**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan Pursuant to Section 4929.05, Revised Code, for an Accelerated Service Line Replacement Program. | ) ) ) ) ) | Case No. 14-1622-GA-ALT |

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## APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.

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Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and, pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) October 26, 2016, Opinion and Order (Order) denying Duke Energy Ohio's Application for an Accelerated Service Line Replacement Program (Application). The Commission's Order is unlawful and unreasonable in the following respects:

A. The Commission wrongfully imposed a burden of proof upon Duke Energy Ohio that is not provided for under Ohio law or Commission regulation and also failed to explain the basis for its decision, as required by R.C. 4903.09.

B. The Commission erred in concluding that Duke Energy Ohio's proposed ASRP is not a just and reasonable alternative rate plan on the ground that the Company failed to evaluate other alternatives. The Commission also failed to explain the basis for its decision, as required by R.C. 4903.09.

C. The Commission erred in concluding that the ASRP is not required under regulation issued by the Pipeline and Hazardous Material Safety Administration (PHMSA), which the Commission is responsible to enforce.

D. The Commission erred in concluding that the risks associated with obsolete natural gas service lines are insufficient to warrant their accelerated removal and also failed to explain the basis for its decision, as required by R.C. 4903.09.

E. The Commission erred in concluding that Duke Energy Ohio's ASRP is not just and reasonable because the Company failed to quantify the benefits associated with such program.

F. The Commission erred in concluding that the Lummus Study failed to provide evidence of the risks presented by obsolete natural gas service lines.

G. The Commission erred in concluding that Duke Energy Ohio's ASRP is unlawful and unreasonable because it would be the first such program in Ohio and also failed to explain the basis for its decision, as required by R.C. 4903.09.

A memorandum in support of this Application for Rehearing is attached hereto.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### I. Introduction

Duke Energy Ohio instituted this proceeding pursuant to R.C. 4929.05, which provides for alternative rate plans. Consistent with the General Assembly's intent, such plans allow for the adoption and implementation of programs that enable the efficient and reliable provision of natural gas service while minimizing costs, such as those attendant to a protracted base rate case proceeding. In passing H.B. 95, the General Assembly thus recognized the importance, to the state, of properly maintained natural gas infrastructure. And to enable an efficient prosecution of a request for an alternative rate plan, the legislature established only three criteria. Two of the criteria – compliance with R.C. 4903.35 and substantial compliance with R.C. 4929.02 – are not at issue in this proceeding. The Commission rightly found that the evidence of record supported the conclusion that Duke Energy Ohio's request for an accelerated service line replacement program (ASRP) and associated cost recovery via Rider ASRP met these two criteria.[1]

The focus of the Commission's decision is the third and final criterion established by the General Assembly; namely, whether the Application is just and reasonable. In assessing the Application against this final standard, the Commission created arbitrary, conflicting, and ad hoc evidentiary requirements, thereby issuing a decision that is unlawful and unreasonable. The Commission further failed to articulate the factual basis, as provided by the evidence in this proceeding, for its decision, thereby violating R.C. 4903.09. As discussed herein, the Company's request for rehearing should be granted.

[1] Order, at pp. 31-33.

## II. Discussion

### A. The Commission wrongfully imposed a burden of proof upon Duke Energy Ohio that is not provided for under Ohio law or Commission regulation and also failed to explain the basis for its decision, as required by R.C. 4903.09.

The Commission admitted that neither controlling law nor its regulations limit approval of an alternative rate plan only to a proposal that reflects the "most effective approach for improving system safety... ."[2] The Commission further admitted that its controlling regulations do not require Duke Energy Ohio "to establish that the ASRP is the least costly program available to reduce risks to the distribution system."[3] Notwithstanding these admissions, the Commission then proceeded to deny the Application because of the cost; because, in its mind, the benefits of removing obsolete service lines prone to corrosion and failure could not be justified by the costs of a methodical and proactive replacement program. The inconsistency in the Commission's decision is profound.

#### 1. Resulting rates are not a consideration given that the Company's Application is not one for an increase in rates.

In its Order, the Commission stated that, in evaluating the proposed ASRP, the cost of the plan (or, concomitantly, the likely resulting rates) may be considered in determining whether the plan is just and reasonable.[4] But the Commission's statement is unlawful and unreasonable as it does not conform to the Commission's own regulations or controlling statutory authority.

The regulation relevant to the Commission's erroneous belief is O.A.C. Chapter 4901:1-19, which establishes, *inter alia*, the filing requirements for alternative rate plans. Significantly, in adopting such regulation, the Commission intentionally differentiated between alternative rate plan applications that are for an increase in rates and those that are not. And only where the

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[2] Id, at pg. 33.
[3] Id.
[4] Id, at pg. 34.

alternative rate plan application is for an increase in rates must there be a determination of whether resulting rates are just and reasonable. Indeed, O.A.C. 4901:1-19-06(C) unambiguously establishes the filing requirements that must be met through the submission of exhibits in order "[t]o determine just and reasonable rates pursuant to section 4929.05 of the Revised Code, for alternative rate plan applications that are for an increase in rates... ."[5] Conversely, a different set of filing requirements apply to an alternative rate plan application that is not for an increase in rates.[6] And these latter filing requirements do not include an evidentiary showing, as to resulting rates that must be made by the applicant. It is undeniable, therefore, that where an application is not for an increase in rates, the applicant is not required to submit evidence as to resulting rates. And if evidence on resulting rates is not required, the Commission's ultimate decision on the application cannot be based on any consideration of resulting rates. The Commission's past decisions, referenced in its Order here, substantiate this conclusion.[7]

Notably, when evaluating the rules under O.A.C. Chapter 4901:1-19, the Commission agreed with Columbia Gas of Ohio, Inc., that H.B. 95 altered prior law, which had required a base rate proceeding as a condition precedent to filing for approval of an alternative rate plan. Importantly, Columbia argued that "H.B. 95 deleted the previous requirement in Section 4929.05, Revised Code, that the Commission determine just and reasonable rates pursuant to Section 4909.15, Revised Code, when considering an alternative rate plan application."[8] The

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[5] O.A.C. 4901:1-19-06(C).
[6] O.A.C. 4901:1-19-06(C)(1).
[7] See, *e.g.*, *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval, Pursuant to Revised Code Section 4929.11, of a Tariff to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as May Be Required to Defer Such Expenses and Revenues for Future Recovery Through Such Adjustment Mechanisms*, Case No. 05-1444-GA-UNC, Supplemental Opinion and Order, at pg. 10 (June 27, 2007)(Commission expressly observing that the filing requirements are different for filings that are for an increase in rates and for filings that are not).
[8] *In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code*, Case No. 11-5590-GA-ORD, Entry on Rehearing, at pg. 3 (Feb. 27, 2013).

Commission agreed. Thus, to ensure proper alignment with controlling law, the Commission deleted reference in its regulation to R.C. 4909.15, and further delineated which alternative rate plan filing requirements apply to applications for an increase in rates and which apply to those applications that are not for an increase in rates.[9] In making this distinction, the Commission incorporated into its regulations the General Assembly's expectation that an alternative rate plan could be considered without a determination of whether the resulting rates would be just and reasonable.

As the Commission accepted in its Order, Duke Energy Ohio's Application in this proceeding is not for an increase in rates.[10] Consequently, the criteria for approval of the ASRP do not include an assessment of resulting rates or costs. Yet, despite unambiguous regulations, the Commission's patent differentiation between those applications that include a rate increase request and those that do not, and the General Assembly's clear intent as reflected in the Commission's prior determinations, the Commission is now arbitrarily relying upon a non-existent evidentiary standard to deny Duke Energy Ohio's request. In doing so, however, it fails to properly explain the rationale for its decision, instead summarily contending that it is afforded broad discretion when reviewing an application for an alternative rate plan. But insofar as it concerns such rate plans, the Commission is incorrect.

Again, the General Assembly eliminated the prior direct association between a traditional rate case and a request for an alternative rate plan. And, in doing so, the legislature restricted the breadth of the Commission's discretion, as the Commission acknowledged when promulgating its regulations and imposing different filing requirements for those applications that included a rate increase and those that did not. It is thus manifestly unlawful and unreasonable for the

[9] Id, at pg. 4.
[10] Order, at pg. 31.

Commission to now ignore Ohio law and its own regulation and subject Duke Energy Ohio to an arbitrary evidentiary standard.

Further, the Commission's unlawful imposition of a contrived evidentiary standard cannot be justified by a passing reference to R.C. 4929.01(A).[11] The cited statutory provision is simply the definition of the term "alternative rate plan" and it merely identifies some of the various types of proposals that may be pursued via an alternative rate plan. Importantly, a definition is not a grant of authority. Thus, through this definition, which does not afford the Commission any authority, the General Assembly did not mandate that resulting rates are a determinative factor to be assessed by the Commission when considering any alternative rate plan. And this definition is entirely consistent with the Commission's acknowledgement that an alternative rate plan may be one that is not for an increase in rates.

Similarly, the Commission cannot cure its unlawful and unreasonable Order through a casual reference to rate case timing, particularly where the reference does not concern Duke Energy Ohio, the applicant here, and does not otherwise provide any justification as to how the Company's last base rate case was determinative of any of the issues in the present proceeding.

In its Order, the Commission observed that it could consider the time period that may have elapsed between a local distribution company's (LDC) last base rate gas and its request for an alternative rate plan.[12] But the authority on which it relied was both decided prior to the passage of H.B. 95 and "limited to the specific facts and circumstances of [that] case."[13] As such,

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[11] Id, at pg. 34.
[12] Id.
[13] *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval, Pursuant to Revised Code Section 4929.11, of a Tariff to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as May Be Required to Defer Such Expenses and Revenues for Future Recovery Through Such Adjustment Mechanisms*, Case No. 05-1444-GA-UNC, Supplemental Opinion and Order, at pg. 12 (June 27, 2007).

it is patently unlawful and unreasonable to subject Duke Energy Ohio to a conclusion that, by the Commission's own admission, is neither controlling nor even informative.

The error in the Commission's Order is further evident in its failure to explain, with reference to the record in this proceeding, the basis for its conclusion that a prior proceeding lacking any precedential value warrants denial of Duke Energy Ohio's Application. Again, the Commission has ignored its obligation under R.C. 4903.09.[14] Consequently, on rehearing, the Commission must articulate, with specific reference to the evidentiary record in this proceeding, how it considered the time period between Duke Energy Ohio's last natural gas base rate case and this proceeding in evaluating the Application.

The Commission further erred in failing to identify which costs associated with the proposed ASRP it considered when summarily concluding that the "risks associated with the Company's service lines are significantly outweighed by the marginal cost attributed to the accelerated replacement of these subject service lines."[15] Specifically and despite the requirements of R.C. 4903.09, the Commission failed to explain, with reference to the record, whether it considered just the estimated costs to replace an approximate 58,000 service lines in an accelerated, orderly manner or whether it also considered the costs of removing the same number of service lines over an extended period of time, the reduction in operating and maintenance costs due to meter relocations, and the avoidance of costs associated with more frequent base rate cases. Additionally, the Commission failed to explain whether it considered the benefits of the ASRP that are incapable of accurate approximation, such as avoiding service line failures and eliminating customer exposure to emergency repairs. Absent a comprehensive explanation by the Commission, Duke Energy Ohio must engage in speculation and guesswork

[14] R.C. 4903.09. See also, *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan Under R.C. 4928.17 and O.A.C. 4901:1-11-37*, 2016-Ohio-7535, ¶¶ 19-23.
[15] Order, at pg. 33.

as to the Commission's rationale, which is contrary to the very foundation of Ohio regulatory law.[16]

2. A cost-benefit analysis is inappropriate given that the Company's Application is not one for an increase in rates.

The unlawfulness and unreasonableness of the Commission's forced attempt to now create pre-filing requirements is further evident it is unsubstantiated conclusion that the Company must "provide [a] quantitative analysis as to the value of the benefit associated with the proposed ASRP."[17] But neither the law nor controlling regulation reflect such a requirement.[18] Duke Energy Ohio acknowledges that the Commission has the ability to implement filing requirements such as quantitative analyses. Indeed, the Commission has promulgated such express requirements for applications for electric security plans.[19] Thus, had it intended a similar analysis for filings made under R.C. 4929.05, it would have included the necessary provision in O.A.C. Chapter 4901:1-19. But no such provision was included. And this omission is likely due to the fact that one cannot accurately quantify the benefit of avoiding the threat to safety caused by natural gas service line failures or of preventing the inconvenience and emotional strain, to customers, of experiencing a natural gas emergency caused by a leaking service line. This requirement must be interpreted as an inappropriate ad hoc measure. And this ad hoc measure – which is both unlawful and unreasonable – will undeniably quell future efforts

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[16] See *MCI Telecommunications Corp. v. Public Utilities Com.* (1987), 32 Ohio St. 3d 306 (1987); *Tongren v. Public Utilities Com.*, 85 Ohio St. 3d 87, 89 (1999); *Ideal Transportation Co. v. Public Utilities Comm.*, 42 Ohio St. 2d 195, 200 (1975); and *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3d 512, 526-527 (2011).

[17] Order, at pg. 40.

[18] See, *e.g.*, *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters,* Case No. 07-1080-GA-AIR, *et al.*, Opinion and Order, at pp. 7, 18 (January 7, 2008)(approving alternative rate plan to accelerate replacement of aging distribution systems); *In the Matter of the Application of The East Ohio Gas d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, *et al.*, Opinion and Order, at pp. 12, 32 (October 15, 2008)(approving alternative rate plan for accelerated infrastructure replacement, which will enhance service and safety).

[19] See, *e.g.*, O.A.C. 4901:1-35-03(C)(9)(ii).

to seek alternative rate plans aimed at safely maintaining the state's natural gas system as applicants will not know the standard against which their application will be measured.

### B. The Commission erred in concluding that Duke Energy Ohio's proposed ASRP is not a just and reasonable alternative rate plan on the ground that the Company failed to evaluate other alternatives. The Commission also failed to explain the basis for its decision, as required by R.C. 4903.09.

As noted above, the Commission acknowledged that its regulations do not restrict alternative rate plans to those that are "the most effective approach" or "the least costly" solution to the issue at hand.[20] That is, the Commission admitted to the flexibility afforded by the General Assembly to LDCs as they pursue programs designed to address system risks and the mitigation thereof. Despite this flexibility, the Commission imposed upon Duke Energy Ohio an ad hoc evidentiary burden that cannot be met, thus yielding an Order that is unlawful and unreasonable.

Significantly, in its regulations, the Commission did not mandate that an LDC must, before filing its application for an alternative rate plan, assess other alternatives. And the absence of such a restrictive mandate is understandable as it aligns with how the Commission has traditionally assessed the justness and reasonableness of any filing by focusing on the merits of that filing, without regard to whether any other alternatives may exist.[21] But the Commission has drastically, and without any explanation, deviated from that precedent by now imposing upon Duke Energy Ohio an express evidentiary obligation to compare and contrast its proposed ASRP

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[20] Order, at pg. 33.

[21] *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Rates*, Case No. 01-1228-GA-AIR, *et al.*, Opinion and Order (May 30, 2002)(Commission approved the AMRP, which was supported by Company witness testimony identifying the AMRP as a "reasonable approach" without regard to alternatives).

to alternatives. But what alternatives? Doing nothing? Waiting for a significant failure before again seeking authority to implement an orderly, accelerated replacement program? The Commission failed to provide any meaningful direction here, and instead created an illusory evidentiary obligation, by stating that not every "possible" alternative must be considered, only those that are "feasible."[22] But that which is possible is that which is feasible.[23]

Notwithstanding the Commission's circuitous rationale, the record confirms that Duke Energy Ohio did consider alternatives. As described in the Application, the Company compared its proposed ASRP to its current practice of responding to service line failures and replacing a small number of obsolete service lines on an annual basis.[24] As this evidence undeniably confirmed, with a replacement rate of 200 service lines per year, it would take Duke Energy Ohio over 200 years to replace the aging infrastructure intended for inclusion in the ASRP.[25] And as Duke Energy Ohio witness Gary J. Hebbeler confirmed,

> [t]o do nothing, or to maintain the current approach of fixing a small number of these services annually and, reactively, fixing the lines when a leak is discovered, does not address the risk itself. Over time, these services will just continue to deteriorate and the number of leak incidents will just continue to rise, thereby increasing the potential for an incident.[26]

The Company demonstrated that the status quo – replacing lines after they have developed a leak – was neither reasonable nor cost effective.[27] The Commission, however, ignored this credible evidence, suggesting instead that reactive programs and programs aimed at mitigating third-party damage are the appropriate comparison.[28] This conclusion demonstrates a

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[22] Id, at pp. 34-35.
[23] See www.Merriam-Webster.com/dictionary. "Possible" means something is able to be done, able to happen or exist. "Feasible" means something that is capable of being done or carried out.
[24] Duke Energy Ohio Ex. 1 (Application), at pp. 4-6.
[25] Id, at pg. 6.
[26] Duke Energy Ohio Ex. 6 (Direct Testimony of Gary J. Hebbeler), at pg. 11.
[27] See, *e.g.*, Duke Energy Ohio Ex. 1 (Application), at pg. 5 (reactionary replacement of failed service lines can involve premium labor dollars).
[28] Order, at pg. 35.

misunderstanding, on the part of the Commission, of the risk to be addressed via the ASRP and as to why reactive programs or those focused excavation damage are irrelevant and void of any credibility.

The ASRP was designed to mitigate the risk, identified under federal regulation, created by obsolete service lines that, because of their age and composition, are prone to corrosion and failure. The ASRP is focused, not on those service lines that have knowingly failed or been compromised, but on those service lines susceptible of failure. And this focus is appropriate as Duke Energy Ohio has existing processes and procedures for responding to service line leaks and is continually implementing measures to guard against third-party damage. Because of the identified risk – potential for failure due to age and composition – the Company rightfully considered the ASRP against its practice of annually replacing a small number of obsolete service lines. Thus, just as the Commission observed, "some consideration of alternative solutions...occurred prior to [the Company's] filing of the application."[29] Yet the Commission failed to even acknowledge this comparison, ignoring its obligation to base its decision on credible evidence and to properly explain its decision pursuant to R.C. 4903.09.

The error in the Commission's decision is compounded by its own contradictory instruction. On the one hand, the Commission expects Duke Energy Ohio to continually evaluate historical solutions and their ongoing use to ensure that they achieve intended safety measures.[30] Yet, on the other hand, the Commission rejects the use of such solutions when addressing the same risk to system integrity. Importantly, on this latter point, the Commission wrongly found that the Company's accelerated main replacement program (AMRP) was focused on eliminating a risk that is "wholly separate and distinct" from the risk presented by obsolete service lines

[29] Id.
[30] Id.

prone to corrosion and thus failure.[31] But the Commission's conclusion cannot be reconciled with the evidence and instead reflects miscomprehension or mistake about or willful disregard for such credible evidence.[32]

The AMRP, initially approved by the Commission in 2000 and periodically re-authorized during the ensuing years, was designed to replace bare steel and cast iron mains and the service lines attached thereto on an accelerated basis.[33] Indeed, under the Commission-approved AMRP, the Company replaced 116,000 main-to-curb service lines.[34] Many of the service lines replaced under the AMRP had the same criteria as those intended for inclusion in the ASRP.[35] And the risk, whether described with reference to the AMRP or the ASRP, is that presented by obsolete natural gas infrastructure: infrastructure that is susceptible to failure given its composition and propensity to corrode. Thus, under the ASRP, the Company has proposed to continue doing exactly that which it successfully accomplished under the AMRP – the coordinated, efficient, and accelerated replacement of obsolete natural gas infrastructure that creates a safety risk. The Commission's decision is unlawful and unreasonable in that it fails to acknowledge the risk to be mitigated by the targeted, accelerated removal of obsolete natural gas infrastructure – a risk that the Commission has previously recognized in approving such accelerated programs. That the Company's ASRP – developed consistent with these very same programs – is suddenly unacceptable cannot be reconciled with the evidence in this proceeding or existing Commission precedent.

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[31] Id.
[32] *Monongahela Power Co. v. Public Utilities Commission of Ohio* (2004), 104 Ohio St. 3d 571, ¶ 29 (Commission decisions that are "so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty" are subject to reversal or modification).
[33] Duke Energy Ohio Ex. 6 (Direct Testimony of Hebbeler), at pg. 6.
[34] Id, at pg. 5.
[35] Duke Energy Ohio Ex. 10 (Direct Testimony of Edward A. McGee), Attachment EAM-2, at pg. 8 (showing replacement rates, under the AMRP, for service lines by composition).

### C. The Commission erred in concluding that the ASRP is not required under regulation issued by the Pipeline and Hazardous Material Safety Administration (PHMSA), which the Commission is responsible to enforce.

The Commission wrongly rejected federal pipeline safety directives, which resulted from federal regulation, as merely advisory in nature and further erred in assessing their significance as a foundational basis for the Company's proposal. To put the Commission's incorrect findings in context, it is necessary to first briefly discuss natural gas pipeline safety regulation.

Natural gas pipeline safety is a subject of federal regulation. PHMSA, created by the federal Department of Transportation, oversees the safety of gas pipelines and ensures compliance with critical safety rules. State commissions, such as this Commission, are responsible for enforcing PHMSA's regulation within their respective states and receive financial assistance for this effort. Importantly, however, it is a body of federal regulation that forms the basis for Ohio's pipeline safety laws.

This federal regulation includes distribution integrity management. Consequently, an LDC such as Duke Energy Ohio is required to develop and implement a distribution integrity management program or DIMP pursuant to which it confirms knowledge of its system, identifies threats thereto, assesses these threats or risks, and implements measures to reduce them.[36] A federally mandated DIMP is not a static program as PHSMA requires ongoing measures for effectiveness and continued system assessments.[37] In its Order, the Commission entirely overlooked this controlling federal law, finding instead the Company's obligation to mitigate a known risk insignificant and PHMSA's appeal to state regulators for the accelerated replacement of obsolete pipeline unpersuasive. In doing so, the Commission wrongly invoked an incorrect interpretation of legal argument and ignored the evidentiary record.

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[36] Duke Energy Ohio Ex. 3 (Direct Testimony of John A. Hill, Jr.), at pg. 3. See also, C.F.R. Part 192, Subpart P.
[37] Id, at pg. 4.

The evidence is this proceeding is undisputed: A known risk to the Company's natural gas distribution system is the continued presence of obsolete service lines, defined by PHMSA as high-risk pipeline,[38] and Duke Energy Ohio is obligated, under federal regulation, to mitigate this risk. And the identified mitigation measure is the ASRP, a program based directly on the highly successful AMRP under which thousands of similar service lines were efficiently and economically replaced and natural gas pipeline safety promoted.

The Commission eschews PHMSA's continued urging for the accelerated removal of high-risk pipeline, based on its previous approval of main replacement programs and belief that it has thus satisfied PHMSA's expectations. But the Commission fails to appreciate the purpose of a DIMP, which is risk mitigation, and the dynamic nature of PHMSA's directive, which is undeniably evident in the requirement, borne by every natural gas distribution company, to periodically evaluate – and improve upon – its DIMP. Again, PHMSA demands recurrent evaluations and performance measurement, thereby creating the expectation that an LDC will continually assess and address risks to its system. That the Commission approved, in the past, programs initially aimed at main replacement is not a logical or sufficient basis for rejecting a current program aimed at replacing obsolete service lines that remain in the system, posing a safety risk. It is thus unlawful and unreasonable for the Commission to now ignore both the regulation and directives of the agency whose objectives it has been entrusted to enforce.

As the first Ohio LDC to initiate the methodical, proactive replacement of aging natural gas infrastructure on an accelerated basis, Duke Energy Ohio readily acknowledges the significant strides taken in respect of pipeline safety. But the Commission's Order will pause those efforts, as it now suggests that a reactive approach is advisable and that the ability to alter regulation in the future is sufficient to ensure safe natural gas distribution systems. But a reactive

[38] Id, at pg. 7 and Duke Energy Ohio Ex. 10 (Direct Testimony of McGee), Attachment EAM-2, at pg. 22.

approach cannot be reconciled with controlling federal regulation and the obligations every Ohio LDC has with regard to distribution integrity management. A reactive approach cannot be reconciled with the Commission's own admission that service line leaks have the potential to cause significant damage.[39] The Commission's current preference, therefore, to advance safe natural gas distribution systems in reliance upon its ability to subsequently alter existing rules through protracted rule-making proceedings is both unlawful and unreasonable and reflects a blatant disregard of the law.

### D. The Commission erred in concluding that the risks associated with obsolete natural gas service lines are insufficient to warrant their accelerated removal and also failed to explain the basis for its decision, as required by R.C. 4903.09.

In its Order, the Commission found that "the current projected likelihood associated with a reportable incident caused by a corroded service line...does not warrant accelerated replacement... ."[40] Although the Commission has failed to identify the specific evidence upon which it relied in reaching this conclusion, it is readily apparent that it could not have been the complete evidentiary record. The Commission thus erred in assessing the record and its conclusions, therefore, are unlawful and unreasonable.

Significantly, Staff witness Kerry Adkins admitted that his risk assessment was flawed; that he failed to consider information specific to Duke Energy Ohio's service territory.[41] And when the correct interpretation is applied, it is undeniable that the risk of failure warrants immediate attention. Indeed, as Duke Energy Ohio witness Edward A. McGee confirmed, the risk of a service line failure in the Duke Energy Ohio service territory is one in twenty-nine. And

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[39] *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment*, Case No. 07-478-GA-UNC, Opinion and Order, at pg. 29 (April 9, 2008).

[40] Order, at pg. 37.

[41] Tr. III, at pp. 540-541.

this risk exists year after year after year.[42] Without justification, the Commission ignored this risk as being irrelevant, as not warranting service lines' accelerated removal.[43] Absent an explanation that is predicated upon credible evidence, the Commission's decision must be found to be unlawful, unreasonable, and incapable of being reconciled with the undisputed evidence – a one in twenty-nine threat of failure.

On this point, the Commission again confuses types of risk and mitigation in an effort to justify its conclusion that obsolete service lines, susceptible to corrosion and ultimate failure, do not warrant accelerated, organized replacement. But the Commission miscomprehends the Company's current practices and the hazards they are intended to address.

In denying the ASRP, the Commission was persuaded by the fact that Duke Energy Ohio has eliminated the Grade III leak classification from its processes and procedures. In doing so, the Company has elected to treat all leaks that rightfully warrant a classification of Grade III as having a classification of Grade II. In its simplest terms, this means that these identified leaks will be addressed within twenty-four months of discovery. But this change in classification cannot negate the reasonableness of, and need for, the proposed ASRP.

Significantly, the risk associated with service lines that are known to be leaking is not the impetus for the ASRP. Rather, the ASRP was designed, consistent with federal regulation, to proactively remove the risk created by obsolete service lines prone to failure due to their age, composition, and propensity to corrode. The Commission did not, in its Order, explain how reacting to a leaking service line in any way mitigates the risk associated with those likely to fail. Nor could it. Its decision, therefore, is unlawful and unreasonable and in violation of R.C. 4903.09.

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[42] Tr. II, at pp. 275-276.
[43] Order, at pg. 37.

The Company would also note that, in assessing the risks associated with corrosion on service lines, the Commission only considered a limited portion of the evidence before it. Recognizing that Duke Energy Ohio's witness testified that the potential harm from a service line leak is comparable to those of main lines, the Commission went on to state that the "record reflects...that the large majority of service line leaks result in discolored lawns... ."[44] Thus, the Commission concluded, the Company did not prove "that the projected harm associated with corrosion on service lines is sufficient to support a finding that the proposed ASRP is just and reasonable."[45] But the Commission entirely ignored the actual, corroded service lines, and the photographs thereof, that were presented by the Company and were accepted into evidence.[46] The Commission failed even to attempt to explain its "conclusion" that these exhibits "lack any sufficient weight."[47] It failed to explain how it believes that natural gas travelling through such corroded pipes could be seen as either safe or likely to cause only discolored lawn. Not only is its conclusion regarding the level of risk associated with obsolete natural gas service lines gravely in error, but it also has once again failed to explain the basis for its decision, as required by R.C. 4903.09.

### E. The Commission erred in concluding that Duke Energy Ohio's ASRP is not just and reasonable because the Company failed to quantify the benefits associated with such program.

The Commission wrongly concluded that the risk created by allowing obsolete service lines to remain in place, transporting combustible natural gas, does not justify their targeted, accelerated removal. Specifically, the Commission found the risk, which it described as generally resulting in discolored lawns, to be insignificant. To reach this conclusion, the

[44] Order, at pg. 38.
[45] Id.
[46] Duke Energy Ohio Ex.7 and Ex. 8.
[47] Order, at pg. 13.

Commission simply observed the lack of reportable failures in the Duke Energy Ohio service territory. Because the Commission's conclusion fails to consider the credible evidence, it is unlawful and unreasonable.

It is undisputed that Duke Energy Ohio completed its AMRP at the end of 2015. It is also undisputed that Duke Energy Ohio replaced 116,000 service lines in connection with the AMRP. Consequently, during the AMRP – and as a direct result thereof – the overall number of reported service line leaks declined.[48] Importantly, however, leaks due to corrosion remained elevated.[49] Indeed, as the overwhelming evidence in this proceeding confirmed, the deterioration rate of service lines in the Duke Energy Ohio service territory is starting to exceed the leak rate.[50] Leaks on service lines in the Duke Energy Ohio service territory due to corrosion are on the rise. Between 2012 and 2014, Grade I leaks due to corrosion increased from 6.9 percent to 11.8 percent and Grade II leaks increased from 24.3 percent to 43.6 percent.[51] Thus, absent an accelerated, targeted program to remove those service lines at risk of failure given their age and composition, it is undeniable that these leaks, and the threat created thereby, will continue to increase. In failing to recognize the overwhelming, credible evidence in this proceeding, the Commission engaged in decision-making that was unlawful and unreasonable.

The Commission attempted to rectify the deficiencies in its Order by referencing existing risk mitigation measures. But in doing so, it again confused types of risk and ignored the specific risk at issue in respect of the proposed ASRP. Its decision, therefore, cannot be reconciled with the evidentiary record.

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[48] Duke Energy Ohio Ex. 10 (Direct Testimony of McGee), Attachment EAM-2, at pg. 11.
[49] Id, at pg. 14 and Attachment EAM-2, at pg. 14.
[50] Duke Energy Ohio Ex. 6 (Direct Testimony of Hebbeler), at pg. 12. See also, Tr. I, at pg. 165.
[51] Duke Energy Ohio Ex. 4.

Oddly, the Commission referenced another LDC's efforts to raise awareness of excavation dangers. It also acknowledged the efforts undertaken by Duke Energy Ohio to mitigate against the risk of third-party damage. But these observations are irrelevant. Third-party damage to service lines is a risk separate and distinct from that created by obsolete service lines. And the potential for a third-party dig-in to compromise the integrity of a service line is the same, whether the service line is plastic or steel. Moreover, increased awareness of Ohio's Call Before You Dig Laws will not – and cannot – prevent a service line from failing due to corrosion. The focus, therefore, on public awareness of excavation damage is misplaced and cannot rationally support a finding that Duke Energy Ohio has already implemented measures sufficient to mitigate the risk, as included in its DIMP, resulting from obsolete service lines.

### F. The Commission erred in concluding that the Lummus Study failed to provide evidence of the risks presented by obsolete natural gas service lines.

The Commission overlooked the undisputed evidence in this proceeding regarding the potential for the obsolete service lines intended for replacement under the ASRP to fail due to their age or composition. Indeed, no party challenged the findings of Company witness McGee that the service lines intended for replacement under the ASRP are, by PHMSA definition, high-risk pipe. And, as PHMSA has urged, such high risk pipe should be removed on an expedited basis.[52]

The Commission wrongly viewed this evidence as deficient because Company witness McGee allegedly "failed to provide any detailed information as to the number of leaks, or their severity, that have occurred on the 58,000 pre-1971 metallic and non-protected service lines...."[53] But no such information could conceivably be produced as these approximate 58,000 service lines are not, to the Company's knowledge, leaking today. Had a leak in any of these

[52] Duke Energy Ohio Ex. 10 ( Direct Testimony of McGee); Appendix C, at pp. 1, 5.
[53] Order, at pg. 42.

lines been discovered, it would have been remedied, the service line replaced, and the old service line removed from the scope of the ASRP. Importantly, therefore, the approximate 58,000 service lines intended for inclusion in the proposed ASRP are not those that have leaked. Rather, these are the lines that are susceptible to failure given their age and composition. It is apparent that the Commission confuses the issues and the evidence and, critically, the risks intended for mitigation under the ASRP as compared to those addressed by the Company's ongoing efforts in responding to known service line leaks. These risks are not the same. The mitigation measures are not the same. And the Company cannot now be prejudiced by failing to present evidence, the existence of which is created only by the Commission's misunderstanding of the proposed ASRP.

### G. The Commission erred in concluding that Duke Energy Ohio's ASRP is unlawful and unreasonable because it would be the first such program in Ohio and also failed to explain the basis for its decision, as required by R.C. 4903.09.

Adopting yet another arbitrary and untenable evidentiary requirement, the Commission concluded that the ASRP is not just and reasonable because it is the first such proposal in Ohio. This conclusion is as illogical as it is bewildering.

Duke Energy Ohio's AMRP was the first such accelerated replacement program approved by the Commission. That it was the first was irrelevant and rightfully so as subjecting a proposal to rejection solely because it is novel would quell all improvements in safety measures, dissuade the pursuit of innovative programs, and undermine the very purpose of H.B. 95. The Commission has not previously rejected original proposals simply on the basis of their originality and doing so now cannot be reconciled with existing precedent. Further, the Commission's conclusion cannot be reconciled with the facts. Although no other Ohio LDC currently has a stand-alone service line replacement program, these other LDCs are in the midst

of broad infrastructure replacement programs, the foundation for which was derived from Duke Energy Ohio's AMRP. These other LDCs are currently replacing, on an accelerated basis and in organized fashion, service lines.[54] Notably, the replacement efforts of these other LDCs include not only service lines attached to obsolete mains but also those that are expected to present an existing or probable hazard.[55] The extent to which these other LDCs may have a need to replace additional service lines on a stand-alone basis because they are not within the scope of the current replacement programs remains to be seen. But is it arbitrary and patently unreasonable for Duke Energy Ohio to be penalized now because of the status of the replacement programs of other companies.

Notwithstanding the lack of such criteria in the controlling regulations, the Commission concluded in this proceeding that it "may certainly take into account whether a program is the first of its kind... ."[56] But the Commission failed to explain how it would take such information into account. Thus, it is unknown whether an applicant must present witnesses who can testify as to another LDC's replacement programs, both those in place and those under consideration. The lack of explanation begs the question of whether the applicant must defend its proposal, novel in

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[54] Duke Energy Ohio Ex. 10 (Direct Testimony of McGee), Attachment EAM-2, at pg. 4. See also, *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval to Modify and Further Accelerate its Pipeline Infrastructure Replacement Program and to Recover the Associated Costs*, Case No. 11-2401-GA-ALT, Opinion and Order, at pp. 9-10 (August 3, 2011)(Commission approved expanded pipeline infrastructure replacement program to include, *inter alia*, bare steel and cast iron mains and associated services, steel pipe installed and field coated before 1955, government-requested relocations, and steel main-to-curb services); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of an Alternative Form of Regulation*, Case No. 11-5515-GA-ALT, Opinion and Order, at pg. 12 (November 28, 2012)(Commission approved expanded infrastructure replacement program to include, *inter alia*, service lines expected to present an existing or probable hazard, cast iron, wrought iron, bare steel and unprotected coated steel mains and associated metallic customer service lines, steel pipe installed and coated before 1955, government-requested relocations); and *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Alternative Form of Regulation*, Case No. 13-1571-GA-ALT, Opinion and Order, at pgs. 6-7 (February 19, 2014)(Commission approved expanded distribution replacement program to include, *inter alia*, cast iron and bare steel mains and associated services, field-coated steel pipe, obsolete pipe and appurtenances, government-required relocations, and incremental service line costs).

[55] *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of an Alternative Form of Regulation*, Case No. 11-5515-GA-ALT, Opinion and Order, at pg. 12 (November 28, 2012).

[56] Order, at pg. 42.

Ohio, through evidence of similar proposals having been approved in foreign jurisdictions. The Commission's failure to explain this previously unidentified element of proof warrants a finding that the Order is unlawful and unreasonable and in contravention of R.C. 4903.09.

## III. Conclusion

In denying the Company's Application, the Commission summarily stated that the Application required "consideration of several factors, including the cost of the proposed program."[57] The Commission continued, stating that it considered several factors, including safety risk and cost.[58] But the factors adopted by the Commission are antithetical to the General Assembly's intentions, as codified through H.B. 95, and cannot be reconciled with controlling regulation or Commission precedent. The Commission's unlawful and unreasonable Order in this proceeding will not enable efficient alternative rate plan filings or ease the administrative burden attendant to protracted rate case proceedings. But more fundamentally, the Commission's Order will not promote proactive measures focused on natural gas pipeline safety. For the reasons stated herein, the Order must be revisited.

[57] Id, at pg. 44.
[58] Id.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered via U.S. mail (postage prepaid), personal, or electronic mail delivery, on this the 23rd day of November 2016 to the parties listed below.

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Summary: App for Rehearing Application for Rehearing of Duke Energy Ohio, Inc. electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Kingery, Jeanne W.