

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Authority to Defer) Case No. 16-1106-GA-AAM
Environmental Investigation and)
Remediation Costs.)

In the Matter of the Application of Duke) Case No. 16-1107-GA-UNC
Energy Ohio, Inc., for Tariff Approval.)

**PUBLIC VERSION
REPLY COMMENTS OF DUKE ENERGY OHIO, INC.**

I. INTRODUCTION

On November 13, 2013, the Public Utilities Commission of Ohio (Commission) authorized Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) to recover costs, incurred through 2012, relative to its obligation to remediate former manufactured gas plant (MGP) sites. The Commission found such expenditures to be costs, to Duke Energy Ohio, of rendering public utility service. As the Commission concluded:

Duke has substantiated, on the record, that the remediation costs were a necessary 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. Not only is Duke legally obligated to remediate these sites as the owner and operator of these sites, but it is undisputed on the record that Duke has the societal obligation to clean up these sites for the safety and prosperity of the communities in those areas and in order to maintain the usefulness of the properties; therefore, these costs are a current cost of doing business.¹

In authorizing recovery of amounts incurred through 2012, the Commission made further provision for future cost recovery. Specifically, the Commission established a process pursuant

¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, at pp. 58-59 (November 13, 2013).

to which the Company would seek to regularly adjust its Rider MGP to recover costs that had been incurred in the year prior to each annual submission.² Consistent therewith, the Commission granted the Company's ongoing deferral authority, finding that Duke Energy Ohio's "request for authority to continue to modify its accounting procedures and to defer costs related to the environmental investigation and remediation costs beyond December 31, 2012, is reasonable and should be approved."³

The Commission also established recovery periods for the costs incurred by the Company in fulfilling its legal and societal obligations. For the property known as the East End site, that period expires December 31, 2016.⁴ Importantly, however, the Commission did not affix an absolute period after which time the Company could not recover the costs related to its provision of public utility service. Rather, the Commission observed that "exigent circumstances" could function to extend that period.⁵ And as the Commission confirmed on rehearing, Duke Energy Ohio is permitted to seek an extension of the recovery period due to "an event beyond the control of the Company."⁶ Consistent with the Commission's prior ruling, Duke Energy Ohio sought an extension of the recovery period applicable to the East End site, setting forth those reasons beyond its control that have prevented completion of necessary remediation activities by December 31, 2016.

On November 23, 2016, Staff, the Ohio Partners for Affordable Energy (OPAE) and, collectively, the Office of the Ohio Consumers' Counsel and the Kroger Company (OCC/Kroger) filed comments opposing the extension of the recovery period. But as discussed

² *Id.*, at 72.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Entry on Rehearing, at pg. 4 (January 8, 2014).

below, their opposition is misplaced and the Company's Application in this proceeding should be granted.

II. DISCUSSION

A. **The pending proceeding is not one in which to challenge the Commission's prior decision allowing Duke Energy Ohio to recover costs of rendering public utility service.**

In its comments, OCC/Kroger primarily focuses on the Commission's decision, in 2013, to authorize the recovery of costs incurred by the Company in rendering public utility service. OPAE's comments are similarly limited to challenging the Commission's grant of cost recovery.⁷ These parties impermissibly use this docket as a platform for criticizing the Commission and its correct application of Ohio law.⁸ But this is not the docket in which to assert such a challenge.

As an initial matter, it must be conceded that OCC/Kroger and OPAE fully appreciate the proper proceeding in which to challenge the Commission's decision to authorize cost recovery. Indeed and rightfully so, they have not contested recoverability in any of the three pending rider proceedings, initiated for the purpose of updating Rider MGP to enable recovery of a prior year's expenditures. Instead, they pursued an appeal. And in response to that appeal, the Commission confirmed that environmental remediation "expenditures [are] recoverable because they [are] a current, legally-imposed obligation that [is] necessary for the good of the communities served and to maintain the properties themselves for other future public uses."⁹ The arguments on appeal have been briefed and the Commission's decision will soon be resolved by the Ohio

⁷ OPAE comments, at pg. 2 (November 23, 2016).

⁸ OCC/Kroger comments, at pp. 2-3 (November 23, 2016).

⁹ *Ohio Partners for Affordable Energy v. The Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 14-328, Merit Brief of the Commission, at pg. 9 (July 2, 2014).

Supreme Court, before which oral arguments will occur on February 28, 2017.¹⁰ OCC/Kroger and OPAE cannot now revisit – and reargue – the Commission’s prior determination that environmental remediation costs are recoverable. Their efforts to do so via comments in this proceeding are improper and should be ignored.

B. The Commission’s criteria for an extension of the recovery period cannot now be redefined by Staff and OCC/Kroger.

Staff and OCC/Kroger contend that the Company has not demonstrated any exigent circumstances that would permit an extension of the East End recovery period. In doing so, they reply upon different – and competing – definitions of the phrase, “exigent circumstances,” in an attempt to restrict the Commission’s prior order. Notably, Staff undertakes a linguistic debate, challenging Duke Energy Ohio’s use of the word “arduous” in lieu of “exigent” when providing the procedural history relevant to its Application.¹¹ In doing so, Staff offers a different definition, opining that “exigent circumstances” are only those that are urgent or reflective of an emergency.¹² OCC/Kroger adopts a similarly narrow, but competing, definition, suggesting that “exigent circumstances” are only those that are unforeseeable.¹³ But the Commission’s decision, in which it intentionally provided an express definition, does not support either of these artificially limiting interpretations.

It is undeniable that the Commission speaks through its orders.¹⁴ Thus, to identify the standard against which the Company’s Application will be measured, it is necessary to understand the Commission’s orders giving rise to same. In the underlying proceeding in which the Commission granted cost recovery and ongoing deferral authority and provided Duke Energy

¹⁰ *Id.*, Notice of Oral Argument (November 2, 2016).

¹¹ Staff comments, at pp. 4-5 (November 23, 2016).

¹² *Id.*

¹³ OCC/Kroger comments, at pg. 6.

¹⁴ See, e.g., R.C. 4903.13 (providing for a right of appeal from a Commission order).

Ohio the right to seek an extension of the recovery period, Duke Energy Ohio demonstrated that the cadence of environmental investigation and remediation work cannot be so inflexible as to risk the efficient, safe, and reasonable completion of such work. As the evidence reviewed by the Commission confirmed, factors outside the Company's control, such as project coordination, influence completion dates.¹⁵ The Commission acknowledged these factors and determined that Duke Energy Ohio could seek an extension of the recovery period for exigent circumstances. Significantly, in its entry on rehearing, the Commission did not provide an example of what might be an exigent circumstance. Rather, it provided a governing definition that is broader in scope than that urged by Staff and OCC/Kroger here. Specifically, the Commission expressly defined exigent circumstances as an "event beyond the control of the Company."¹⁶ Consequently, the Commission's prior orders do not support the contention, advanced by Staff and OCC/Kroger, that exigent circumstances must be restricted to either only urgent or emergency situations or those that are unforeseeable. Additionally, and as confirmed by the precise definition provided by the Commission, the circumstances do not need to be "unusual, new, or unknown"¹⁷ to properly qualify as being outside the Company's control.

Staff and OCC/Kroger attempt now to disregard that which the Commission provided for in its prior orders. They attempt to change the standard. But the Commission's orders control. And consistent with the plain language in these past decisions, Duke Energy Ohio has demonstrated, through its Application in this proceeding and as discussed herein, that events beyond its control have occurred, warranting an extension of the East End recovery period.

¹⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Duke Energy Ohio Application for Rehearing, at pg. 5 (December 13, 2013).

¹⁶ *Id.*, Entry on Rehearing, at pg. 4 (Commission used abbreviation for "that is" for purposes of defining "exigent circumstances" and it is thus clear that it did not intend an example, but instead, a precise definition).

¹⁷ Staff comments, at pg. 6 (seeking to impose a second, and equally restricted, definition of "exigent circumstances").

C. Circumstances outside the Company's control warrant an extension.

Staff and OCC/Kroger contend that the circumstances identified by Duke Energy Ohio do not support an extension. Although OCC/Kroger identifies the different exigent circumstances discussed in the Company's Application, it offers only a general challenge here, summarily stating that such circumstances were foreseeable.¹⁸ OCC/Kroger has failed to provide any meaningful objection to the Company's request. As demonstrated above, "exigent circumstances," as defined by the Commission, are not those that are only unforeseeable. Thus, whether Duke Energy Ohio may have general knowledge of the potential for extreme weather events to happen at any time, that regulators could amend existing or impose new regulation, or that coordination with others could be necessary to ensure regulatory compliance and safe operation is irrelevant to the merits of the pending Application. Aside from improperly seeking to re-litigate the legality of the Commission's decision, OCC/Kroger offers no comments of merit in this proceeding.

Staff maintains, as an initial position, that the circumstances discussed by Duke Energy Ohio do not warrant an extension because they are not "unusual, new, or unknown"¹⁹ to the Commission. But this argument is untenable and premised upon false logic. Again, the standard against which the Application is to be measured is not whether the Commission knew of the significant degree to which the natural gas industry is regulated, that those regulations could potentially compel operational restrictions, or that extreme caution might have to be taken when engaging in investigation and remediation activities so as to not compromise the continued, safe operation of existing utility infrastructure. Rather, the question is whether the Company has encountered circumstances beyond its control that impacted the timing of its investigation and

¹⁸ OCC/Kroger comments, at pg. 6.

¹⁹ Staff comments, at pg. 6.

remediation efforts. On this point, Duke Energy Ohio would be remiss if it did address Staff's reference to the polar vortex as insignificant and, arguably, something even the Commission must have considered in approving cost recovery months prior.

The January 2014 polar vortex was not a usual, common, or typical weather event. It was a radical anomaly – temperatures remained below freezing for days, with sustained wind chills plunging even lower. The regional power market was approaching a precarious position and the availability of fuel supplies constrained.²⁰ Throughout this abnormal weather event, the remnants of which extended for many weeks, Duke Energy Ohio provided an uninterrupted supply of natural gas to its customers and, in fulfilling this obligation, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Thus, the polar vortex and consequences created thereby were clearly outside the Company's control and forced adjustments, or delays, in an efficient and reasonable investigation and remediation schedule at the East End site. Although one might arguably anticipate extreme weather to occur, there is no reasonable way to predict when, where, or how it will occur. The occurrence of the 2014 polar

²⁰ *Winter 2013-2014 Operations and Market Performance in Regional Transmission Organizations and Independent Systems Operators*, FERC Docket No. AD-14-8-000, Statement of Michael J. Kormos Executive Vice President-Operations PJM Interconnection, L.L.C. (April 1, 2014); John R. Kasich, Governor- State of Ohio, Communication Department, 'Kasich Issues Emergency Declaration to Expedite Heating Propane Shipments' (January 18, 2014).

vortex cannot, as Staff suggests, be characterized as either irrelevant or within the Company's control.

Staff also submits that the discovery of buried structures and equipment is not an exigent circumstance as such information was known by the Commission, in 2013, when it authorized the recovery of costs applicable to the East End remediation. Again, Staff invokes an incorrect standard. It fails to acknowledge the specific facts included in the Application, opting instead for generalized and irrelevant conclusions. That the Company previously encountered buried facilities while remediating certain areas at the East End site is immaterial to the discovery of buried infrastructure in the middle parcel or area west of the west parcel, where remediation is now occurring, or what that means to the scope and schedule of work. The equipment identified in documents submitted for Commission review in 2013 was not the equipment first unearthed and discovered in 2014, as part of the investigation of the middle parcel or area west of the west parcel.²¹ It simply could not have been the same. And only after Duke Energy Ohio discovered the structures buried at the middle parcel or area west of the west parcel could it understand the condition and dimensions of the structures and the extent of any contamination located in proximity thereto. Only after discovery could Duke Energy Ohio evaluate the additional precautions that may be necessary to enable safe dismantling and removal. Only after discovery could Duke Energy Ohio correctly determine the specific measures needed to avoid compromising adjacent critical utility infrastructure. Only after discovery could Duke Energy Ohio accurately determine an appropriate and prudent progression of work. Importantly, the Company did not control the condition of such structures, the extent to which contamination and needed safety precautions complicated their safe dismantling and removal, and the overall effect on remediation activities. And remediation of the middle parcel is particularly complex due to

²¹ Application, at para. 17.

location of buried structures but these complexities were not, and could not have been, fully realized until after site assessments were complete. Such site assessments caused the Company to conclude that further investigation and remediation was necessary to prepare and implement a safe remediation plan. Thus, although it is reasonable to expect that one might encounter unexpected obstacles while undertaking remediation, it is not possible to proactively incorporate such encounters into an efficient plan or schedule.

[REDACTED]

[REDACTED]

Staff's first suggestion is incorrect and the second misplaced. So as to avoid challenges that its request was premature, speculative, or unsubstantiated, it was appropriate for Duke Energy Ohio to institute this proceeding only after having encountered – and understood the impact of – specific events. That is, it needed a valid basis for its request.

Duke Energy Ohio identified the reasonable and prudent actions it took in respect of environmental investigation at the middle parcel and area west of the west parcel prior to filing its Application. It explained how these investigations were hampered by regulations that restricted access and the use of invasive techniques. The Company detailed the external influences that prevented active investigation and remediation during certain months of the year.²² The Company further discussed how site investigations led to the discovery of buried structures, the precise location, condition, and dimensions of which were previously unknown; and how the site investigations allowed Duke Energy Ohio to confirm the extent and location of contamination, which is critical to developing the necessary remediation plan. It further explained how the existence of sensitive buried infrastructure required the use of complex

²² Id., at para. 15.

techniques not previously employed to protect the integrity of this infrastructure.²³ The Company explained how the impact of both regulation and its statutory obligation to serve customers complicated the progression of work²⁴ and how highly abnormal weather conditions led to atypical and restrictive activity.²⁵ That is, through the Application, the Company has established the occurrence of events on which this proceeding is based.

[REDACTED]

[REDACTED] As explained in the Application, the scheduling and sequencing of investigation and remediation activities is highly dependent on a multitude of variables, many of which are outside the Company's control. These variables include limitations on the Company's activities due to public health and safety and applicable laws and regulations, the conditions of the property and extent of contamination, the Company's statutory obligation to continue to provide reliable natural gas service even during remediation, and complex contract negotiations

²³ Id., at para. 16-19.

²⁴ Id., at para. 7, 15, and 20.

²⁵ Id., at para. 20.

²⁶ [REDACTED]

²⁷ [REDACTED]

with its environmental consultants. Although Duke Energy Ohio and its consultants may prepare the scheduling of investigation and remediation activities, the Company does not have control over the variables identified above that undeniably limit the pace of remediation and impact the overall remediation schedule.

[REDACTED]

[REDACTED]

[REDACTED] Duke Energy Ohio recognizes its obligation to conduct investigation and remediation activities in a reasonable and prudent manner, invoking a cadence that is not hurried or rushed, and the potential for complicating factors outside its control to force alterations to or delays in the process. The Company, therefore, respectfully proposes an extension of the current East End site recovery period for five years, through the end of 2021, subject to the same caveat as that existing today.²⁸ Such a revised period would properly enable Duke Energy Ohio to perform environmental investigation and remediation work in an efficient and reasonable manner, as supported by OCC/Kroger.²⁹ It would also ensure that the Company's financial integrity is not compromised during the provision of ongoing utility service and as it addresses admitted legal and societal obligations.³⁰ Given the complexity of environmental investigation and remediation, this revised period is fair and appropriate.

²⁸ Such caveat being that the Company can seek further extension of the recovery period due to reasons outside its control; that is, because of exigent circumstances.

²⁹ See OCC/Kroger comments, at pg. 6 (conceding that work should be appropriately paced).

³⁰ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, *et al.*, Entry on Rehearing, Concurring Opinion of Chairman Haque, at pp. 1, 3 (October 12, 2016)(authorizing cost recovery to ensure that utility "retains a certain level of financial health and creditworthiness so that it can" make future investments and recognizing that Ohio's public utilities should be healthy); *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, *et al.*, Entry on Rehearing, Concurring Opinion of Chairman Haque at pg. 1 (November 3, 2016) (providing financial certainty by authorizing cost recovery for contractual interest).

As a final attack on the Commission's unambiguous language, Staff comments that the Company did not experience catastrophic events that would have triggered contractual *force majeure* clauses. Again, Staff errs. The concept of *force majeure* was not invoked by the Commission when creating the right, on the part of Duke Energy Ohio, to request a modification of the recovery period. It is thus undeniable that an extension is not restricted only to those circumstances where, due to contractual terms and conditions, a counterparty may be excused from its commitments. Staff's efforts at re-defining that which the Commission expressly defined cannot now succeed.

D. The Commission has already determined that the costs at issue may be deferred such that Staff's current attempts are barred by the doctrine of collateral estoppel.

Asserting yet another challenge to the plain language in the Commission's order authorizing recovery of environmental investigation and remediation costs, Staff maintains that the Company failed to address the criteria for a deferral request.³¹ But no such showing is required as Duke Energy Ohio's right to defer remediation costs was decided earlier and is not in question here.

It is undeniable that the Commission already authorized deferral authority for the costs at issue here – costs incurred by the Company in fulfilling its legal and societal obligation to remediate former MGP sites.³² That these types of costs satisfy the criteria for deferral authority under Ohio law has thus been established and Staff is now barred from any attempt to re-litigate this issue.³³ This conclusion is evident from the clear language employed by the Commission

³¹ Staff comments, at pp. 13-14.

³² *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM, Finding and Order, at pg. 3 (November 12, 2009).

³³ *New Winchester Gardens, Ltd. v. Franklin County Board of Revision* (1997), 80 Ohio St. 3d 36, 41, 684 N.E.2d 312 (collateral estoppel precluded the re-litigation of an issue that has been "actually and necessarily litigated and determined in a prior action"); Restatement of the Law, Second, Judgment, Section 27.

when initially authorizing cost recovery. Through this language, the Commission established conditional deadlines for recovery of remediation costs.³⁴ Notably, the Commission also contemplated, in 2013, the potential for these same remediation costs to be incurred beyond the identified recovery periods and provided a means by which Duke Energy Ohio could seek to extend those periods.³⁵ And in doing so, the Commission did not require Duke Energy Ohio to again establish that deferral authority should extend to the very same type of costs for which deferral authority was previously granted. Rather, the Commission directed only the demonstration of exigent circumstances for purposes of extending the deferral period, as has been done in this proceeding. And the required showing is understandable as the nature of costs has not changed – these remain costs incurred because of legal obligations arising under federal and state environmental laws and attendant to providing ongoing utility service.

Just as the Company’s right to defer environmental remediation costs is not an issue in this proceeding, neither is OPAE’s attempt to alter that deferral authority and associated ratemaking principles. The Commission has affirmed that the costs incurred by Duke Energy Ohio for investigation and remediation of former MGP sites “constitute recoverable operating expenses for ratemaking purposes under any applicable test that [the Supreme] Court has ever used... .”³⁶ The sole question in this proceeding is whether the Company has demonstrated exigent circumstances such that the recovery period applicable to the East End may be extended and OPAE’s efforts to enlarge the scope by introducing irrelevant commentary must fail.

³⁴ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, at pg. 72 (recovery periods conditional in that the Commission expressly authorized Duke Energy Ohio to request enlargement of same due to exigent circumstances).

³⁵ *Id.*, Entry on Rehearing, at pg. 4.

³⁶ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, *et al.*, Supreme Court of Ohio Case No. 2014-328, Merit Brief of Commission, at pg. 15 (July 2, 2014).

E. Staff's speculation as to the ongoing use of the East End site must be disregarded.

Staff's final comment is rooted entirely in speculation. Notwithstanding the significant infrastructure at the East End property that is used by Duke Energy Ohio in providing safe, reliable, and efficient natural gas service to its customers, Staff opines that the Company is

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] existing natural gas infrastructure will remain, in place and in use, at East End. Such infrastructure includes three underground natural gas lines that feed into the system, providing service to Duke Energy Ohio customers.³⁷ Staff is undeniably aware of these existing lines as it has admitted the need for their ongoing maintenance.³⁸ It is thus inexplicable for Staff to now claim that Duke Energy Ohio is also intending to remove these existing lines, integral to its ongoing public utility service obligations. At best, [REDACTED]

[REDACTED]

[REDACTED] a property on which vital utility infrastructure remains and the Commission should reject the insinuations currently advanced by Staff. Further, the future recovery of costs related to new infrastructure, critically necessary to the provision of natural gas

³⁷ Id., Second Supplemental Direct Testimony of Gary J. Hebbeler at pp. 3-4, 8 (April 22, 2013).

³⁸ Id., Staff Report, at p. 41 (January 4, 2013).

service consistent with applicable regulation, is not an issue currently before the Commission and it is patently inappropriate for Staff to seek to sway the Commission's decision on the narrow issue now before it with reference to these future events.

III. CONCLUSION

For the reasons stated herein and in its Application, Duke Energy Ohio respectfully requests that the Commission extend the recovery period applicable to the East End site for five years, through 2021, subject to the existing caveat that future requests for an extension may be made in the event of exigent circumstances. As demonstrated in the Application, such exigent circumstances have been encountered and warrant the extension.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

Handwritten signature of Amy B. Spiller in blue ink, written over a horizontal line.

Amy B. Spiller (0047277) (Counsel of Record)

Deputy General Counsel

Elizabeth H. Watts (0031092)

Associate General Counsel

Duke Energy Business Services LLC

139 E. Fourth Street, 1303-Main

P.O. Box 961

Cincinnati, Ohio 45201-0960

(513) 287-4359 (telephone)


(513) 287-4385 (facsimile)

Amy.Spiller@duke-energy.com

Elizabeth.watts@duke-energy.com

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 2nd day of December 2016 to the parties listed below.



Amy B. Spiller

Thomas McNamee
Assistant Attorneys General
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Thomas.mcnamee@ohioattorneygeneral.gov

Christopher Healey
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
Christopher.healey@occ.ohio.gov

Counsel for Staff of the Commission

Counsel for the Office of Ohio Consumers' Counsel

Colleen L. Mooney
Ohio Partners for Affordable Energy
P.O. Box 12451
Columbus, Ohio 43212
cmooney@ohiopartners.org

Kimberly W. Bojko
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
bojko@carpenterlipps.com

Counsel for Ohio Partners for Affordable Energy

Counsel for The Kroger Co.

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