ohio Edison I* and *Ohio Edison II* cases, however, reflects distinctions without the asserted differences. There is no material distinction to be made. The PUCO's cited court precedents involved costs associated with utility plant that had never been used and useful (*Ohio Edison I*), [36] and utility plant that was no longer used and useful (*Ohio Edison II*). [37]

In both those cases, the associated expenses were disallowed because those expenses could not be matched with utility plant that was used and useful in the provision of utility service as of date certain. This is **exactly** the factual circumstances the PUCO was presented with in the current Duke MGP case. While the nature of the expenses (environmental cleanup costs) is different than the decommissioning costs in *Ohio Edison I* and security costs for a retired electric generating plant in *Ohio Edison II*, the nature of the expenses makes no difference. It is the fact that the property related to those costs was not used and useful that aligns the Ohio Edison cases with the current case, and doesn't distinguish it. Indeed, it is hard to imagine how the PUCO could have cited two cases that better support the opposing conclusion from the conclusion that it reached.

---

[35] Order at 53-54.

[36] *In the Matter of the Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR, (August 16, 1990) 1990 Ohio PUC Lexis 912 *("Ohio Edison I").*

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

Additionally, under the PUCO's interpretation of R.C. 4909.15, subsections (A)(1) and (A)(4) are not connected and are treated as two completely separate sections of the Revised Code.[38] Such an approach to statutory construction is contrary to how the PUCO has long viewed R.C. 4909.15 and contradicts how the Supreme Court has directed that statutes are constructed and to be interpreted.[39]

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

> It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law. *Wooster Republican Printing Co. v. Wooster* (1978), 56 Ohio St.2d 126, 132, 10 Ohio Op.3d 312, 315, 383 N.E.2d 124, 128. Statutes which relate to the same subject are *in pari materia*. Although [* * *6] enacted at different times and making no reference to each other, they should be read together to ascertain and effectuate the legislative intent.[40]

When these principles of statutory construction are applied to R.C. 4909.15(A)(1) and R.C. 4909.15(A)(4), it is clear that the two sections should be read together and not as separate provisions. The appropriateness of this statutory construction for R.C. 4909.15 (A)(1) and R.C. 4909.15(A)(4), is most evident because those two subparts were enacted

---

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

[39] See *In the Matter of the Application of Ohio Edison Company,* Case No. 89-1001-EL-AIR, (August 16, 1990) 1990 Ohio PUC Lexis 912; see also *In the Matter of the Application Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rate for Distribution Service*, Case No. 07-551-EL-AIR, et al. Opinion and Order (January 21, 2009).

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

at the same time and the various subparts of R.C. 4909.15 reference each other. Even if these statutory provisions were not part of the same section of the Revised Code, the inter-related subject matter would require a harmonized reading which is consistent with the PUCO's matching principle, as discussed by PUCO Staff.[41]

The linkage between expenses for rendering public utility service and facilities that are used and useful during the test period was an important factor in the PUCO's disallowance in *Ohio Edison II*. This important linkage is completely missing in the PUCO's authorization of Duke's collection of $55.5 million from customers for MGP-related investigation and remediation expenses for facilities that were not used and useful as of the date certain.

For all the above reasons, the PUCO should determine that Duke failed to meet its burden of proving that the environmental investigation and remediation costs in this case are recoverable as test-year expenses under R.C. 4909.15(A)(4) when the costs are not associated with plant that is used and useful under R.C. 4909.15 (A)(1). The PUCO should grant rehearing and reject Duke's proposal to charge MGP-related expenses to customers.

B. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not A Cost To The Utility Of Rendering Public Utility Service During The Test Year, In Violation Of R.C. 4909.15(A)(4) and (C)(1).

According to Ohio ratemaking law, the utility has the burden in these cases to prove that the costs that have been incurred and deferred are costs that were incurred for rendering utility service.[42]

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

[42] Order at 58.

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

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:
>
> > (4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

The critical component of this ratemaking formula is that the costs reviewed during that ratemaking process must be costs incurred to render public utility service. Also, the underlying property that gave rise to the costs must be used and useful in providing service for customers on the date certain. The MGP-related investigation and remediation costs did not meet this requirement; therefore, the PUCO should not have authorized the collection of these costs from Duke's customers.

C. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not A Normal Recurring Expense, In Violation Of Ohio Law Including But Not Limited To O.R.C. 4909.15(A)(4).

In determining whether to include certain costs in customers' rates, the PUCO must determine whether the costs in question are "the cost to the utility of rendering the public utility service for the test period."[43] In addition, the Ohio Supreme Court has held that "R.C. 4909.15(A)(4) is designed to take into account normal, recurring expenses incurred by utilities in the course of rendering service to the public for the test period."[44]

The PUCO disregarded arguments in this case that the MGP-related investigation and remediation costs were not a normal and recurring expense.[45] In fact, the Applicant, Duke, did not argue that the MGP-related investigation and remediation costs were

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

[44] *Consumers' Counsel* at 164.

[45] OCC/OPAE Initial Brief at 24 (June 6, 2012).

normal and recurring. An Amicus, Columbia Gas of Ohio, Inc., did make such argument.[46] The PUCO's Order did not adopt such argument and did not conclude that the MGP-related investigation and remediation costs were recurring expenses which is one of the requirements of R.C. 4909.15(A)(4) for recovery in a base rate proceeding. Because there is no finding that the MGP-related investigation and remediation costs are normal or recurring, the costs are not recoverable.

Moreover, not all costs incurred by a public utility are current or recoverable from customers. The PUCO has stated that the MGP remediation costs are business costs; however, the mere fact that the PUCO has classified remediation costs as "business costs" does not mean that they can be collected from customers. For example, charitable contributions are considered business costs, but they are not costs recoverable from customers.[47] Similarly, promotional and institutional advertising are business costs to the utility, but in *Cleveland*, the Ohio Supreme Court held:

> This court is of the opinion that this same presumption must be applied by appellee, if operating expenses are truly to reflect "the cost of rendering the public utility service." Therefore, institutional and promotional advertising expenses are to be disallowed, unless the utility can clearly demonstrate a direct, primary benefit to its customers from such ads.[48]

Likewise the MGP-related investigation and remediation costs should not be considered costs of rendering current public utility service merely by the PUCO's classification of them as business costs. The classification alone does not overcome the

---

[46] Order at 55.

[47] *Cleveland v. Pub. Util. Comm.* (1980) 63 Ohio St.2d 62, 1980 Ohio Lexis 773, ("Applying this same standard to charitable contributions, this court finds that this item also cannot be sustained as a proper operating expense. While we recognize that this holding deviates from our decision in *Cincinnati* v. *Pub. Util. Comm*. (1978), 55 Ohio St.2d 168, 173, this court is persuaded by the record in the instant cause and by Justice Locher's well-reasoned dissent in *Cincinnati, supra,* **that such contributions are not a cost of rendering the public utility service.**") (Emphasis added).

[48] Id. at 72-73.

fact that these costs do not provide a direct and primary benefit to Duke's current utility customers.

The PUCO has failed to comply with the requirements of R.C. 4903.09, as more fully explained below. In this regard, the PUCO failed to provide specific findings of fact and written opinions that were supported by record evidence on very critical aspects of the PUCO's Order. Therefore, the PUCO should grant the Joint Consumer Advocates' Application for Rehearing on this issue.

D. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not Expenses For Duke's Utility Distribution Service, In Violation Of Ohio Law including But Not Limited To R.C. 4909.15 (and Contrary To The Opinion Of The Dissenting Commissioners).

These cases were an application for a distribution base rate increase as noted by the Utility's pre-filing notice filed on June 7, 2012.[49] As such a base rate case is governed by R.C. 4909.15, which requires a report of the Utility's property used and useful in rendering public utility serve for customers. In these cases, the MGP-related investigation and remediation costs had nothing to do with Duke's provision of distribution utility service. In fact, Duke failed to meet its burden of proving that there was any nexus between the MGP-related investigation and remediation costs and the provision of natural gas distribution service. Two Commissioners expressly noted this fact, stating:

> We respectfully dissent from our colleagues in this case. Duke is attempting to obtain relief that we are simply unable to grant as we are limited by the statutory authority given to this Commission under R.C. 4909.15. Specifically, Duke is attempting to recover the expenses for remediation of the subject properties under R.C 4909.15(A)(4). We decline to extend the statutory language and the established precedent to interpret (A)(4) to include the remediation performed by Duke here, that is, we find that the

[49] Duke, Pre-Filing Notice (June 7, 2012).

> remediation is not a "cost to the utility of rendering the public utility service" as being incurred during the test year, and is not a "normal, recurring" expense. **Further, the public utility service at issue is distribution service, and Duke has failed to demonstrate the nexus between the remediation expense and its distribution service.**[50]

The dissent does not disagree with the majority on issues of discretion or weight of the evidence arguments, but rather reflects a fundamental disagreement about ratemaking law. The dissenting opinion is consistent with the Joint Consumer Advocates' interpretation of Ohio's ratemaking law. The MGP-related investigation and remediation costs were not shown to be related to the provision of distribution utility service. This is a distribution rate case, yet the costs in question, have no relationship to Duke's provision of distribution utility service to current distribution customers.

The PUCO's Order erroneously applied the ratemaking law in Ohio in order to authorize Duke to collect $55.5 million from its customers. For all the reasons discussed above, under R.C. 4909.15(A)(4) and 4909.15(C)(1), the MGP-related investigation and remediation costs should not have been considered by the PUCO to be a cost of providing current distribution utility service. Therefore, the PUCO should grant rehearing on this issue.

E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, For Providing Specific Findings Of Fact And Written Opinions That Are Supported By Record Evidence.

The PUCO is required by R.C. 4903.09, to make decisions based on the record before it and based on Ohio law. R.C. 4903.09 states:

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and

[50] Order at Dissenting Opinion (Emphasis added).

> written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

The PUCO failed to meet this obligation under the law, because its findings and opinions were not supported by record evidence in these cases.

The record evidence shows that Duke is not under a statutory mandate to remediate the MGP sites. Duke acknowledges that it faces strict liability for remediating contamination at both the East End and West End MGP sites under CERCLA.[51] CERCLA is the federal statute that authorizes the EPA to respond to releases, or threatened releases, of hazardous substances that may endanger public health, welfare, or the environment.[52] CERCLA also enables the EPA to force parties responsible for environmental contamination to clean it up or to reimburse Superfund for response or remediation costs incurred by the EPA. However, in these proceedings, Duke is not under an order from any environmental agency or Court and instead is voluntarily undertaking the remediation actions at the two MGP Sites.[53] Duke has not faced an enforcement action from the U.S. EPA or the Ohio EPA.[54] That is a critical fact that is misconstrued in the very key portions of the PUCO's Order.

1. The record evidence did not support the PUCO's Order that the used and useful standard under R.C. 4909.15(A)(1) is not applicable.

There has been no ruling by any environmental agency or Court ordering Duke to act with regard to the MGP sites. Although Duke has liability to remediate these MGP sites, the PUCO has over-stated Duke's reliance on CERCLA liability in an effort to circumvent Ohio's ratemaking statute. For example, the PUCO unjustly and

---

[51] Duke Ex. No. 21A (Supplemental Direct Testimony Jessica Bednarcik) at 4 (February 25, 2013). See also Tr. Vol. I at 183 (Bednarcik) (April 29, 2013).

[52] 42 USCS § 9607 (a)(1)-(4).

[53] Duke Ex. No. 21 (Jessica Bednarcik) at 6-7 (July 20, 2012).

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

unreasonably determined that an exception to the used and useful standard under R.C. 4909.15(A)(1) exists. In explaining why it is not necessary to apply the used and useful standard in these cases, the PUCO stated:

> There is no disagreement on the record that the sites for which Duke seeks cost recovery must be cleaned up and remediated in accordance with the directives of CERCLA. There is also no dispute that Duke had MGP operations, and still has utility operations, on the East and West End sites, including, but not limited to; underground gas mains and pipelines; a gas operations center; storage, staging, and employee facilities; sensitive utility infrastructure; and propane facilities. Moreover, for the East End site, a residential development is planned adjacent to the site, and, for the West End site, construction and relocation of facilities resulting from the Brent Spence Bridge Corridor Project is necessary. **Therefore, in light of the circumstances surrounding the two MGP sites in question and the fact that Duke is under a statutory mandate to remediate the former MGP residuals from the sites, the Commission finds that R.C. 4909.15(A)(1) and the used and useful standard applied to the date certain for rate base costs is not applicable** to our review and consideration of whether Duke may recover the costs associated with its investigation and remediation of the MGP sites.[55]

This language from the PUCO Order above is internally inconsistent with the record in these cases, and also cannot be reconciled with current law. First, the PUCO has failed to specify the exact "circumstances" that the Commission is relying upon to support its decision that Duke may recover the costs associated with its investigation and remediation of the MGP sites. Second, the PUCO's statement that "the fact that Duke is under a statutory mandate to remediate the former MGP residuals * * *,"[56] is unsupported by the record. The Joint Consumer Advocates noted that Duke has not faced an enforcement action from the U.S. EPA, so liability has not attached under CERCLA. Furthermore, the PUCO Order quotes Duke's own witness Mr. Fiore who admitted that

[55] Order at 54 (Emphasis added).

[56] Order at 54.

the remediation activities are not being done pursuant to CERCLA.[57] Duke is not facing an enforcement action, but rather is cleaning up the MGP sites voluntarily under the Ohio VAP. Therefore, contrary to the PUCO Order, there is a disagreement on the record that the sites for which Duke seeks cost recovery must be cleaned up and remediated in accordance with the directives of CERCLA.

Based upon the above arguments refuting the findings of fact that the PUCO relied upon, it was unjust and unreasonable for the PUCO to determine that "R.C. 4909.15(A)(1) and the used and useful standard" was not necessary to be applied to the MGP sites in these cases to the date certain for rate base costs is not applicable to our review and consideration of whether Duke may recover the costs associated with its investigation and remediation of the MGP sites."[58] By doing so, the PUCO has created an exception that does not exist under the law, and incorrectly dismissed the used and useful legal arguments made by the PUCO's Staff and other intervenors in these cases.[59]

2. The record evidence did not support the PUCO's Order that the MGP-related investigation and remediation costs were costs of rendering public utility service under R.C. 4909.15(A)(4).

The PUCO incorrectly agreed with Duke's claim that because CERCLA imposes liability, the remediation costs for the MGP sites are "necessary" costs of rendering public utility service under R.C. 4909.15(A)(4). The PUCO's Order stated:

> Duke has substantiated, on the record, that the remediation costs were a necessary cost of doing business as a public utility in

[57] Order at 31 ("Duke witness Fiore states that a feasibility study, which is an exhaustive evaluation of potential remedial alternatives is required under the federal CERCLA, but it is not required under the VAP. However, he points out that the remediation at the East and West End sites is being done pursuant to the VAP and not under CERCLA; therefore, a feasibility study is not required.")

[58] Order at 54 (Emphasis added).

[59] See Staff Initial Brief.

> response to a federal law, CERCLA, that imposes liability on Duke and its predecessors for the remediation of the MGP sites.[60]

The PUCO also found that Duke's "societal obligation to clean up these sites for the safety and prosperity of the communities" surrounding the sites makes MGP remediation costs "a current cost of doing business."[61]

But these findings are contrary to Ohio law. The facilities to which this clean-up relates have not been used for 50 years or longer. Current customers receive no benefit from operation of any facilities that caused the coal tar discharges being addressed. If the PUCO's position were correct, there would be no point in time at which a utility would be precluded from claiming that costs incurred related to the provision of service in the past. The law is clear that the costs claimed must be related to the rendering of current public utility service.[62] These MGP clean-up costs were not caused by, and do not relate to, facilities that are being used for current distribution service, and cannot properly be charged to customers.

3. The record evidence did not support the PUCO's Finding that strict liability for Duke under CERCLA means Duke's Customers should be responsible for paying the MGP-related investigation and remediation expenses.

The Strict liability provisions of CERCLA apply to owners and operators but not customers. However, the PUCO in its Order stated:

> Upon our review of the record in these cases, we find that Duke has supported its claim that the remediation costs incurred on the East and West End sites were a cost of providing utility service. Duke has substantiated, on the record, that the remediation costs were a necessary

[60] Order at 58-59.

[61] Order at 58-59 (Emphasis added).

[62] *In the Matter of the Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR, (August 16, 1990) 1990 Ohio PUC Lexis 912; See also, *In the Matter of the Application Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rate for Distribution Service*, Case No. 07-551-EL-AIR, et al. Opinion and Order (January 21, 2009).

> cost of doing business as a public utility in response to a federal law, CERCLA, that imposes liability on Duke and its predecessors for the remediation of the MGP sites.[63]

The PUCO is wrong. Duke acknowledges that it faces strict liability for remediating contamination at both the East End and West End MGP sites under CERCLA.[64] CERCLA is the federal statute that authorizes the EPA to respond to releases, or threatened releases, of hazardous substances that may endanger public health, welfare, or the environment.[65] CERCLA also enables the EPA to force parties responsible for environmental contamination to clean it up or to reimburse Superfund for response or remediation costs incurred by the EPA. However, in these proceedings, Duke is voluntarily undertaking the remediation actions at the MGP Sites.[66] Duke has not faced an enforcement action from the U.S. EPA or the Ohio EPA.[67]

CERCLA identifies four categories of actors upon whom it imposes liability. None of the four categories extend liability to actors uninvolved with the property. Under CERCLA, liable parties include 1) the owner or operator of a site where the contamination release occurred, 2) past owners or operators at the time of the release, 3) "arrangers" which are actors, who were often the generator of the hazardous substance, that arranged for the transportation and disposal of the waste at the site where the release occurred, and finally 4) transporters who selected the site for disposal where the

[63] Order at 58-59.

[64] Duke Ex. No. 21A (Supplemental Direct Testimony Jessica Bednarcik) at 4 (February 25, 2013). See also Tr. Vol. I at 183 (Bednarcik) (April 29, 2013).

[65] 42 USCS § 9607 (a)(1)-(4).

[66] Duke Ex. No. 21 (Jessica Bednarcik) at 6-7 (July 20, 2012).

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

hazardous release occurred.[68] The customers of a utility do not fall within any of the four above-listed categories, and are not liable for these costs.

Under these categories there is no dispute that Duke is the current owner or operator of the site where the contamination releases occurred. There is also no dispute that Duke's predecessor was the past owner or operator of the site where the contamination releases occurred. However, according to Duke, Columbia Gas of Ohio, Inc. ("Columbia") may also have been the owner or operator of the sites at the time of the contamination release from 1909 to 1946.[69] With regard to the third category of liable parties -- arrangers -- the generator of the hazardous substance that arranged for disposal and release of the contamination – this is also Duke and possibly Columbia. Finally, under category four -- the transporter who selected the site for disposal of the hazardous material -- again this is Duke and possibly Columbia. Duke's customers do not fall under any of the four CERCLA categories of liable parties.

In addition to the CERCLA categories not applying to Duke's customers, the legislative intent of CERCLA points to Duke as the party responsible for the release of hazardous substances and thus the party that should pay the costs associated with a clean-up or remediation, and not the taxpayers.[70] The legislative history of CERCLA also shows that forcing taxpayers to pay for the cleanup of contaminated sites was thought to "unfairly force those most likely to suffer personal health and property damage to bear the additional cost of removal" and that Congress did not want to "allow the responsible parties to evade the costs of cleanup at the expense of the taxpayers."[71] In this case, the

[68] 42 USCS § 9607 (a)(1)-(4).

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

[70] 96 Cong. House Debates 1980; CERCLA Leg. Hist. 17. (Statement of National Association of Attorney Generals) (Statement of Mr. Jeffords).

[71] Id.

Utility's customers are analogous to taxpayers and should not be held responsible for the costs of cleanup, and thus allow Duke to evade liability.

F. The PUCO Erred By Making The Remedy For The Utility's Pollution Of MGP Sites The Financial Responsibility Of Duke's Customers Instead Of Duke's Responsibility To Pay To Remediate Its Pollution.

The PUCO has accepted Duke's argument that it has strict liability under CERCLA, and; therefore, the MGP-related investigation and remediation expenses are a business cost that should be paid by customers, that is mistaken.[72] However, long before CERCLA, there was an anti-dumping statute in Ohio as far back as 1896 intended to protect the environment from the dangers of MGP operations. Sec. 6925 states:

> Whoever intentionally throws or deposits or permits to be thrown or deposited, any coal dirt, coal slack, coal screenings,, or coal refuse from coal mines, or any refuse or filth from any coal oil refinery **or gas works,** * * * upon or into any of the rivers, lakes, ponds or streams of this state or upon or into any place from which the same will wash into any such river, lake, pond or stream; * * *.[73]

In light of the location of Duke's MGPs, along the Ohio River, the above law would have had applicability for the operations of those plants. Duke's predecessors operated these facilities in contravention to the existing law at their own risk, and despite the historical awareness of the dangers associated with the MGP plants operations, the Utility shuttered them with minimal remediation at most.

Now in excess of 50 years after the MGP plants dating to the 1800's, ceased operations Duke recognizes its obligation to cleanup these sites. It is unjust and unreasonable for the PUCO to consider these costs to be a necessary cost of doing

[72] Order at 58-59.

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

business for purposes of holding Duke's customers responsible. Instead, these MGP-related investigation and remediation expenses should be viewed as costs to remedy Duke's obligation under Ohio law that existed at the time the plants were operating and the pollution was being released. Duke's current customers should have no more responsibility for paying these costs resulting from Duke's violation of the anti-dumping law than Duke's past customers (those taking service during the time the MGP plants were operating) should have had for cleanup of unacceptable pollution.

G. The PUCO Erred In Finding That Duke Met Its Burden Of Proof To Show That It Was Necessary For It To Spend Approximately $55.5 Million In MGP Remediation Costs To Meet Applicable Standards And To Protect Human Health And The Environment, A Finding That Was Unreasonable And Unlawful And Against The Manifest Weight Of The Evidence.

The PUCO recognized that, under R.C. 4909.154, in fixing rates, it may not allow Operational and Maintenance ("O&M") expenses to be collected by the utility through management practices or administrative practices that are imprudent.[74] The burden of proof is on public utilities to show that their expenses are prudently incurred. [75] The utility must prove a "positive point" -- that its expenses had been prudently incurred.[76] Whether other parties demonstrate imprudence is "irrelevant" until the utility meets that prudence burden.[77]

Duke did not sustain its burden of proof in the record of the case. It did not make the most basic showing that the costs it has incurred have been reasonable and necessary to protect human health and the environment from the impact of the coal tar residues at its former manufactured gas plant sites. Instead, assuming that its costs would be

[74] Order at 63.

[75] *In re Duke Energy Ohio, Inc.* (2012), 131 Ohio St.3d 487, 488.

[76] *In re Duke Energy Ohio, Inc.* (2012), 131 Ohio St.3d 487, 489.

[77] *In re Duke Energy Ohio, Inc.* (2012), 131 Ohio St.3d 487, 489.

approved for recovery because they were allowed to be deferred, Duke engaged in mismanagement of its remediation effort. "Gold plating" is what expenditures of this magnitude are appropriately termed. A remediation could have met applicable standards and protected human health and the environment for a fraction of the cost Duke incurred. The PUCO's determination was error that Duke was prudent in its expenditure for MGP remediation of $55.5 million.

The PUCO erred first in its conclusion that Duke's lack of documentation -- or proof -- that it had appropriately assessed alternative remedial options[78] was not a fundamental shortcoming in meeting its burden. And its conclusion that Duke's witnesses had "provided ample information on the process to support a conclusion on prudency in these cases"[79] is at odds with the evidence.

The process Duke used did not include assessing and costing out alternative remedial options.[80] If an assessment of alternative remedial options, including costing out such options, was not part of its "process," then that process was simply inadequate and does not support a conclusion that Duke acted prudently. Duke's statements that it considered alternatives and that its selected remedy was the "presumptive remedy" is self-serving and lacks any sound factual premise, basis or support. Essentially, this Duke position is we did evaluate alternatives; just trust us. The PUCO should recognize this faulty premise and reverse its decision on this issue.

[78] Order at 64.

[79] Order at 64.

[80] Post-Hearing Brief of OCC/OPAE at 25-43 (June 6, 2013); Reply Brief of OCC/OPAE at 39-52 (June 20, 2013).

1. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving recovery of $55.5 million in MGP remediation costs when Duke failed to produce a single written report documenting, or witness testifying, as to Duke's detailed consideration of alternative remedial options and their associated costs.

The PUCO found Duke's MGP investigation and remediation to be prudent even though Duke did not produce any documentation of its consideration of MGP remediation alternatives and their associated costs. The PUCO's determination in this regard was unreasonable and unlawful.

Duke's witnesses alleged that Duke had assessed alternative remedial options. Despite claims of assessing options by Duke Witness Bednarcik, Duke's "consideration" of alternative remedial options happened **without a single document evidencing this effort** and **without any pricing of alternative remedial options**.[81] This lack of documentation is even more befuddling given the significant amount of costs involved. Costs spent to date have been $55.5 m**i**llion and there are significant expenditures yet to be made, as Duke's witnesses have acknowledged.[82] There are **no documents available to be reviewed** of Duke's purported analysis and selection of remedial alternatives at the East End or West End sites.[83] Customers have a right to expect that if a utility hopes to pass the costs of extraordinary expenditures of this nature on to customers, the prudence of such expenditures will be properly documented and the costs and benefits of different options will be assessed. This is especially important in the case of the MGP expenditures, where the evidence demonstrates that there were alternative approaches to

[81] Tr. Vol. I at 212, 215 (Bednarcik) (April 29, 2013).

[82] Tr. Vol. II at 573-574 (Fiore) (April 30, 2013). Duke witness Fiore testified that remediation could well cost twice the sum spent to date.

[83] Tr. Vol. I at 212, 215 (Bednarcik) (April 29, 2013).

MGP remediation that could have been taken that were significantly less costly than the approach used by Duke.[84]

In addition, Ms. Bednarcik was dismissive of the merits of examining alternative remedial options, arguing that spending $250,000 for a feasibility study would have been imprudent.[85] But a feasibility study, or at least a detailed alternatives analysis with pricing of alternative remedial options, even if it would have cost $250,000, was absolutely necessary for MGP remediation projects of this size - a price tag of $55.5 million and growing. It is difficult to imagine a scenario in which the utility would have spent $55.5 million in shareholder dollars without such review and documentation. It was imprudent for Duke to take so little action to protect customers from such excessive expenditures, that it did not even document alternative considerations or actions.

The PUCO erred in finding that Duke gave sufficient consideration to remediation alternatives and that Duke witnesses "provided ample information on the process to support a conclusion on prudency."

2. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's mere "consideration" of remediation alternatives and incorporation of "various engineering and institutional control measures mentioned by the intervenors," independent of a detailed analysis of far less costly remediation alternatives, made Duke's environmental remediation plan reasonable and prudent.

The PUCO found Duke's mere "consideration" of remedial alternatives and incorporation of some of the remediation measures "mentioned by the intervenors" sufficient to make Duke's remediation prudent. The PUCO erred in this finding, as mere "consideration" and incorporation of some lower-cost remediation activities does not

[84] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 38 (Table 2) (February 25, 2013).

[85] Tr. Vol. I at 215-17 (Bednarcik) (April 29, 2013).

make a $55 million endeavor reasonable when it can meet requirements for $7 million. Moreover, even though some undocumented consideration of remedial alternatives was claimed by Ms. Bednarcik, the burden of proof requires more than undocumented "consideration."

Meeting the burden of proof requires consideration sufficient to determine that there were not alternatives that were significantly more cost-effective. Absent a requirement for sufficient documentation, a utility could sponsor a witness who could make any claim necessary to "support" a burden of proof question and presumably meet the burden. This would make a mockery of the burden of proof requirement. Further, as both the range and level of potential remediation costs increase, greater consideration must be given to the evaluation of remediation alternatives. Duke's alleged and undocumented "consideration" was simply insufficient to prove prudence for the scope of the MGP remediation at either the East End or West End sites.

The PUCO erred in suggesting that Duke's piecemeal use of institutional and engineering controls, while excavating far beyond what was necessary, was prudent. The PUCO should reverse its finding that Duke met its burden of proof that its remediation expenditures were prudent.

3. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's use of Ohio EPA's Voluntary Action Program (VAP), which "does not specify or prescribe remedial options" was a sufficient basis for the PUCO to find that Duke's selected remediation was reasonable and prudent for customers to pay.

The PUCO says that "utilizing the Ohio EPA's VAP in a proactive manner" was a reasonable and prudent decision.[86] The VAP does provide a flexible means to remediate

[86] Order at 64.

and, thereby, control costs more effectively. However, Duke's failure to use that flexibility appropriately in order to implement a cost-effective remedial plan undermined the value of its decision to use the VAP program. The PUCO erred in finding that the use of the VAP program constituted a cost-effective remedial plan and met the standards provided for prudent management expenditures set forth in R.C. 4909.15.

Indeed, Duke witness Fiore recognized the potential flexibility, since "**VAP does not specify or prescribe remedial options**." [87] Rather, "[i]t is up to the remediating party to determine how best to achieve those standards following the VAP regulations."[88] He acknowledged that "different approaches carry with them different costs."[89] Thus, remediating parties have a range of options to protect human health and the environment.[90] It is "up to the remediating party to determine how best to achieve" applicable standards.[91]

As discussed above, Mr. Fiore did not assess alternative remedial options or the cost associated with them. In the absence of such assessment, and Mr. Fiore's recognition that VAP does not **prescribe** a specific prudent remedial action plan, Duke did not show -- and the PUCO could not reasonably conclude -- that Duke's high-cost remedy was reasonable and prudent. This is true simply from a burden of proof standpoint even if evidence did not exist to the contrary. Intervenors provided a specific cost-effective remedial action plan that met applicable standards, protected human health and the environment (consistent with VAP standards), Duke still did not meet its burden

[87] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013) (Emphasis added).

[88] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013).

[89] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 23 (April 22, 2013).

[90] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013).

[91] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 23 (April 22, 2013).

of proving prudence. Based upon information known at the time -- that would have been many times less costly than the remedy Duke undertook.

4. The PUCO's reliance on the testimony of Duke witness Fiore was misplaced, as the witness admitted he had not independently assessed, or priced out, the alternative remedial options available to Duke or the reasonableness and prudence of those alternative remedial options for reducing the costs of what Duke sought to charge to its customers.

The PUCO relied almost entirely on the testimony of Duke witness Fiore, even though Mr. Fiore never evaluated, documented, or priced out, alternative remedial options[92] and his testimony therefore could not satisfy this burden. Therefore, the evidence does not support the PUCO's finding of prudence.

Mr. Fiore testified that Duke's site assessment and remediation activities were "prudent and reasonable, and in conformance with VAP regulations" at both sites,[93] as discussed above But Mr. Fiore could not reasonably make such a judgment in the absence of evaluation of alternative remedial options, and their associated costs. Indeed, he testified that he was never asked to examine the reasonableness of costs at the MGP sites.[94] It is difficult to understand how Mr. Fiore could testify as to prudence and reasonableness in the absence of such an evaluation. In the absence of such an analysis, the PUCO must reject his testimony. Ohio Rule of Evidence 702(c) specifically requires an expert witness's testimony to be "based on reliable scientific, technical or other specialized information." Expert testimony requires a reliable scientific methodology be

[92] Post-Hearing Brief of OCC/OPAE at 39, 56-57 (June 6, 2013); Post-Hearing Reply Brief of OCC/OPAE (June 20, 2013) at 39-41, 52; Tr. Vol. II at 553, 556 (Fiore) (April 30, 2013); Tr. Vol. III at 639-40 (Fiore) (May 1, 2013).

[93] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 20 (April 22, 2013).

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

employed in formulating an opinion.[95] Because expert opinion based on nebulous methodology is unhelpful to the trier of fact, it has no place in courts of law.[96]

Mr. Fiore lacked an appropriate basis for this testimony in that he did not perform any analysis of alternative remedial options. He did not review any "documentation that showed an analysis of different options that Duke had available as far as remediation techniques" and he was unaware of any "sufficient documentation" of such options.[97]

Moreover, Mr. Fiore testified beyond the scope of his knowledge. Ohio Rule of Evidence 703 states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." The facts are that Duke did not document any examination of alternative remedial options or their associated costs[98] and that Mr. Fiore conducted no such independent examination on his own, but relied entirely upon Ms. Bednarcik's representations to support his opinion. And, as discussed above, Ms. Bednarcik acknowledged that no detailed alternatives analysis was performed. Thus, Mr. Fiore's determination that Duke's remediation was reasonable and prudent lacked an appropriate basis or methodology. Consequently, the PUCO should have rejected Mr. Fiore's testimony.

---

[95] *Valentine v. Conrad*, 110 Ohio St.3d 42, 45 (Ohio 2006).

[96] *Id.* The Supreme Court of Ohio, quoting the U.S. Supreme Court, stated:
"Experts often base their opinions on data and research from within their field of study. Evid.R. 702(C) requires not only that those underlying resources are scientifically valid, but also that they support the opinion. Although scientists certainly may draw inferences from a body of work, trial courts must ensure that any such extrapolation accords with scientific principles and methods. In this respect, we find persuasive *Gen. Elec. Co. v. Joiner*. In *Joiner*, the United States Supreme Court, in discussing the reliability requirements of Fed.R.Evid. 702, stated, "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. *Gen. Elec. Co. v. Joiner*, 522 U.S. at 146, 118 S.Ct. 512, 139 L.Ed.2d 508." *Valentine v. Conrad*, 110 Ohio St.3d 42, 45 (Ohio 2006).

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

[98] Post-Hearing Brief of OCC/OPAE at 39, 56-57; Post-Hearing Reply Brief of OCC/OPAE at 39-41, 52; Tr. Vol. II at 553, 556 (Fiore) (April 30, 2013); Tr. Vol. III at 639-40 (Fiore) (May 1, 2013).

5. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in relying upon the fact that Duke's expert witnesses were "subject to discovery, as well as extensive, and at times pointed, cross-examination" without examining whether their opinions regarding the prudence of Duke's expenditure of $55.5 million in MGP costs were reasonable, when their opinions lacked foundation and, in fact, did not stand up to cross-examination.

The PUCO concluded that the testimony of Duke's expert witnesses was meritorious, in the absence of any documented analysis of alternative remedial options. The PUCO emphasized that Duke's witnesses were "subject to discovery, as well as extensive, and at times, pointed cross-examination."[99]

This is a curious finding by the PUCO. The failure of Duke to document consideration of alternative remedial options and their associated costs cannot be remedied by exposing Duke and its witnesses to "discovery" and "cross-examination." In fact the "discovery" and "cross-examination" of Joint Consumer Advocates and other parties revealed just how little Duke and its experts had done to assess cost-effective alternative remedial options.[100] While noting the "extensive, and at times pointed cross-examination" performed by intervenors, the Order makes no mention of just how poorly Duke's witnesses responded.

It was error for the PUCO to have concluded that Duke's failure to document its analysis of alternative remedial options was acceptable simply because Duke's witnesses were "subject to discovery" and "cross-examination." There was no citation in the PUCO's Order to support the legal standard in the PUCO's conclusion. Rather, the

[99] Order at 64.

[100] Post-Hearing Brief of OCC/OPAE at 28, 39, 56-57 (June 6, 2013); Post-Hearing Reply Brief of OCC/OPAE at 39-41, 52 (June 20, 2013); Tr. Vol. I at 212, 215 (Bednarcik) (April 29, 2013); Tr. Vol. II at 553, 556 (Fiore) (April 30, 2013); Tr. Vol. III at 639-(May 1, 2013).

PUCO should have concluded that, despite Duke's numerous opportunities to remedy its documentation shortcomings, Duke failed to do so. Instead, time and again Duke demonstrated imprudent management and oversight of these costly remediation projects.

In contrast, a correct conclusion was reached by the PUCO in another Opinion and Order it issued the same day as the Duke Order. In a Gas Cost Recovery ("GCR") case, involving Northeast Ohio Natural Gas Corporation ("Northeast") and Orwell Natural Gas Company ("Orwell"),[101] the PUCO found that Northeast and Orwell failed to meet their burden of proof. The utilities failed to provide proof or documentation to support their claims, despite a utility witness on the witness stand who claimed that costs were reasonable. Nevertheless, the PUCO determined that certain costs were unreasonable, because it was not reasonable for ratepayers to pay twice for the same activities. [102]

There appears to be no consistency between the burden of proof requirement the PUCO applied to Northeast and Orwell and to Duke in this case. Whereas the PUCO disallowed costs for Northeast and Orwell because the utilities failed to provide proof or documentation to justify charging customers twice for the same activities, Duke's failure to document any analysis of consideration of MGP remediation alternatives, despite its significant resources, was found to be acceptable by the PUCO. Indeed, Duke was rewarded for its failure to document its actions by the PUCO's decision that Duke's undocumented "consideration" was adequate to meet its burden of proof in these cases.

The PUCO should grant rehearing on this issue.

---

[101] *In the Matter of the Regulation of the Purchased Gas Adjustment clauses Contained Within the Rate Schedules of Northeast Natural Gas Corporation and Orwell Natural Gas Company*, Case Nos. 12-209-GA-GCR and 12-212-GA-GCR, Opinion and Order (November 13, 2013) .

[102] *Northeast and Orwell*, Order at 42 (November 13, 2013).

6. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving $55.5 million in charges to customers for MGP investigation and remediation when Duke is required by law to minimize charges to customers and when OCC produced uncontradicted evidence of a $7.1 million MGP remediation alternative (to Duke's expending of $55.5 million or more) that would also meet applicable standards.

The PUCO approved Duke's $55.5 million remediation approach despite OCC's uncontradicted evidence of a $7.1 million MGP remediation alternative for both sites. OCC disputes that changes in use of the two MGP sites triggered a need to remediate the properties. And as discussed below, it was Duke's own actions -- the sale of portions of the East End site - that triggered the need for remediation there. Once the need to investigate and remediate the sites was triggered, however, Duke, as a public utility, had two obligations. First, it was required to investigate and remediate consistent with applicable utility laws and regulations, i.e. to meet applicable standards and protect human health and the environment. Second, if Duke intended to seek cost recovery from utility distribution customers, it was required to determine the most cost-effective way to investigate and remediate these sites consistent with applicable standards and the protection of human health and the environment, at the time of the discovery of the need.

Upon review of Duke's remediation, OCC witness Dr. Campbell detailed a path for remediation that would have met these requirements and thus should have been followed by Duke. Dr. Campbell demonstrated that a reasonable and prudent remediation, meeting applicable standards and protective of human health and the environment, could have been completed on both MGP sites for only approximately $7.1 million. But Dr. Campbell's assessment was disregarded by the PUCO.[103]

[103] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 38 (Table 2) (February 25, 2013).

It was unreasonable and unlawful for the PUCO to approve charges for $55.5 million -- to date -- for this remediation when remediation meeting applicable standards could have been completed for $7.1 million. The PUCO erred in disregarding the evidence that investigation and remediation, consistent with environmental laws and regulations, could have been completed at this substantially lower amount.

7. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in disregarding the evidence that excavating to 2 feet and then applying a surface cap would have met applicable standards and protected human health and the environment across most of the MGP sites, rather than the 20 – 40 feet uniformly excavated by Duke, which resulted in significantly greater costs to Duke (and thus to customers that the PUCO has authorized Duke to Charge for the remediation).

The PUCO's decision was unreasonable and unlawful in disregarding the testimony of Dr. Campbell that Duke's costly excavation to 20 – 40 feet below ground surface (BGS) across a large portion of both the East End and West End sites was unreasonable. Excavation to 20 – 40 feet BGS requires costly excavation shoring, water management and disposal, off-site disposal of soil, site security, and air and vibration monitoring that is not needed at shallower depths. [104]

As Dr. Campbell testified VAP rules only require excavation to two (2) feet BGS where institutional controls are applied in a non-residential setting except, "when it is reasonably anticipated that exposure to soil will occur through excavation, grading or utilities maintenance."[105] For the Duke MGP sites, effective institutional controls -- land

[104] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 11, n.12 (February 25, 2013).

[105] Post-Hearing Brief of OCC/OPAE at 50-51 (June 6, 2013); OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 10, *citing* VAP Rule 3745-300-07 (Phase 2 Property Assessments) (February 25, 2013).

use restrictions, City Ordinances, or similar measures -- that prohibit use of groundwater in the area are extant and serve to prevent exposures below 2 feet BGS in most locations.

Similarly, the PUCO disregarded the evidence that groundwater remediation, beyond institutional and engineering controls, and monitoring, was not necessary.[106] Dr. Campbell carefully assessed Duke's groundwater test results and VAP rules to determine groundwater remediation was not necessary, and this analysis is detailed in OCC's Post-Hearing Brief.[107] Groundwater, and the leaching to groundwater exposure pathways, can only be protected if groundwater is not already contaminated.[108] But because groundwater at the Duke MGP sites is already contaminated, these exposure pathways re not applicable under the VAP.[109]

The PUCO also improperly disregarded the evidence that Duke's excavation below 2 feet BGS was not necessary to protect workers, who could have been protected through an appropriate soil management plan, without excessive expenditures.[110]

[106] Post-Hearing Brief of OCC/OPAE at 63-71 (June 6, 2013).

[107] Post-Hearing Brief of OCC/OPAE at 63-71 (June 6, 2013).

[108] Post-Hearing Brief of OCC/OPAE at 63 (June 6, 2013).

[109] Post-Hearing Brief of OCC/OPAE at 63 (June 6, 2013).

[110] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at JRC-16 DEO-MGP 001261-001262 (February 25, 2013).

H. The PUCO Erred By Applying A Standard Which Discounted The Weight Placed Upon The Testimony Of Intervenor Experts, (Who Presented Expert Opinions On The Record Consistent With the Ohio Rules of Evidence), Unlawfully Favored Utility Witnesses And Effectively Created A Presumption That A Utility's Actions Were Prudent, Contravening PUCO And Ohio Supreme Court Precedent.[111] The PUCO's Finding Was So Clearly Unsupported By The Record As To Show Misapprehension, Mistake Or A Willful Disregard Of Duty By The PUCO.

Although Duke neither performed, nor presented, any alternatives analysis or feasibility study of remediation alternatives, the PUCO appears to reach the conclusion (without saying so) that there were not less costly remediation alternatives available to Duke that could have been implemented consistent with legal and regulatory requirements.[112] Duke could not meet its burden of proof without having performed, or presented, an analysis of remediation alternatives. As discussed above, the PUCO's conclusion to allow Duke rate recovery of its MGP costs fails to hold Duke to **its** burden of proof.

Instead, the PUCO shifted the burden of proof to opposing parties to show "less costly remediation alternatives," stating that intervenors "question the level of remediation employed by Duke" and make "an effort to illustrate potentially less costly remediation alternatives."[113] The PUCO then rejected the evidence presented by intervenors that MGP remediation of these sites could have been completed within legal and regulatory requirements for a fraction of Duke's expenditures to date -- let alone what it is yet to spend.[114] In particular, the PUCO rejected the testimony of OCC's expert environmental engineer, Dr. James Campbell, who determined that a reasonable

---

[111] *Northeast and Orwell*, Order at 4 (November 13, 2013); See also *In re Duke Storm Damage Case*, 131Ohio St.3d 487, *CG&E v. PUCO*, 86 Ohio St.3d 53, citing *CG&E v. PUCO 67 Ohio St.3d 523;* and *Syracuse Home Util. Cos. v. PUCO*, Case No. 86-12-GA-GCR.

[112] Order at 64.

[113] Order at 64.

[114] Order at 64.

and prudent remediation consistent with Ohio EPA's VAP for both sites would have cost $7.1 million[115] -- not the $55.5 million approved by the PUCO. The PUCO rejects Dr. Campbell's testimony, stating that intervenors' witnesses "did not have expertise with regard to the Ohio's EPA's VAP and the associated rules and regulations, and, unlike Duke's experts, the intervenors' witnesses did not have the in-depth, firsthand knowledge of the MGP sites at issue."[116]

The PUCO's mischaracterization of Dr. Campbell's testimony, its attack on his expertise, and its suggestion that only those working a remediation site have the "firsthand knowledge" necessary to critique it are all wrong. The PUCO's findings are not supported by the record.

First, Dr. Campbell does not simply "question the level of remediation employed by Duke" or make an "effort to illustrate" less costly remediation alternatives. Rather, he rigorously critiques Duke's remediation, methodically assessing what is necessary to meet VAP requirements and the extent to which Duke's remediation plan goes beyond those requirements. Dr. Campbell does not merely make an "effort to illustrate" less costly remediation; he provided a detailed estimate of a remediation alternative consistent with VAP requirements. All of these details were laid out, with appropriate citations to Dr. Campbell's testimony, in OCC's Initial Post-Hearing Brief.[117]

Second, the PUCO's attack on Dr. Campbell's expertise is simply contrary to legal standards. The PUCO states that Dr. Campbell "did not have expertise with regard to Ohio EPA's VAP and the associated rules and regulations."[118] But the PUCO's

[115] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 38 (Table 2) (February 25, 2013).

[116] Order at 64.

[117] Post-Hearing Brief of OCC/OPAE at 54-89 (June 6, 2013).

[118] Order at 64.

finding in this respect is in error. Although Dr. Campbell is not a VAP CP, as shown throughout his testimony,[119] he is an environmental engineer who reviews and addresses varying federal and state regulations throughout his work as experts typically do. Specifically, Dr. Campbell studied and was extensively versed in VAP rules and regulations at the time he submitted his testimony.[120] He specifically testified as follows (and no effort was made by any parties to strike his testimony there or object to its admission):

> Q. How much time did you spend reviewing Ohio VAP requirements and related documentation associated with the expert opinions you provided in this matter?
>
> A. I don't remember the exact number but I spent a significant amount of time reviewing this information and I had been familiar with the VAP and my other work under compliance programs in Ohio. We had referenced the VAP from time to time as a reference point and so I was familiar with portions of the VAP through my other work.[121]

Furthermore, environmental engineers such as Dr. Campbell have to review and address varying federal and state regulations throughout their work. While there are differences between environmental regulations in every jurisdiction that have to be taken into account, the fact that rules and regulations are different from one jurisdiction to another cannot fairly be viewed as an impediment to an expert's review of an environmental remediation. For example, it is well-established that medical doctors can testify as experts throughout the country, and throughout the world, even though they have a medical license in a single jurisdiction.[122] Similarly, engineers need not have

[119] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) (February 25, 2013).

[120] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) (February 25, 2013); Tr. Vol. IV at 995-96 (Testimony of James R. Campbell, Ph.D.) (May 2, 2013).

[121] Id.

[122] Indeed, to testify as a medical expert in Ohio "against a physician, podiatrist or hospital" as a result of "diagnosis, care or treatment of any person by a physician or podiatrist," Ohio Rule of Evidence 601only

licensing in a particular state to testify within the scope of their expertise.[123] As Dr. Campbell testified, the VAP rules are nothing new to the practice of an environmental engineer:

> A. * * * But as I read through the VAP rules, what was written therein was very familiar to me. They didn't reinvent the rule when they wrote the VAP in the early '90s. **It reflects the basic environmental regulatory practice across the country.** There are some differences here and there, but everything I read there looked very familiar to me.[124]

Moreover, the PUCO's Attorney Examiners specifically denied Duke's written Motion to Strike Dr. Campbell's testimony (and Motion to Clarify Scope of Proceeding) with respect to VAP requirements.[125] Although the Attorney Examiners indicated that they would entertain further motions at the time of presentation of Dr. Campbell, no motion was forthcoming. OCC expert witness Dr. Campbell was allowed to and did express expert opinions on the record, including those pertaining to VAP investigation and remediation of Duke's MGP sites, consistent with the Ohio Rules of Evidence. Those opinions were admitted into the record without further objection.

The PUCO had no reasonable basis to discount the testimony of Dr. Campbell on the grounds that he is not a VAP CP, when he demonstrated significant familiarity with VAP rules and regulations. Indeed, Dr. Campbell's knowledge of these rules and regulations was not effectively challenged by any party by discounting Dr. Campbell's testimony, the PUCO would undermine the basic standards applicable to qualification of

---

requires that an appropriate medical expert be licensed by the relevant licensing authority "of any state." Evid. Rule 601. For engineers testifying as experts, there is not even a "licensing" requirement as there is for doctors.

[123] *State v. Tillman*, 2004-Ohio-6240 (Ohio Ct. App., Butler County Nov. 22, 2004).

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

[125] Tr. Vol. I at 11-12 (April 29, 2013).

an expert by requiring licensing with respect to every jurisdiction and agency regarding which an expert testifies. The PUCO's advancement of such a rule is not proper and is inconsistent with the requirements of Ohio Rule of Evidence 702 and precedent.

Ohio Rule of Evidence 702(B) provides that a witness is "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony."[126] Further, Ohio courts have long held that "[t]he fact that a witness is not licensed to practice under the laws of a jurisdiction is immaterial insofar as concerns his competency to testify as an expert, which is based upon his specialized training, knowledge and experience."[127] A "witness need not have special certification or licensing in order to qualify as an expert as long as his knowledge will aid the trier of fact in understanding the evidence or determining a fact in issue."[128]

Neither Ohio law nor the Ohio Rules of Evidence limit the ability of engineers to testify as expert witnesses because they lack a certification or license as an Ohio Registered Professional Engineer. Nor is there any proscription for environmental engineers to testify as experts in Ohio with respect to the prudence of an environmental clean-up project because they are not certified under Ohio EPA's VAP.

It is well-established in Ohio law that "expert opinion 'may not be arbitrarily ignored, and some reason must be objectively present for ignoring expert opinion testimony.'"[129] And a court or agency abuses its discretion when it "disregards credible

[126] Evid. Rule 702(B).

[127] *Reed v. Hodge*, 1975 Ohio App. LEXIS 6967 (Ohio Ct. App., February 27, 1975).

[128] *State v. Tillman*, 2004-Ohio-6240 (Ohio Ct. App., Butler County Nov. 22, 2004*), citing State v. Baston*, 85 Ohio St.3d 418, 423, 1999 Ohio 280, 709 N.E.2d 128.

[129] *Lagway v. Dallman* (N.D.Ohio 1992), 806 F.Supp. 1322, 1340; *State v. White*, 118 Ohio St.3d 12, 885 N.E.2d 905, 2008-Ohio-1623, ¶¶71-74.

and uncontradicted expert testimony."[130] Objective reasons for ignoring an expert report include: (1) the correctness or adequacy of the factual assumptions on which the expert opinion is based; (2) possible bias in the expert's appraisal of the defendant's condition; (3) inconsistencies in the expert's testimony, or material variations between experts; and (4) the relevance and strength of the contrary lay testimony."[131] In this case, there was no objective reason to ignore Dr. Campbell's expert testimony. Dr. Campbell clearly had the qualifications to offer the opinions that he offered and the testimony he offered regarding the availability and cost of MGP remediation alternatives at the East End and West End MGP sites was not contradicted by any witness. The PUCO abused its discretion in disregarding his testimony regarding cost-effective MGP remediation alternatives.

Moreover, while critiquing Dr. Campbell, the Order ignores the fact that neither Ms. Bednarcik nor Dr. Middleton, two of Duke's three environmental engineering experts, were not Ohio VAP CPs. Further, none of Duke's other witnesses demonstrated the level of familiarity with VAP Rules and Regulations demonstrated by Dr. Campbell. This double standard for utility and intervenor experts is unjustified.

The PUCO also disregarded the minimal qualifications for a VAP CP detailed in OCC/OPAE's Reply Brief.[132] At no point did Duke claim that Dr. Campbell did not meet the qualifications for a VAP CP, other than that he had not taken the 8-hour training

---

[130] *Lagway v. Dallman* (N.D.Ohio 1992), 806 F.Supp. 1322, 1340; *see also State v. White*, 2005-Ohio-6990 ¶20 (Ohio Ct. App., Summit County Dec. 30, 2005), *rev'd on other grounds State v. White*, 118 Ohio St.3d 12, 885 N.E.2d 905, 2008-Ohio-1623.

[131] *Id.*

[132] Post-Hearing Reply Brief of OCC/OPAE at 62 (June 6, 2013). VAP provides educational, experiential, and code of conduct requirements, all of which are met or exceeded by Dr. Campbell, plus an 8-hour training course and the payment of a $2,500 annual fee. Duke Ex. 26, Direct Testimony of Shawn S. Fiore at 9-11 (April 22, 2013); Transcript Vol. II at 564-70 (discussing CP qualifications, including educational, experiential, training, and code of conduct requirements) (April 30, 2013); Tr. Vol. III at 655 (discussing fees applicable to CP) (May 1, 2013).

course and paid the $2,500 fee. His extensive familiarity with VAP is well-reflected in his testimony in this proceeding.

Joint Consumer Advocates would also emphasize Dr. Campbell's significant experience, which in terms of length and breadth exceeds that of Duke witness Fiore. Dr. Campbell received a Civil Engineering Degree from Youngstown State University, and an M.S. and Ph.D. from Carnegie Mellon University in environmental engineering.[133] Since 1991, he has been a Registered Professional Engineer and holds that licensing in both Michigan and Pennsylvania.[134] He has significant experience addressing environmental issues associated with MGP and coal tar industry sites spanning more than three decades.[135] Dr. Campbell worked on more than 50 MGP/coal tar sites for Koppers Company, which designed and built many of the MGP plants in North America, from 1984-1990.

In 1992, Dr. Campbell started Engineering Management, Inc. ("EMI") to provide project management and expert services related to environmental liabilities.[136] During his career, he has worked on the analysis and/or environmental assessment and cleanup of over 100 sites.[137] He has provided expert analysis in approximately 20 Superfund cases, 12 of which were MGP sites.[138] His experience includes "working with, and interpreting, many federal and state environmental regulations."[139]

---

[133] OCC Ex. No. 15.1, (Direct Testimony of James R. Campbell, Ph.D.) at 1-3 & Attachment JRC-1 (February 25, 2013).

[134] Id. Dr. Campbell also was previously a licensed professional engineer in Ohio. (Tr.Vol. IV at 950.

[135] Id.

[136] Id. at 2.

[137] Id.

[138] Id.

[139] Id.

Finally, the PUCO's suggestion that only those working at a remediation site have the "firsthand knowledge" necessary to critique it is contrary to any reasonable standard. Such a standard would disqualify everyone -- including PUCO Staff witnesses -- other than the utility's witnesses from offering expert testimony regarding an environmental investigation and remediation. But even under this standard, the PUCO could not rely on Duke witness Fiore regarding the issues in this case since he was not involved in the selection of the remedial options for either the East End or West End sites and relied entirely upon Ms. Bednarcik for information regarding the different options considered.[140] Mr. Fiore had no more "in-depth firsthand knowledge" of remedial option selection than OCC's witness Dr. Campbell.

This standard for expert witness testimony that the PUCO applied in these cases is contrary to Ohio's Rules of Evidence and is untenable. Such a standard would effectively give a utility a presumption of prudence since only the utility's witnesses could testify -- firsthand -- about prudence. But the Supreme Court of Ohio has made clear that there is no presumption of prudence and that the Utility must **prove** the prudence of its actions:

> Duke Energy Ohio, Inc. (Duke) sought reimbursement for roughly $30.7 million in costs associated with damages caused by Hurricane Ike and the Commission had limited Duke's recovery to only $14.1 million. In its appeal to the Court, Duke argued that "other parties did not conclusively prove that the claimed expenses were unreasonable or imprudent." In upholding the Commission's decision, the Court established that it is the utility that has to "prove a positive point: that its expenses had been prudently incurred and that the Commission did not have to find the negative: that the expenses were imprudent" **and it rejected any presumption of prudence on the part of the utility**.[141]

[140] Tr. Vol. II at 553 (Fiore) (April 30, 2013); Tr. Vol. III at 663-64 (Fiore) (May 1, 2013).

[141] *Northeast and Orwell*, Order at 4 (November 13, 2013) (Emphasis added).

The PUCO's decision in these cases would turn expert qualification standards and the utility's burden of proof on their head. The PUCO's decisions to disregard Dr. Campbell's expert testimony and to rely entirely on the Utility's expert because of "firsthand" knowledge is contrary to the law and the evidence in this proceeding. By taking this approach, the PUCO has erred in presuming that the actions Duke took to remediate the MGP sites are prudent. This presumption was unwarranted and unlawful. Therefore, the Joint Consumer Advocates' Application for Rehearing should be granted on this issue.

I. The PUCO Erred In Finding That Duke's Need To Investigate And Remediate The East End MGP Site Was A Result Of Changes In The Use Of The Property And Adjacent Properties When Such Changes In Use May Not Have Occurred But For Duke's Decision To Sell A Portion Of The East End Site To Adjacent Owner(s), A Decision Which Was Unreasonable And Imprudent.

The PUCO's decision indicates that Duke made a reasonable and prudent decision by "acknowledging the changes in the use of the properties and adjacent properties in a timely manner."[142] But the change in use with respect to the East End MGP site was brought about by Duke's own non-utility actions. Duke initially sold the western parcel of the East End MGP site to a residential developer, and granted an ingress-egress and landscape easement across the western parcel.[143] Duke witness Bednarcik recognized that these actions "altered the 'limited accessibility' engineering control" that had previously prevented Duke from having to remediate the site.[144] Without Duke's sale of the western parcel to a real estate developer or the granting of an easement, there would not have been a change in use that triggered the need to take remediation actions.

[142] Order at 64.

[143] Duke Ex. No. 21A (Supplemental Direct Testimony of Jessica Bednarcik) at 17-19 (February 25, 2013); Duke Ex. No. 17 (Supplemental Direct Testimony of Andrew C. Middleton, Ph.D.) at 11-12 (February 25, 2013); Tr. Vol. I at 2 (Margolis) (April 29, 2013).

[144] Duke Ex. No. 21A (Supplemental Direct Testimony of Jessica Bednarcik) at 18 (February 25, 2013).

Thus, even though Duke properly acknowledged that the change in use triggered an environmental liability, it can hardly be said that Duke's actions to sell the western parcel and to grant a use easement were utility activities. Nor can Duke contend that the actions were reasonable and prudent. Indeed, Duke should have known that its actions would trigger its need to remediate -- and could impose costs on customers.

The Duke sale of the western parcel was designed to benefit shareholders alone. The PUCO's decision was unreasonable and unlawful in finding that this shareholder-benefiting transaction was reasonable and prudent for purposes of cost recovery from ratepayers. Instead, the PUCO should have found that the sale of the western parcel disqualified Duke from charging customers for any costs of remediation resulting from the site's change in use.

J. The PUCO Erred By Failing To Comply With R.C. 4909.19 Which Required The PUCO Staff's Report Of Investigation To Include A Determination Of The Prudence Of The MGP-Related Investigation And Remediation Costs To The Utility.

The Staff Report of Investigation is an important part of the rate case process under R.C. 4909.19. R.C. 4909.19 states:

> The commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, * * *. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

However, in these cases, the PUCO Staff did not investigate the prudence of Duke's remediation activities -- a $55.5 million issue in these cases. The Supreme Court of Ohio

defers to the PUCO, because the PUCO, with its expert Staff, can best resolve technical utility factual claims.[145] In the Order, the PUCO accepted not only the PUCO Staff's decision not to investigate the prudence issue but also the Utility's opinion in these cases. The PUCO stated:

> Staff states that its determination of the reasonableness of the MGP-related expenses was limited to verification and eligibility of the expenses for recovery from natural gas distribution rates. **Staff did not investigate or make any finding or recommendations regarding necessity or scope of the remediation work performed by Duke.** (Staff Ex. 1 at 40.) Staff witness Adkins notes that **Staff finds it reasonable to accept the opinion of Duke's Ohio EPA CP on these issues,** because Staff currently has limited expertise in the area of verifying the adequacy of environmental remediation efforts under applicable legal standards (Staff Ex. 6 at 25).[146]

If the PUCO Staff lacks expertise, the PUCO Staff could (and often does) pursue hiring a consultant with the appropriate expertise to investigate the facts. The PUCO has permitted the hiring of outside consultants to conduct prudence or financial reviews.[147] As required under R.C. 4909.19, OCC noted in its Objections to the Staff Report of Investigation the limited scope of the PUCO Staff's investigation with regard to the prudence of the MGP-related investigation and remediation costs. [148] However, other than noting in the record OCC's objection, the PUCO did not address the merits of this OCC objection in any detail in the Order.[149] It was contrary to Ohio law and PUCO Rules for the PUCO to tacitly accept the PUCO Staff's decision not to investigate the

[145] *See State ex rel. Columbia Gas of Ohio, Inc. v. Henson* (2004), 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶26 (service violation claims are within the exclusive jurisdiction of the Commission).

[146] Order at 28 (Emphasis added).

[147] *See e.g.* O.A.C. Ann. 4901:1-35-09(D); 4901:1-35-08(C); 4901:1-35-11(B)(5); and 4901:1-36-03(C).

[148] OCC Objections to the Staff Report of Investigation at 12-13 (February 4, 2013).

[149] Order at 28.

prudence of the investigation and remediation costs, and to defer to the Utility's expert on this important issue.

Under R.C. 4909.19, the PUCO's Staff must investigate the facts in Duke's application and exhibits.[150] The Ohio Supreme Court emphasized the importance of the PUCO Staff's investigation:

> The purpose of a Staff report 'is * * * to facilitate meaningful contest of rate increase applications by providing interested parties with materials necessary for an informed challenge."[151]

In an Ohio Edison case, the PUCO refused to include property in the rate base, because the utility did not provide the PUCO Staff enough time to independently verify information.[152] The utility did not provide the information requested by PUCO Staff until three weeks after the commencement of the hearings. The Court found that the utility's actions prevented Staff from performing its statutory duty. Even though the utility insisted that the PUCO Staff's independent verification is not required, the Court found that the PUCO's exclusion of the plant was reasonable. The Court noted that "to hold otherwise * * * invite[s] the future circumvention of R.C.4909.19."[153]

In *Consumers' Counsel*, the PUCO Staff's investigation of four terminated nuclear plants was addressed in a subsequent report and not in the original report, because the decision to cancel the plants was announced too late to include the issue in the original report. A party objected to the adequacy of PUCO Staff's investigation and

---

[150] O.R.C. 4909.19; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 418 (Sec. 4909.19 does not authorize the Commission to investigate "matters not put in issue by the applicant and not related to the rates which are the subject of the application."); *In the Matter of the Application for Waiver of Certain Portions of The Standard Filing Requirements Required Prior to a Filing of a Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance No. 21-1994 of the Council of The City of Garfield Heights, Ohio*, Case No. 94-578-EL-CMR, 1994 Ohio PUC LEXIS 284, *4 (Apr. 7, 1994) (Substantial costs for the Staff's investigation and hearings are expected.)

[151] *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 160-161.

[152] *Ohio Edison Co. v. Pub. Util. Comm.* (1991), 63 Ohio St.3d 555, 558, 589 N.E.2d 1292.

[153] *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 160-161.

report, arguing that the investigation and report in regards to the terminated nuclear plants denied the party an adequate opportunity to review the PUCO Staff's findings and prepare for hearings. The Court determined that the Commission's investigation and report complied with R.C. 4909.19. The Court noted that the appealing party benefited from the PUCO Staff's investigation and had adequate opportunity to examine experts at the hearings.[154]

In these cases, even though the PUCO Staff conducted an investigation and prepared a report on Duke's application, the PUCO Staff's Report failed to address an important aspect of Duke's application to recover remediation costs -- the necessity and scope of the remediation efforts. The prudence of remediation costs is a contentious and significant issue clearly raised by Duke's request. The PUCO Staff was statutorily obligated to investigate the necessity and scope of Duke's remediation efforts.

Moreover, PUCO Staff did not hire a consultant with the appropriate expertise to investigate the MGP remediation cost issues. Instead, PUCO Staff deferred to Duke's expert witness that the costs were necessary and the scope of the remediation work performed was reasonable. Unlike *Consumers' Counsel*, the only party in these cases to benefit from the lack of an investigation on the prudence issue in the Staff's Report was Duke. Other parties (and all of Dukes' customers) were denied the benefits of an impartial investigation. The PUCO Staff's Report did not fulfill its purpose, because it did not provide parties with materials necessary for an informed challenge. The PUCO Staff failed to comply with R.C. 4909.19, and the Commission unlawfully endorsed its Staff's failure.

[154] Id. at 160.

Finally, the PUCO's decision in these cases is inconsistent with other recent decisions where the PUCO has rejected the concept that the utility is entitled to a presumption of prudence. In an Order issued by the PUCO on the same day as the Order in these cases, the PUCO stated:

> In upholding the Commission's decision, the Court established that it is the utility that has to "prove a positive point: that its expenses had been prudently incurred and that the Commission did not have to find the negative: that the expenses were imprudent" **and it rejected any presumption of prudence on the part of the utility**.[155]

By deferring to Duke's expert witnesses on the prudence of the Utility's remediation activities, the PUCO is providing Duke a presumption of prudence. On the question of whether Duke was prudent in spending $55.5 million for MGP investigation and remediation -- of course the Utility's expert witnesses are going to state that Duke's actions and expenditures were prudent. It was up to the PUCO Staff to address the prudence of Duke's costs as part of the investigation and Staff Report so as to provide interested parties with materials necessary for an informed challenge and to assist the PUCO in making an informed decision. Therefore, the PUCO should grant rehearing on this issue.

K. The PUCO Erred In Finding That Duke Has Taken Reasonable And Prudent Actions To Pursue Recovery Of Investigation And Remediation Costs From Other Potentially Responsible Third Parties And Insurers, So As To Reduce What Customers Would Be Charged.

The PUCO's decision indicates that Duke made a reasonable and prudent decision by "pursuing recovery of remediation costs by other potentially responsible third parties and insurers."[156] Joint Consumer Advocates agree with the PUCO's decision that Duke

[155] *Northeast and Orwell*, Order at 4 (November 13, 2013) (Emphasis added).

[156] Order at 64.

should "pursue recovery of costs" from third parties and insurers.[157] Joint Consumer Advocates also agree with the PUCO that these funds should be first used to reimburse customers for any amounts for which customers are responsible, net of costs to achieve those proceeds.[158] To the extent amounts collected from third parties and insurers exceed the amount recoverable from customers, Duke should be permitted to retain such amounts.[159]

However, Duke's efforts to collect amounts of MGP costs from third parties and insurers are just beginning. It is premature for the PUCO to conclude that Duke's limited actions to date have been reasonable and prudent when not a single dollar has been recovered from third parties or insurers. Indeed, OCC/OPAE recommended that, only after Duke's efforts to collect these amounts from third parties and insurers are exhausted, should the PUCO permit any recovery from customers.[160]

The PUCO should carefully examine Duke's collection efforts in a future proceeding and should address the prudence of Duke's efforts to collect such amounts at that time.[161] The PUCO should vacate its finding that Duke's actions have been reasonable and prudent when not a single dollar has been collected from third parties and insurers, and the PUCO should avoid any pre-approval of future efforts as prudent.[162]

---

[157] Order at 67.

[158] Order at 67.

[159] Order at 67.

[160] Post-Hearing Brief of OCC/OPAE at 94-96 (June 6, 2013).

[161] *See* Post Hearing Brief of OCC at 94-96 (June 6, 2013); OCC Ex. 14 at 39-40 (Direct Testimony of OCC witness Bruce Hayes) (February 25, 2013).

[162] Tr. Vol. II at 380 (Bednarcik) (April 30, 2013)

L. The PUCO Erred By Authorizing Duke To Collect The Deferred MGP Investigation And Remediation Costs From Customers Over An Unreasonably Short Five-Year Period.

The PUCO established an unreasonably short five-year amortization period. The PUCO stated:

> Upon consideration of the record and the arguments of the parties, the Commission finds that it is reasonable to permit Duke to amortize the amount authorized herein for recovery through Rider MGP over a five-year period. Given that the Commission adjusted the amount to be recovered through Rider MGP to reflect only those costs that were prudently incurred for the rendering of utility service, we find that a five-year period is reasonable and supported by the evidence. **Moreover, the five-year amortization period balances the public interest, while allowing the recovery of the approved costs**.[163]

Consumer Advocates provided testimony supporting a longer amortization period of ten-years,[164] and the PUCO Staff agreed with the ten-year amortization period.[165] The longer amortization period will mitigate rate impacts on customers who did not receive benefits from the operation of the MGP Plants, and should have no responsibility for their cleanup.[166]

Duke argued against the longer amortization period because of the constraints the PUCO placed on Duke's ability to accrue carrying charges on the MGP deferrals. The PUCO stated:

> Duke is further authorized to accrue carrying charges on all deferred amounts between the dates the expenditures were made and the date recovery commences.[167]

---

[163] Order at 68 (Emphasis added).

[164] OCC Ex. No. 22 (Direct Testimony of David Effron) at 11; See also OCC Ex. No. 13 (Additional Direct Testimony of Kathy Hagans.); See also Kroger Ex. No. 1 (Direct Testimony of Neal Townsend) at 7 (April 22, 2013).

[165] Order at 67.

[166] Kroger Ex. No. 1 (Direct Testimony of Neal Townsend) at 7 (April 22, 2013); See also Kroger Initial Brief at 14 (June 6, 2013).

[167] *Id.*, Finding and Order at 3.

As a result of the deferral case order, the accrual of carrying charges was to cease with the commencement of recovery. However, in the Order in these cases, the PUCO disallowed the collection from customers of any carrying charges on the remediation costs. The PUCO stated:

> **In addition, we find the intervenors' argument that the shareholders should bear some of the responsibility for the remediation costs persuasive, in that the carrying costs should not be borne by the ratepayers**. * * *, and request for recovery in a timely manner, so as to minimize the ultimate rate burden on customers. Therefore, given the circumstances presented in these cases and the decades-long contamination that necessitated these utility costs, we find it appropriate to deny Duke's request for recovery of the associated carrying charges.[168]

The stated rationale for denying the Utility collection of carrying charges, would also present legitimate arguments for extending the amortization period longer than the five-years authorized -- (1) the shareholders should bear some responsibility for the remediation costs, and (2) the recovery should minimize the ultimate rate burden on customers. The combination of the two stated rationales supports a ten- year amortization period rather than the minimal five-year period authorized by the PUCO.

The PUCO should reconsider and provide a longer and more reasonable 10-year amortization period. The incremental burden on shareholders of the foregone carrying charges between years five and ten would better balance the interests of shareholders and customers if the PUCO should find that customers should bear responsibility under the law for these costs.

Joint Consumer Advocates would emphasize that Duke's customers are already substantially burdened by Duke's distribution charges. Specifically, a residential customer is levied a fixed delivery service charge per month of $33.03 ($396.36 per

[168] Order at 59-60 (Emphasis added).

year);[169] Rider AMRP has a fixed monthly charge of $1.00 ($12.00 annually);[170] Advanced Utility Rider has a fixed monthly charge of $1.07 ($12.84 annually);[171] and all delivered gas is subject to a per hundred cubic feet ("CCF") charge for a variety of riders.[172] In addition to the previously listed charges, Duke's customers are asked to pay for the manufactured gas plant cleanup. For a residential customer, these MGP costs would be $1.62 per month ($19.44 annually) and $97.20 over the five-year amortization period.[173]

In light of the significant distribution-related charges that Duke's customers already pay, and the fact that Duke has not finished remediating the two MGP sites (and cannot estimate what the future investigation and remediation costs will be),[174] the amortization period for any authorized MGP-related charges should be extended to at least 10-years, in order to minimize the ultimate rate burden for Duke's customers.

Therefore, the PUCO should grant Joint Consumer Advocates' Application for Rehearing on this issue.

[169] Duke Compliance Tariff Filing, PUCO Gas No. 18, Sheet No. 30.17, Page 1 of 2 (Issued: November 22, 2013).

[170] Duke Compliance Tariff Filing, PUCO Gas No. 18, Sheet No. 65.12, Page 1 of 1 (Issued: November 22, 2013).

[171] Duke Compliance Tariff Filing, PUCO Gas No. 18, Sheet No. 88.6, Page 1 of 1 (Issued: November 22, 2013).

[172] Duke Compliance Tariff Filing, PUCO Gas No. 18, Sheet No. 30.17, Page 1 of 2 Sheet No. 63 Rider PIPP, Rider UE-G, Uncollectable Expense Rider, Sheet No. 68 State Tax Rider, Sheet No. 76 Contract Commitment Cost Rider (Issued: November 22, 2013).

[173] Duke Compliance Tariff Filing (PUCO Gas No. 10, Original Sheet No. 69, page 1 of 1) (November 27, 2013).

[174] Tr. Vol. II at 573-574 (Fiore) (April 30, 2013).

M. The PUCO Erred By Unreasonably Granting The Utility The Authority To Collect (From Customers) MGP-Related Investigation And Remediation Costs Incurred By Duke After December 31, 2012 Through A Rider.

The PUCO granted Duke the authority to continue to defer costs related to MGP remediation after December 31, 2012.[175] However, the PUCO's Order granting Duke the authority to collect from customers such amounts through the MGP Rider that represents costs incurred subsequent to December 31, 2012, is contrary to the Staff Report and Stipulation on this matter which required Duke to file a subsequent rate case application for the collection of future MGP-related investigation and remediation expenses incurred after December 31, 2012. The PUCO stated:

> Duke also requests authorization to file an application in each subsequent year to update Rider MGP based on the unrecovered balance and related carrying charges as of the prior December 31. In light of the fact that the Commission has determined herein that Duke should be authorized to recover the prudently incurred costs of MGP investigation and remediation for these two sites, the Commission finds Duke's request for annual updates to Rider MGP in order to reflect the costs for the preceding year is reasonable and should be approved. **Accordingly, the Commission finds that, beginning March 31, 2014, and on or before March 31 in each subsequent year, Duke must update Rider MGP based on the unrecovered balance, minus any carrying charges as required previously in this Order, as of the prior December 31. In these subsequent cases wherein Duke will be updating Rider MGP, Duke shall bear the burden of proof to show that the costs incurred for the previous year were prudent**.[176]

For reasons discussed further below, only those MGP-related investigation and remediation expenses that are found to meet legal and regulatory requirements and that were deferred on or before December 31, 2012, should be subject to being considered for recovery from customers.

---

[175] Order at 72.

[176] Order at 72 (Emphasis added).

Duke's Application, in these cases, proposed collection of MGP-related amortization expenses from customers through approved base rates.[177] The discussion of a Rider MGP for collection of authorized MGP-related amortization expenses originated in the Staff Report. The Staff Report states:

> The Staff also does not agree with Duke that the MGP investigation and remediation expenses should be recovered in base rates. * * ***The Staff recommends that the ongoing environmental monitoring costs should continue to be deferred under authority granted by the Commission in Case No. 09-712-GA-AAM with future recovery of the expenses determined in a future rate proceeding**.[178]

The Staff Report recommendation with regards to Rider MGP recommended: (1) the ongoing deferral of Duke's **environmental monitoring costs**, but not any other investigation or remediation costs, and (2) the future recovery (if any recovery is allowed) of such deferrals to be determined in a future rate proceeding.

Despite disagreeing with these recommendations in the Staff Report, Duke did not include either issue within its Objections to the Staff Report.[179] Duke did not object to Staff's recommendation to limit future deferrals, under the authority granted by the PUCO in Case No. 09-712-GA-AAM to ongoing environmental monitoring costs. Therefore, the PUCO should require Duke to file a new application in order to receive PUCO authority to defer MGP-related future investigation (e.g. non-ongoing monitoring) costs, as well as, future investigation and remediation costs. And Rider MGP cannot be used by Duke to collect from customers costs which Duke does not currently have authority to defer.

[177] Duke Ex. No. 2 (Application Vol. I) at 5-6 (July 9, 2013).

[178] Staff Hearing Ex. No. 1, Staff Report at 47 (January 4, 2013) (Emphasis added).

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

The PUCO's Order is contrary to the Stipulation because the Stipulating Parties were resolving the Utility's rate case Application that had a test-year that ended on December 31, 2012. The Stipulation states:

> The Parties agree that the Company may establish a rider, subject to the terms of this Stipulation and subject to Commission authorization after hearing from Parties in litigation, for recovery of any Commission approved costs associated with the Companies environmental remediation of manufactured gas plants (MGP). The Parties agree to litigate their positions at the evidentiary hearing in the above captioned proceedings, for resolution by the Commission in its Order in these cases. The Staff agrees to litigate its positions as stated in the Staff Report of investigation on the MGP issues, subject to the usual caveat to allow for correction of errors (if any) or updated information.[180]

There is nothing in the Stipulation that envisions implementation of a Rider that would allow Duke to collect from its customers ongoing MGP-related investigation and remediation costs that have been deferred on or after January 1, 2013.

Furthermore, the Stipulation states:

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

Staff Report Resolves Other Issues.

> The Parties agree that the Staff Report resolves the remaining issues not addressed in this Stipulation and Recommendation with one exception as follows:
>
> > The Company will not submit a facilities based cost of service study in its next gas distribution rate case. [181]

Therefore, the Staff Report and the Stipulation resolve this issue, and the PUCO's Order is contrary to the intent of the Stipulating Parties with regards to the applicability of Rider MGP to costs deferred after December 31, 2012.

As the Staff Report recommended, a future rate proceeding is where Duke may seek collection from customers of any future deferrals if any additional amounts are authorized to be deferred. Rider MGP is not an appropriate mechanism for the collection of any MGP-related costs incurred after December 31, 2012 unless appropriate deferral is authorized and such amounts are authorized to be collected in a future rate proceeding. Therefore, the PUCO should grant rehearing on this issue.

V. CONCLUSION

For all the reasons stated above, the PUCO should grant rehearing in this case.

[181] Joint Ex. No. 1 (Stipulation and Recommendation at 14 (April 2, 2013).

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

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

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: Sauer (614) 466-1312
Telephone: Serio (614) 466-9565
Telephone: Berger (614) 466-1292
larry.sauer@occ.ohio.gov
joseph.serio@occ.ohio.gov
edmund.berger@occ.ohio.gov

OFFICE OF THE OHIO CONSUMERS' COUNSEL

/s/ Kimberly W. Bojko
Kimberly W. Bojko, Counsel of Record
Mallory M. Mohler
Carpenter Lipps & Leland LLP
280 North High Street
Suite 1300
Columbus, Ohio 43215
Telephone: 614-365-4124
Fax: 614-365-9145
Bojko@CarpenterLipps.com
Mohler@CarpenterLipps.com

THE KROGER COMPANY

/s/ Robert A. Brundrett
Robert A. Brundrett, Counsel of Record
33 N. High Street
Columbus, Ohio 43215
Phone: 614-629-6814
Fax: 614-224-1012
rbrundrett@ohiomfg.com

OHIO MANUFACTURERS' ASSOCIATION

/s/Colleen L. Mooney
Colleen L. Mooney, Counsel of Record
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45840
Telephone: (419) 425-8860
Or (614) 488-5739
FAX: (419) 425-8862
cmooney@ohiopartners.org

OHIO PARTNERS FOR AFFORDABLE ENERGY

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Application for Rehearing* was served on the persons stated below, electronically this 13th day of December, 2013.

/s/ Larry S. Sauer
Larry S. Sauer
Counsel of Record

SERVICE LIST

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

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

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

Joseph M. Clark
21 East State Street, Suite 1900
Columbus, Ohio 43215

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

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

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

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

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

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

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

AE: chris.pirik@puc.state.oh.us

Summary: Application Application for Rehearing by Office of the Ohio Consumers' Counsel, Kroger Company, Ohio Manufacturers' Association, Ohio Partners for Affordable Energy electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.