BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 14-375-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 14-376-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 15-452-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No.15-453-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No. 16-542-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 16-543-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No.17-596-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No.17-597-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates.	)))	Case No.18-283-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No.18-284-GA-RDR

COMMENTS OF DUKE ENERGY OHIO, INC.

I. INTRODUCTION

As a matter of law and policy, prudently incurred expenses for environmental remediation of contamination associated with Duke Energy Ohio's former manufactured gas plant (MGP) operations are recoverable through utility rate proceedings. Indeed, the recovery of expenses incurred in rendering public utility service was upheld by the Ohio Supreme Court. The Staff of the Public Utilities Commission of Ohio (Staff) is misapplying regulations in a manner inconsistent with the Ohio Supreme Court's decision and without regard for good public policy.

As was provided for by the Public Utilities Commission of Ohio's (Commission) November 13, 2013, Opinion and Order in Case No. 12-1965-GA-AIR, *et al.*,[1] (Gas Rate Case) Duke Energy Ohio was authorized to continue its deferral of environmental investigation and remediation costs associated with two former MGP operations and submit annual applications to recover such costs (Opinion and Order).[2] On September 28, 2018, four years and six months after the Company's first annual update application for cost recovery of MGP remediation was filed, Staff submitted its first Staff Report in these consolidated cases.[3] Staff recommends a disallowance of $11,867,900 in remediation expense based solely upon geography and misunderstood property boundaries. In its Opinion and Order, the Commission made it very clear that "it is undisputed on the record that [Duke Energy Ohio] has the societal obligation to clean up these sites for the safety and prosperity of the communities in those areas…therefore, these costs are a current cost of doing business."[4] Liability and the need to remediate (or "clean up") MGP contamination does not stop at an arbitrary geographic border.

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[1] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No.12-1865-GA-AIR, *et al.*
[2] Gas Rate Case, Opinion and Order (November 13, 2013).
[3] Staff Report (September 28, 2018).
[4] Gas Rate Case, Opinion and Order (November 13, 2013), p. 59.

Moreover, Staff's methodology for apportioning remediation expenses between parcels of property is unsupportable and ignores the fact that the Ohio Supreme Court has already agreed with the Commission's determination that "remediation costs [are] a necessary cost of doing business as a public entity in response to federal law, CERCLA, that imposes liability on Duke Energy Ohio and its predecessors for the remediation impacts at the East End and West End sites."[5] Duke Energy Ohio's liability and obligation to remediate contamination from MGP byproducts and residuals is not tied to any specific property boundaries, but rather, is tied to the requirements of applicable federal and state laws that impose liability for remediation of the MGP contamination, notwithstanding its geographic location. Neither federal nor state law exempts MGP contamination from remediation based upon property boundaries, nor by what would be considered "used and useful" for purposes of utility rate-making. As the Commission noted in its Opinion and Order:

> 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.[6]

Because the Company is legally obligated to remediate the impacts associated with the former MGP operations, the Commission held:

> 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. 4905.15(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. Therefore, it is not necessary for the Commission to determine if the MGP sites would be considered used and useful under R.C. 4909.15.[7]

[5] Gas Rate Case, Opinion and Order, p. 59; *In re Application of Duke Energy Ohio, Inc.*, 2017-Ohio-5536.
[6] Gas Rate Case, Opinion and Order, p. 54 (emphasis added).
[7] Gas Rate Case, Opinion and Order, p. 54 (emphasis added).

The Ohio Supreme Court agrees, and has affirmed the Company's ability to recover its remediation expense as a cost of providing utility service and that the statutory obligation to remediate distinguishes the situation from other cases where costs were considered discretionary.

> In short, because Duke is seeking to recover costs—and not its capital investment in the MGP property and facilities—the commission correctly refused to apply the used-and-useful standard under R.C. 4909.15(A)(1);[8]
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> Specifically, the commission stated that Duke, unlike the utility in the *Ohio Edison* cases that sought recovery of discretionary maintenance costs, is under a statutory mandate to remediate the contamination stemming from the production of manufactured gas on the MGP sites.[9]

Despite the Commission's unambiguous ruling (and the Court's affirmation) that it is the statutory mandate to remediate that results in a cost of providing utility service, Staff now seeks to restrict the recovery of remediation costs by interpreting the Commission's Order as limiting recovery of costs for remediation to only locations within the boundaries of sites that were formerly "used and useful" in providing utility service by way of MGP operations.[10] Staff's notion that geography remains a condition of recovery necessarily means that Staff continues to believe that some form of the "used and useful" standard applies. Although the Commission determined and the Ohio Supreme Court affirmed that a test of "used and useful" was not applicable when finding that MGP remediation costs were recoverable, it is worth noting that the material present at all sites came from former MGP operations that <u>were used</u> to provide service to its customers. Duke Energy Ohio has liability under state and federal law for MGP contaminants no matter where the material has physically migrated. All remediation of the MGP contamination is thus a cost of providing utility service and should be recoverable, as the Commission and the Ohio Supreme Court have already determined.

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[8] *In re Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2017-Ohio-5536, p. 8.
[9] *In re Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2017-Ohio-5536, p. 10.
[10] Staff Report, p. 3.

The Commission should not adopt the recommendations of the Staff Report in these proceedings. Rather, the Commission should continue to recognize the strong public policy in encouraging remediation of these sites, "for the safety and prosperity of the communities," and that the need to perform any and all remediation stems from the provision of service using the East End and West End facilities to serve customers.

II. HISTORY OF THESE PROCEEDINGS

In 2012, Duke Energy Ohio submitted its Gas Rate Case application seeking an increase in rates for providing natural gas service to customers in southwest Ohio.[11] That case was settled by a unanimous stipulation that resolved all of the rate-related elements of the Company's application with one exception. Specifically, the parties did not reach agreement on Duke Energy Ohio's ability to recover expenses incurred as a result of environmental remediation of impacts from former MGP operations at sites owned and operated by the Company and its predecessors in name.

An evidentiary hearing was held with regard to that one remaining issue. The Staff and other intervenors argued that the Company should be permitted to recover only remediation costs associated with facilities that were tied to property that was considered to be "used and useful" as Staff deemed appropriate under R.C.4909.15.[12] Indeed Staff's analysis focused on the presence of current utility equipment and infrastructure on the two Duke Energy Ohio sites.[13] The Commission ultimately and appropriately rejected this argument and approved the Company's recovery of the MGP remediation costs through a discrete cost recovery mechanism (Rider MGP). The Commission's Opinion and Order included authority for Duke Energy Ohio to continue to defer costs related to the MGP remediation, without any carrying charges, after

[11] Gas Rate Case, Application (July 9, 2012).
[12] Gas Rate Case, Opinion and Order, p. 28-29.
[13] *See, e.g.*, Gas Rate Case, Opinion and Order p. 40 (describing Staff's analysis of the West Parcel of the East End site as being mostly vacant and recommending disallowance of remediation expenses 50 feet beyond existing structures).

December 31, 2012, and to file annual updates to Rider MGP through separate applications to recover costs incurred during the previous year.[14] Several parties sought rehearing of the Commission's decision to authorize cost recovery of MGP remediation and eventually appealed the issue to the Ohio Supreme Court. As more fully explained below, the Ohio Supreme Court upheld the Commission's determination granting recovery of remediation costs as a present cost of providing utility service.

Beginning in 2014, and in each subsequent year through 2018, Duke Energy Ohio submitted annual filings to adjust its Rider MGP to recover MGP remediation expenses for the prior calendar year. Moreover, as the first case had not been acted upon, the Company has also, each year thereafter requested that the pending cases be consolidated. The cases have been largely dormant since 2014. Because the Commission denied Duke Energy Ohio's request to accrue carrying costs on these deferrals, the delay in addressing these applications has itself, harmed the Company due to the loss in the time value of money. The Company's motion to consolidate was granted for the first time, this year.[15] Now, the Commission has consolidated these five proceedings, ten individual cases, for evaluation.[16]

On September 28, 2018, Staff issued a report on the Company's remediation efforts over the last five years (Staff Report).[17] In its Staff Report, Staff continues to associate, inappropriately, MGP remediation costs with fictitious parcel boundaries used for planning and sequencing remediation activities on property owned by the Company and has recommended a significant disallowance of remediation costs that were incurred to address Duke Energy Ohio's liability under federal and state environmental laws. Staff has inappropriately apportioned a significant amount of remediation expense already incurred associated with property that Staff

[14] *Id.*, p. 71-72.
[15] Entry, granting motion to consolidate (June 28, 2018).
[16] *Id.*
[17] *See* Staff Report, September 28, 2018.

incorrectly maintains is not "used" to provide utility service. Both Staff's allocation analysis and basis for disallowance of costs are flawed and are inconsistent with the Commission's 2013 Opinion and Order and the decision of the Ohio Supreme Court.

III. THE COMMISSION AND THE OHIO SUPREME COURT AUTHORIZED DUKE ENERGY OHIO TO RECOVER COSTS INCURRED TO REMEDIATE ITS LIABILITY UNDER FEDERAL AND STATE ENVIRONMENTAL LAWS

A. Duke Energy Ohio's Authorization to Recover Remediation Costs Required Under Federal and State Laws Results from the Provision of Utility Service, Is Not Limited to Specific Property, and is a Cost of Providing Utility Service.

Whether the Company's recovery of remediation expenses should be limited to property that is used and useful in the provision of utility service was the focus of the 2012 Gas Rate Case and the Commission rejected that condition. After a lengthy hearing, in 2013, the Commission rightfully also discarded the "used and useful" limitation argument then maintained by Staff and other intervening parties, and correctly concluded that Duke Energy Ohio is under a statutory mandate (*i.e.*, is legally required) to remediate the contamination associated with the former MGP operations at both its sites and that the remediation was a current cost of providing utility service. The Commission's analysis and reasoning is telling:

> 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 find 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. Therefore, it is

not necessary for the Commission to determine if the MGP sites would be considered used and useful under R.C. 4909.15.[18]

The Commission rightfully determined that the Company should be allowed to recover its remediation costs as a cost of rendering utility service. In doing so, the Commission consciously applied R.C. 4909.15(A)(4) to the question of whether MGP remediation costs were recoverable and concluded that remediation was a cost to the utility of rendering the public utility service for the test period. The Commission held that R.C. 4909.15(A)(4) "...is the section of the Ohio Revised Code that is relevant to [its] determination of whether Duke is permitted to recovery the MGP investigation and remediation costs through Rider MGP in these cases."[19] Nothing in R.C. 4909.15(A)(4) suggests that a utility can only recover costs incurred on utility property or on utility property that is used and useful. The Commission further supported its finding by clarifying, "[n]ot 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 an in order to maintain the usefulness of the properties; therefore, <u>these costs are a current cost of doing business.</u>"[20]

While the Commission's Opinion and Order did include some limitations, they were unrelated to the physical presence of MGP residuals on property. Rather, the Commission limited the time within which the Company could defer and recover its ongoing remediation costs, absent exigent circumstances.[21] The Commission also disallowed recovery of $2,331,580, representing the amount over and above the fair market value of the land paid by Duke Energy Ohio, to purchase a parcel of property located to the west of the West Parcel at the East End site

[18] *Id.*, p. 54 (*emphasis added*).
[19] *Id.*, p. 58.
[20] Gas Rate Case, Opinion and Order, p. 59 (*emphasis added*).
[21] Gas Rate Case, Opinion and Order, p. 72.

(Purchased Parcel)[22] as this amount "relates to the price Duke paid to purchase the property from a third party and not to the statutorily mandated remediation efforts."[23]

In its Opinion and Order, the Commission references Staff's incorrect description of the Purchased Parcel as a residential neighborhood that was never part of the East End MGP site.[24] Staff's description of the Purchased Parcel as a residential neighborhood in the 2012 Gas Rate Case was inaccurate insofar as the purchase in fact included the reacquisition of some land that was part of the original East End site.[25] This Purchased Parcel is what Staff now incorrectly and improperly identifies and refers to as the "Area West of the West Parcel" or "WOW" in its Staff Report.[26]

As more fully described below, the Commission's Opinion and Order did not prohibit recovery of remediation costs associated with the former MGP operations at the Purchased Parcel, only the premium paid above what was considered to be the fair market value was disallowed by the Commission in the 2012 Gas Rate Case.

B. The Ohio Supreme Court Confirmed that Remediation Costs related to Utility Service are Recoverable.

The Commission's Opinion and Order was appealed to the Ohio Supreme Court by The Office of the Ohio Consumers' Counsel, The Kroger Corporation, Ohio Manufacturers' Association and Ohio Partners for Affordable Energy.[27] These appellants argued that the MGP remediation expenses were not recoverable under R.C. 4909.15(A), unless they relate to property that is presently used and useful in providing public utility service to customers. In 2017, the

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[22] Gas Rate Case, Opinion and Order, p. 73.
[23] Gas Rate Case, Opinion and Order, p. 60.
[24] Gas Rate Case, Opinion and Order, p. 42.
[25] *See* Attachment, historical drawings of the East End MGP site. The Purchased Parcel included land to the east (and west) of Munson Street, that housed MGP facilities and was part of the original East End MGP site. Munson Street established the western border of the East End MGP site. The area at issue to the east of Munson Street is where the remediation work has occurred that Staff is recommending be excluded from recovery in the "Area West of West Parcel."
[26] Staff Report, p. 59.
[27] *In re Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2017-Ohio-5536.

Ohio Supreme Court firmly supported the Commission's decision. The Court pointed out that the appellants' interpretations of R.C.4909.15(A) "runs aground on the plain language of the statute..."[28]

The Court found that R.C. 4909.15(A) "requires the commission to make a series of determinations when fixing rates."[29] One of those determinations, under R.C. 4909.15(A)(4), is whether or not the costs are incurred by the utility in "rendering public utility service for the test period."[30] The Court found that operating expenses are recoverable if incurred in rendering utility service under R.C. 4909.15(A)(4) and are prudent.[31] Whether the property upon which the service is, or was provided, is itself used (and useful, presently or formerly) is not part of the equation under the relevant statute.[32] The Court held that R.C. 4909.15(A)(4) contains neither the phrase "used and useful" nor any other language that ties recoverable costs to property that is used and useful.[33] In fact, there is no mention of any tie to property whatsoever in R.C. 4909.15(A)(4). The Court determined that under Ohio's ratemaking statutes, the only statutory restrictions for recovery of operating expenses are if they were incurred in rendering service during the test period and are prudent.[34]

Thus, the Court considered and unambiguously rejected a requirement that the Company's remediation costs related to specific property and if such property is used and useful in the rate base. Moreover, as the Court acknowledged, "[a]s the current owner or operator of facilities from which there is a release or threatened release of hazardous material, Duke is liable for remediation of the MGP sites under the Comprehensive Environmental Response,

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[28] *Id.*, p. 8.
[29] *Id.*, p. 6.
[30] *Id.*, p. 7.
[31] *Id.*, p. 8.
[32] *Id.* (the Court reasoned that Duke was seeking to recover its costs- and not its capital investment in the MGP property and facilities).
[33] *Id.*, p. 8.
[34] *Id.*

Compensation and Liability Act (CERCLA)."[35] The Company's liability is strict[36] and not limited to contamination on only its owned property. Furthermore, the Court confirmed that such legally mandated costs incurred in providing service are recoverable.[37] Because MGP remediation itself is a cost of providing utility service mandated under the law, all such remediation costs should be recoverable irrespective of historic property ownership or whether an actual piece of equipment once was set upon the land where MGP residual is discovered.

Nonetheless, Staff's position that Duke Energy Ohio should not recover costs associated with certain areas of the property that it believes was not part of the former MGP operations is also in error as all of the MGP remediation costs at issue in these proceedings that the Company has incurred, is on property that is or was owned by the Company and was used as part of the provision of the utility's MGP service long ago.

IV. STAFF'S RECOMMENDED DISALLOWANCE OF REMEDIATION COSTS IS BASED UPON A MISUNDERSTANDING OF THE EAST END SITE BOUNDARIES.

A. Staff's Assumption that the Purchased Parcel Establishes a Boundary for the East End Site that was Used in Providing MGP Service is Incorrect.

As an initial matter, it is important to understand that the designations given to areas at the East End and West End sites were solely for purposes of sequencing remediation work as is permitted under Ohio's Voluntary Action Program (VAP). These designations were never used for identifying actual real estate parcel boundaries or facility operations, and are not based upon the actual boundaries or actual parcels of property under Ohio real estate law. Put another way, the designations of the East End site as including the "East Parcel," the "Middle Parcel," the "West Parcel," and the "Area West of the West Parcel" were simply the Company's internal nomenclature to identify and reference areas that were to be investigated and remediated in a

[35] *Id.*, p. 15; *citing* 42 U.S.C. 9601, *et seq.*
[36] *Id.*
[37] *Id.*

prudently phased and iterative work plan to remediate the entire East End site.[38] The parcel designations are wholly unrelated to the physical presence of current natural gas facilities or equipment or historic MGP facilities and equipment.

It is also important to understand that the terms "Purchased Parcel" and the "Area West of the West Parcel" or "WOW" are not synonymous. Staff appears to conflate the "Purchased Parcel" and the "Area West of the West Parcel" in its Staff Comments and refers to both generically as "WOW." The "Area West of the West Parcel", which is being remediated by Duke Energy Ohio, references only a small portion of the approximately 9-acre "Purchased Parcel" that was acquired from DCI Properties, Inc. (DCI) in 2011. Staff fails to acknowledge in its Staff Report, and in fact, confuses still today, that a significant portion of the Area West of the West Parcel was part of the East End site when it was operating as an MGP. This area was acquired by Duke Energy Ohio's predecessors at the same time that the Company acquired the northern portion of the West Parcel. Staff does not contend that the Commission's 2013 Opinion and Order prevents Duke Energy Ohio from recovering any costs associated with remediating the "West Parcel" at the East End site. Both the northern portion of the West Parcel and the southeastern portion of the Area West of the West Parcel were part of the East End site during MGP operations and the only difference between these two areas is that one was sold to DCI in 2006 and reacquired in 2011.[39] Thus, there is no reasonable basis to deny recovery of remediation costs associated with part of the Area West of the West Parcel and permit recovery of remediation costs associated with the entirety of the West Parcel. The figure in the Attachment depicts an aerial view of this same area today that overlays the "Purchased Parcel."[40]

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[38] Gas Rate Case, Opinion and Order, p. 36 (describing the East End site was separated into three smaller areas as well as one purchased parcel and the priority of the remediation efforts at those sites).
[39] Deed from the Cincinnati Street Railway Company to the Cincinnati Gas & Electric Company, recorded *circa* 1928, in Deed Book 1473, Page 384, and Deed to Duke Energy Ohio, Inc. recorded *circa* 2011, in Deed Book 11730, Page 1072.
[40] Attachment.

As depicted by the highlighted area, a significant portion of the Area West of the West Parcel, including the specific area within the Area West of the West Parcel where remediation work has occurred (labeled as "Phase 2 Area"), was actually formerly owned by Duke Energy Ohio (and predecessor companies) and was part of the East End site since 1928, during the site's operation as an MGP, until it was sold in 2006.[41] Most, if not all, of this remediation work that Staff is recommending be disallowed, was in fact in either the West Parcel or the legacy MGP portion of the Area West of the West Parcel.[42]

B. The Commission's Opinion and Order Did Not Disallow Recovery of Remediation Expenses at the Purchased Parcel or the Area West of the West Parcel.

The sole issue related to the Purchased Parcel "issue" decided by the Commission in the Company's 2012 Gas Rate Case was limited. In its 2012 Rate Case Application, the Company had requested recovery, as a cost of remediation, a portion of the purchase price for the Purchased Parcel. That portion, approximately $2,331,580, accounted for the difference between the price the Company paid to resolve a dispute with DCI to purchase the entire Purchased Parcel (which included a re-purchase of the legacy MGP portions of the East End site) from DCI and the fair market value based on an appraisal conducted for Duke Energy Ohio. The purchase price had been negotiated as part of a confidential settlement resolving various claims asserted by DCI. Importantly, the Company did not seek recovery of the entire purchase price of the Purchased Parcel. The Commission's Opinion and Order only addressed Duke Energy Ohio's request for recovery of the additional amount to reacquire the parcels impacted by the presence of MGP residuals and to settle claims asserted by DCI. The Commission did not opine on the total price paid to reacquire the legacy MGP portion of the East End site, nor did it find that the Company somehow acted imprudently in reacquiring this legacy MGP portion through the

[41] Attachment (highlighted portion).
[42] *Id.*

Purchased Parcel in order to fulfill its remediation obligation under CERCLA. As it relates to cost recovery for the Purchased Parcel, the Commission's Opinion and Order only addressed the additional amount to reacquire the property.

Although the Commission noted that there was insufficient evidence to differentiate between the MGP and non-MGP portions of the property in its Opinion and Order and acknowledged that some of the Purchased Parcel was part of the original East End site, such geography was not the focus of the evidentiary hearing. Nor should it be now as it is the statutory requirement under federal and state law directing remediation that necessitates it as a cost of providing utility service. Nonetheless, there exists incontrovertible evidence that demonstrates that most, if not all, of the remediation work performed to date in the area Staff describes as "WOW" is actually within the legacy portion of the East End site that is a part of the Area West of the West Parcel. This legacy portion was owned by the Company when the East End site operated as an MGP and all of the remediation work that has occurred is directly attributable to the provision of utility service.[43] Again, notwithstanding the fact that remediation itself is recoverable as a cost of providing service, as is clearly evidenced in the Attachment, the Phase 2 Area where Staff is now recommending disallowance of costs actually housed former MGP equipment, including an Iron Tar Tank.[44]

Although the Commission denied recovery of the additional amount paid to reacquire the property because "it relates to the price Duke [Energy Ohio] paid to purchase the property from a third-party and not to the statutorily mandated remediation efforts," the Commission clearly recognized the distinction between the premium paid to acquire the property and the expense that would be required to remediate it.[45] Actual remediation costs for the Purchased Parcel were not at issue in the case because the Company had not yet commenced the statutorily mandated

[43] Attachment.
[44] *Id.*
[45] Gas Rate Case, Opinion and Order, p. 60 (*emphasis added*).

remediation work in the Area West of the West Parcel. Indeed, the Company testified and the Commission's Opinion and Order confirms that at the time of the 2012 Rate Case, sampling was still underway at both the Middle Parcel and the Area West of the West Parcel and a decision regarding the extent of remedial actions, if any, had not been made.[46] No remediation work was at the time, or is currently, planned for the remainder of the Purchased Parcel, which had never been part of the East End site and is apparently is not impacted by the former MGP operations..

Remediation costs for this area were not an issue in the hearing as Duke Energy Ohio had neither performed nor sought remediation cost recovery for work in the "Area West of the West Parcel" (or in the Ohio River) at that time.[47] The focus of the opposing parties' litigation positions in the 2012 Gas Rate Case was the applicability of the used and useful standard under R.C. 4905.15(A)(1) and the existence of the Company's current natural gas equipment and facilities, not that of the past. As such, the Commission did not, and could not, address either the cost recovery issues or prudency of costs for any remediation of MGP residuals at the Area West of the West Parcel as part of the Company's 2012 Rate Case. Had the Commission done so at the time, it would have amounted to an advisory opinion, which the Commission cannot provide under the law.[48] As such, these consolidated proceedings, present the first opportunity for the Commission to hear and consider the remediation costs at the Area West of the West Parcel. Moreover, this proceeding also represents the first time that the Company has been made aware of Staff's confusion regarding the Company's remediation of the portion of the legacy East End MGP site that was reacquired as part of the Purchased Parcel. Finally, this proceeding also brings to light Staff's irreconcilable position to limit remediation cost recovery to work performed inside the original MGP site borders based upon its perceived threshold test of land that was once

[46] Gas Rate Case, Opinion and Order, p. 37.
[47] Gas Rate Case, Opinion and Order, p. 37.
[48] *White Consol. Indus. v. Nichols*, 15 Ohio St.3d 7, 471 N.E.2d 1375 (1984); *In the Matter of the Complaint of WorldCom, Inc., AT&T Corp., and Time Warner Telecom of Ohio, L.P., Complainants, v. City of Dayton*, Case No. 03-324-AU-PWC, Opinion and Order (August 19, 2003); 2003 Ohio PUC LEXIS 368.

used in the historic provision of utility service, and Staff's subsequent disregard of the actual East End site's original boundaries.

Again, it bears repeating that the Commission unambiguously clarified in its Opinion and Order approving remediation costs that there was no need to determine whether the property needing remediation met the standard under R.C. 4905.15(A)(1), because the cost of remediating these sites was a legally mandated cost of doing business and met the criteria under R.C. 4905.15(A)(4). Staff's recommendation persists in tying the recoverability of remediation expense to whether the affected property was used in the provision of service. As discussed above, the Staff Report refers to the entire Purchased Parcel, not just the Area West of the West Parcel (where remediation activities have been conducted) as the "WOW" parcel. The Area West of the West Parcel includes property that was part of the legacy East End site that was once part of the MGP operations. This legacy portion contains contamination directly from the existence and provision of that historic MGP service. These remediation costs are and will continue to be costs of utility service appropriate for recovery as previously determined by the Ohio Supreme Court.

While R.C. 4905.14(A)(4) does not require Duke Energy Ohio to demonstrate that remediation costs incurred are tied to specific property used in the provision of utility service, the Area West of the West Parcel was indeed part of the East End site during its operation as an MGP. However, the issue before the Commission is not whether certain areas of the East End site were either currently or formerly used and useful, but whether the remediation expenses were incurred in the provision of utility service. The Ohio Supreme Court has confirmed that MGP remediation is a cost incurred in providing utility service and recoverable under R.C. 4905.14(A)(4).

While the Company maintains that all MGP remediation work at the East End and West End sites are directly related to the provision of MGP utility service and constitutes a current cost of providing service irrespective of geographic proximity to legacy MGP facilities, nonetheless, the work that has occurred in the Area West of the West Parcel within the Purchased Parcel was within areas that were owned by the Company and were part of the East End site during MGP operations. Recovery of these remediation costs should be permitted as a cost of utility service as previously held by the Commission and affirmed by the Ohio Supreme Court.

C. Staff's Calculation and Justification to Exclude Remediation Costs Beyond the East End and West End Sites are Flawed.

1. The MGP tar-like residuals are mobile and State and Federal Law require Duke Energy Ohio to remediate such residuals irrespective of their physical location.

Staff attempts to justify its position through an accounting allocation that Staff claims was designed to ensure that ratepayers were not charged for (1) costs associated with remediation of the parcel of land adjacent to the East End site that Staff claims the Commission denied for recovery and (2) costs associated with investigation and remediation of soil, water or any other tract of land located outside the original footprint of the East End site.[49] Staff also recommends a disallowance for work Staff "observed" taking place in the Ohio River. With respect to the West End site, Staff recommends disallowance of costs associated with relocation of an electric substation and investigation and remediation work that was performed outside of the West End site boundaries. Staff erroneously quotes the Commission's Opinion and Order as requiring that costs must relate only to the East End and West End site "footprints." No such word is found at the cited page. Rather the Commission explicitly found:

> [A]ny prudently incurred MGP investigation and remediation costs related to the East and West End sites, less costs associated with the purchased parcel, the costs

[49] *Id.*, p. 3.

> incurred in 2008 on the West End site and all carrying costs, should in accordance with R.C. 49.0.14(A)(4), be considered cost incurred by Duke for rendering utility service and be treated as expenses incurred during the test year.[50]

The Commission's decision clearly authorized recovery of prudently incurred remediation costs relating to East End and West End sites. The reference to cost recovery related to these sites is far more general and encompassing than the use of the term "footprint." Staff's limitation and insertion of the "footprint" requirement is also inconsistent with how liability is imposed under environmental laws. The sites include all areas that comprised the property at East End and West End at the time the utility service was provided and any other areas where MGP contaminants have migrated necessitating investigation and remediation under applicable environmental laws.

As previously discussed, Staff misconstrues the Commission's finding that Duke Energy Ohio failed to substantiate that the Purchased Parcel "was, or ever had been, used for the provision of manufactured gas or utility service for the customers of Duke or its predecessors" as a bright-line rule that the Company cannot recover costs to remediate areas that are not within the footprint of the former MGP operations. Such an interpretation expressly contradicts federal and state environmental laws that impose liability upon Duke Energy Ohio for impacts from its former MGP operations (whether on the original MGP footprint or having migrated from that area)[51] and, more importantly, it also contradicts the unambiguous findings of the Commission and the Ohio Supreme Court that Duke Energy Ohio may recover costs related to the former MGP operations to address its liabilities under federal and state environmental laws as current costs of doing business.

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[50] Gas Rate Case, Opinion and Order, p. 60 (*emphasis added*).

[51] The definition of "Facility" as defined by CERCLA includes any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or has otherwise come to be located. 40 C.F.R. 300.5. *See, e.g., Kalamazoo River Study Group v. Rockwell Intl. Corp., et. al*, 171 F.3d 1965, 1068 (6th Cir. 1999) (CERCLA liability exists if plaintiff can establish a causal connection between a defendant's release of hazardous substances at one site and response costs incurred in cleaning them up at the second site).

As explained by Duke Energy Ohio witness Shawn Fiore in the 2012 Gas Rate Case, there is significant free product, which is defined as a separate liquid hydrocarbon phase that has a measurable thickness of greater than one one-hundredth of a foot, at the East and West End sites, in the form of liquid mobile coal tar.[52] As the Company is liable for these impacts, whether they are on-site or have migrated off-site, requiring that the Company's remediation costs to be tied to a specific location of historic MGP equipment cannot be reconciled with the obligation to remediate under the law and thus is contrary to the Commission's own holding regarding recovery of costs related to the East End and West End sites.

Staff describes the purpose of its review of remediation costs, in part, as ensuring ratepayers were not charged for "costs associated with investigation and remediation of soil, water or any other tracts of land *located outside the original footprint of the East End site.*"[53] Clearly, in performing its review, Staff has not considered or examined the actual original footprint of the East End site. As described above, the remediation that has occurred at the legacy MGP portion of the Purchased Parcel, referred to as WOW by Staff was within the original East End site footprint. Additionally, Staff states that it "observed various remediation activities taking place in the Ohio River," which it describes as "outside the East End boundaries." As discussed below, Staff's description and characterization of its River "observation" is also wrong. As previously explained, there is no legal basis to preclude Duke Energy Ohio from recovering its costs to investigate and remediate any MGP impacts, regardless of location, under either federal and state environmental laws. Indeed, these laws impose the obligation to remediate the contamination and are not limited by geographical boundaries.

Although Staff's River "observation" is not relevant to the recoverability of the costs, nonetheless, the "observed" investigation activities in the Ohio River is, nonetheless, being

[52] Gas Rate Case, Opinion and Order, p. 33.
[53] Staff Report, p. 4.

performed largely within the "original footprint of the East End site." Again Staff's observation underscores its lack of understanding regarding the East End MGP operations and original site boundaries. Due to the construction of the Markland Dam in the 1960s, the elevation of the Ohio River today is much higher today than it was during the operation of the MGPs at the East End and West End sites. As such, the original southern boundaries of the East End and West End sites were located more than two hundred feet further into the current Ohio River. As shown in the Attachment, the original East End site's southern boundary is not the same as it is today. Indeed, the original boundaries of the East End site actually extended much farther to the south and parts of that original site are today, under the waterline. The Company's work within the Ohio River, as required under applicable law, is to evaluate impacts associated with the former MGP operations at the East End site to the Ohio River. Staff's recommendation that any river remediation be disallowed is irreconcilable with the Commission's Opinion and Order, the Court's confirmation thereof, and Staff's own proclaimed goal in issuing its Staff Report. The Commission should disregard Staff's recommendation altogether.

2. **Staff's calculation of an $11,867,900 disallowance of remediation cost recovery is arbitrary, unreasonable, punitive, and unsupportable by both facts and the law.**

Staff claims to propose apportionment of costs among discrete portions of the Company's property over the past five years. However, Staff's approach does not assign any specific costs to the associated parcel, but instead imposes an across-the-board allocation to the Area West of the West Parcel of 50% of the costs incurred in 2013 to 2016, and 70% of the costs incurred in 2017. As a result, Staff arbitrarily recommends a disallowance of over $11 million.

While the Company did explain in multiple discovery requests that it could not differentiate costs associated with certain remediation activities among the various "parcels" at each site, such is not a basis to deny recovery. All costs are remediation costs. As an example,

the costs associated with site-wide groundwater monitoring cannot easily be divided between the "parcels" as the work is in connection with remediating the entire site. Nonetheless, it is indisputable that groundwater monitoring is absolutely a necessary and prudently incurred cost of remediation. It is obvious that Staff's approach grossly overestimates the costs that could theoretically be associated with the Area West of the West Parcel. The Area West of the West Parcel was remediated during the same mobilization as the Middle Parcel; however, these costs should not simply be split in half. The costs of remediating the Middle Parcel are significantly higher than the costs of remediating the Area West of the West Parcel due to the larger area for remediation, the higher volume of materials that are being disposed, as well as having to account for complexities due to critical subsurface infrastructure in that area. Duke Energy Ohio has reviewed the invoices associated with this project and estimates that the actual amount of remediation that has occurred in the Area West of the West Parcel, which again, involved a significantly smaller area than the area remediated in the Middle Parcel and was part of the original East End MGP operations, is significantly less than the $11 million arbitrarily allocated by Staff.

D. Insurance Proceeds Must Be Allocated At the Conclusion of the Riders.

The Staff Report states that the Commission ordered the Company to pursue every effort to collect remediation costs available under its insurance policies. Staff recommends that a collaborative process be established between Staff and the Company to account for recovered dollars, cost to achieve the proceeds and the return of those dollars to ratepayers.[54] Duke Energy Ohio has pursued, and will continue to pursue, recovery of such proceeds. Duke Energy Ohio has entered into settlement agreements with several insurers and has recovered settlement funds from those insurers to resolve the insurers' obligation under various policies to provide insurance

[54] Staff Report, p. 6.

coverage for claims related to pollution, including the presence of MGP residuals at the sites. It must be pointed out that the Commission itself recognized that there is a cost to recover these proceeds and that such cost will be reflected in the final allocation of any proceeds achieved. Because that process is not yet completed, it remains premature to begin allocating any such proceeds at this point.

It must be recognized that the insurers' obligation to provide coverage is not limited in any way to the remediation of a specific parcel of property at either site. Nor are the proceeds limited in time in the same way that the Commission's Opinion limited recovery. If the Commission adopts Staff's interpretation of the Opinion and Order and apportions remediation cost responsibility between the Company and customers, or otherwise limits the Company's recovery of costs, including as it relates to timing of remediation, so too must the insurance proceeds be appropriately apportioned. The Commission and the Ohio Supreme Court have already determined that Duke Energy Ohio was statutorily obligated to address contamination for the former MGPs. These consolidated proceedings present the first time that Staff has taken the position that any MGP remediation expense should be disallowed and Staff's recommended disallowance is solely related to Staff's false sense of geographic restriction. To the extent the Commission apportions any amount of the remediation expense incurred thus far at either the East End or West End sites as unrelated to utility service, then a proportional amount of the insurance proceeds must also be apportioned between the Company and its customers.

Additionally, although the Commission has established a time limitation on the Company's deferral authority with an ability to seek an extension under exigent circumstances, the insurance claim established no such end date. Therefore, the Commission cannot apportion any insurance proceeds until all remediation is complete. These proceeds are to settle all claims for all MGP contamination. The Commission's Opinion and Order in the 2012 Gas Distribution

Rate Case notes that Staff's recommendation in that case was that "proceeds paid by insurers for MGP investigation and remediation should be split between shareholders and ratepayers, commensurate with the proportion of MGP costs paid by ratepayers, until customers are fully reimbursed."[55]

Even OCC recognized the necessity to properly apportion the insurance proceeds. OCC's witness in the 2012 Gas Distribution Rate Case recommended that insurance proceeds be addressed "in a future proceeding in which its remediation costs are reconciled with its recoveries."[56] In so arguing, OCC explicitly recognized that apportionment could not occur until remediation was complete. Indeed, the Commission's final order stated that to the extent the proceeds collected from insurers and/or third parties exceed the amount recoverable from rate payers, Duke should be permitted to retain such amount."[57] Clearly, the need for apportionment recognized and was left to be decided in a future proceeding. Such apportionment cannot occur until all remediation is completed and such an amount of apportionment cannot be established until all proceeds, net of costs are known. For all of these reasons, the apportionment of MGP proceeds in this proceeding is premature.

IV. COMMENTS OF THE OFFICE OF OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel (OCC) first recommends that Staff (or a third party) perform an audit on the costs submitted to ensure that such costs are prudently incurred. Staff has performed such an audit so OCC's request has already been met.

The OCC next argues that the Commission should ensure that customers receive the benefits of all insurance proceeds related to remediation of the MGP contamination. While the Company agrees with Staff that it is reasonable to provide status updates with respect to the Company's efforts to obtain recovery from third parties and insurance companies, OCC's

[55] Gas Rate Case, Opinion and Order, p. 66.
[56] Gas Rate Case, Opinion and Order, p. 66.
[57] *Id.*, p. 67.

demand that any proceeds be credited to the rider immediately is enormously shortsighted. The Commission correctly allowed the Company to net the proceeds to include costs incurred in obtaining the insurance recovery. Although Duke Energy Ohio has settled with a number of its insurance carriers, litigation is still underway, therefore the final cost of obtaining the insurance recovery is not known. Thus, crediting the rider immediately is impractical and would lead to complications with respect to future rider calculations. OCC's recommendation is improper for the reasons noted above, namely that remediation is not complete and that the proceeds were for settlement of all claims for all MGP remediation. Accordingly, OCC's recommendation is premature, impractical and uninformed.

The OCC likewise recommends to the Commission that it required Duke Energy Ohio to describe all efforts it has taken to date to identify other potentially responsible parties, contact such parties and attempt to recover funds from such parties. OCC can easily obtain non-privileged information that is relevant to these matters through discovery.

OCC next argues that the Commission should order Duke Energy Ohio to complete all remediation efforts by the end of 2019. As OCC itself notes, the Commission has created "remediation timelines" for both the East End and West End sites. OCC now recommends that the Commission engage an auditor to "focus on whether Duke is properly pacing its remediation efforts to complete them by 2019."[58] Such comments demonstrate OCC's complete lack of understanding with respect to environmental investigation and remediation and the manner in which such processes occur. The Company's remediation work is done in a manner consistent with the VAP process and is overseen by a VAP-certified professional who is charged with verifying that properties are investigated and cleaned up following the procedures and to the levels required by the VAP rules. In addition to these Ohio Environmental Protection Agency

[58] OCC Comments, p.6.

(OEPA) compliance concerns, the Company is constrained by the need to conduct environmental remediation on property that also houses utility operations that are currently active. At times, environmental remediation must be paused due to other operational needs of the Company, including its need to provide safe and reliable service to customers, or for external forces that impact the ability to perform remediation activities. Finally, and of the most importance, the Company conducts this remediation consistent with the health and safety of Duke Energy Ohio's employees and the public. The Company's work is adequately overseen and supervised by the OEPA certified professional and a third-party audit is unnecessary, costly and redundant.

Finally, OCC incorrectly states that in the 2012 case, "the Consumers' Counsel expert identified significant Duke expenditures that were not prudent and should not be charged to consumers for cleanup of 19th century manufactured gas plants." OCC argues that the parties should have an opportunity for testimony and a hearing in these cases.

Any expenditure that "the Consumers' Counsel expert" may have identified in 2013 is now irrelevant. Recovery of costs was addressed and resolved as part of the 2012 Gas Rate Case. The Commission and the Ohio Supreme Court have affirmed the Company's ability to recover those costs for remediation. There is no need to reconsider such expenditures and such matters are subject to doctrines of res judicata and collateral estoppel. Again, the Commission should disregard OCC's comments.

V. CONCLUSION

For the reasons set forth above, the Company disagrees with the disallowance contained within Staff's Report and believes that such results are incorrectly reasoned, contrary to the Commission's previous Opinion and Order and contrary to the Opinion of the Ohio Supreme Court decision that affirmed the Commission's Opinion and Order in the Company's distribution gas rate proceeding. Staff's recommendation to limit the Company's remediation cost recovery is

based upon a misunderstanding of environmental laws, which impose liability upon Duke Energy Ohio for impacts caused by its former MGP operation, regardless of geography. Staff's recommendation is also based on its failure to understand that the remediation activities in the Area West of the West Parcel are in areas that were formerly part of the East End site during its operation as an MGP and contain impacts from MGP residuals which require remediation today. These remediation costs are and will continue to be costs of utility service appropriate for recovery as previously determined by the Ohio Supreme Court and should be recoverable.

Respectfully submitted,

Rocco O. D'Ascenzo
Deputy General Counsel
Elizabeth H. Watts (0031092)(counsel of record)
Associate General Counsel
139 E. Fourth Street, 1303-Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
Rocco.D'Ascenzo@duke-energy.com
Elizabeth.Watts@duke-energy.com
Attorneys for Duke Energy Ohio, Inc.


RIVERSIDE DRIVE (EASTERN AVENUE)
Riverside Drive (Eastern Avenue)
AREA WEST OF THE WEST PARCEL
ROADWAY EASEMENT
WEST PARCEL
MIDDLE PARCEL
EAST PARCEL
ST. ANDREWS STREET (VACATED)
PITTSBURG STREET (VACATED)
CORBIN STREET
CWW TUNNEL
PHASE 2 AREA
Gas Storage Cavern
OHIO
KENTUCKY
LEGEND
1891 SANBORN HISTORIC FEATURE
1904 SANBORN HISTORIC FEATURE
1917 SANBORN HISTORIC FEATURE
1950 SANBORN HISTORIC FEATURE
1963 FACILITY PLAN FEATURE
1981 SANBORN HISTORIC FEATURE
OHIO / KENTUCKY STATE LINE (APPROX. MEAN LOW WATER LINE PRIOR TO MARKLAND DAM)
DUKE UPLAND REMEDIATION PARCELS
REMEDIATION LIMITS
CG&E/DUKE PROPERTY LIMIT (1963)
NOTE
1. PROPERTY LIMITS FROM 1963 BASED ON CINCINNATI GAS & ELECTRIC COMPANY PLAN TITLED "LOCATION PLAN MAJOR FACILITIES DATED 25 MARCH 1963.
2. AERIAL IMAGE PROVIDED ELECTRONICALLY BY GOOGLE EARTH PRO AND DATED MAY 2017.
PRIVILEGED & CONFIDENTIAL PREPARED AT THE REQUEST OF LEGAL COUNSEL
0
150
300
SCALE IN FEET
HALEY ALDRICH
DUKE ENERGY OHIO, EAST END GAS WORKS
2801 RIVERSIDE DRIVE
CINCINNATI, OH
PROPERTY MAP
SCALE AS SHOWN
OCTOBER 2018
FIGURE 1

CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments was served on the persons stated below via electric transmission this 30th day of October 2018.

Elizabeth H. Watts
Elizabeth H. Watts
Associate General Counsel

SERVICE LIST

Thomas.McNamee@ohioattorneygeneral.gov

CMooney@ohiopartners.org

dboehm@bkllawfirm.com

mkurtz@bkllawfirm.com

jkylercohn@bkllawfirm.com

Christopher.Healey@occ.ohio.gov

Case No(s). 14-0375-GA-RDR, 14-0376-GA-ATA, 15-0452-GA-RDR, 15-0453-GA-ATA, 16-0542-GA-RD

Summary: Comments Comments of Duke Energy Ohio, Inc. electronically filed by Ms. Elizabeth H Watts on behalf of Duke Energy Ohio, Inc.