

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. 19-174-GA-RDR
)	

In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)	
)	Case No. 19-175-GA-ATA
)	

**DIRECT TESTIMONY OF
MICHAEL J. LYNCH
ON BEHALF OF
DUKE ENERGY OHIO, INC**

_____	Management policies, practices, and organization
_____	Operating income
_____	Rate Base
_____	Allocations
_____	Rate of return
_____	Rates and tariffs
<u> X </u>	Other: Insurance

March 29, 2019

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I. INTRODUCTION AND PURPOSE

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A. My name is Michael J. Lynch and my business address is K&L Gates LLP, K&L
3 Gates Center, 210 Sixth Avenue, Pittsburgh, Pennsylvania 15222.

4 **Q. WHAT IS YOUR OCCUPATION AND BY WHOM ARE YOU**
5 **EMPLOYED?**

6 A. I am an attorney licensed to practice in the Commonwealth of Pennsylvania, and
7 before the United States Supreme Court, the Third Circuit Court of Appeals and the
8 Federal District Court for the Western District of Pennsylvania. I am also currently
9 admitted *pro hac vice* in a number of jurisdictions across the country, including the
10 State of Ohio. I am a partner in the law firm of K&L Gates LLP.

11 **Q. PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND**
12 **PROFESSIONAL EXPERIENCE.**

13 A. I received an A.B. degree from Colgate University in 1976 and a Juris Doctorate
14 (J.D.) from the University of Virginia School of Law in 1981. I was hired in October
15 1981 as an associate by Kirkpatrick, Lockhart, Johnson & Hutchison, a predecessor
16 of K&L Gates LLP. I became a partner of the law firm in November 1989. I have
17 been a member of the law firm's litigation group since my early days as an
18 associate. Since 1991, the vast majority of my work has been in the insurance
19 coverage area. For the last 28 years, I have represented policyholder clients in their
20 efforts to obtain insurance coverage through litigation and negotiation, principally
21 for environmental cleanups and toxic tort liabilities. A significant portion of my
22 practice has been representing utilities in their efforts to obtain insurance recovery
23 for liabilities arising from environmental damage at and around former

1 manufactured gas plant sites. In this regard, I have represented utility clients in
2 Connecticut, Pennsylvania, Maryland, North Carolina, Ohio, Illinois, Arizona,
3 Oregon and Washington State seeking coverage for, collectively, over 100 MGP
4 sites.

5 **Q. ARE YOU FAMILIAR WITH DUKE ENERGY OHIO'S EFFORTS TO**
6 **OBTAIN INSURANCE COVERAGE FOR THE INVESTIGATION AND**
7 **REMEDICATION OF DUKE ENERGY OHIO'S EAST END**
8 **MANUFACTURED GAS PLANT SITE AND ITS WEST END**
9 **MANUFACTURED GAS PLANT SITE IN CINCINNATI, OHIO?**

10 A. Yes. My law firm, K&L Gates LLP, and I represented Duke Energy Ohio (also
11 referred to herein as the Company) in *Duke Energy Ohio, Inc. v. Associated Electric*
12 *& Gas Insurance Services Limited, et al* (No. A1604053) in the Court of Common
13 Pleas, Hamilton County, OH (the Coverage Action), the lawsuit that the Company
14 filed against its historical insurance carriers (Historical Insurers) to obtain coverage
15 for environmental investigation and remediation at the East End Site and the West
16 End Site in Cincinnati, OH (collectively, the MGP Sites).

17 **Q. PLEASE EXPLAIN WHAT YOU ARE REFERRING TO BY THE TERM**
18 **MGP SITES?**

19 A. I am referring to the properties owned by Duke Energy Ohio that are generally
20 referred to as the East End Site and the West End Site, which are respectively
21 located at 2801 Riverside Drive, Cincinnati, OH 45226 and at 646 West Mehring
22 Way. I am also referring to the groundwater beneath and around each of these
23 properties, any soil on nearby properties and any sediments in the Ohio River next

1 to or near these properties that have sustained environmental damage from
2 constituents that emanated from the gas manufacturing or other operations that
3 historically took place on these properties and that Duke Energy Ohio is
4 investigating and remediating.

5 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE PUBLIC**
6 **UTILITIES COMMISSION OF OHIO?**

7 A. No.

8 **Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY IN THESE**
9 **PROCEEDINGS?**

10 A. Through this testimony, I will provide information regarding the insurance policies
11 through which Duke Energy Ohio obtained coverage for the investigation and
12 remediation of the MGP Sites, including in particular the scope of coverage
13 provided by those policies, and information regarding settlement agreements that
14 Duke Energy Ohio reached with its Historical Insurers regarding the MGP Sites,
15 including in particular the scope of those agreements.

16 **II. DISCUSSION**

17 **Q. CAN YOU GENERALLY DESCRIBE THE INSURANCE POLICIES**
18 **FROM WHICH DUKE ENERGY OHIO HAS OBTAINED COVERAGE**
19 **FOR THE CLEANUP COSTS AT THE MGP SITES?**

20 A. Yes. Duke Energy Ohio sued the solvent insurance companies that provided first,
21 second and third excess layer liability policies to it from 1940, the first year for
22 which it had any policy evidence, through 1986. Starting in the mid-1980s, liability
policies issued by the insurance industry typically contained absolute pollution

1 exclusions and, therefore, often do not provide coverage for the kind of
2 environmental property damage found at the MGP Sites. Duke Energy Ohio did not
3 pursue in the lawsuit liability policies for the pre-1986 period that were issued by
4 now insolvent insurance companies or contained a mandatory arbitration clause.

5 **Q. WHAT COVERAGE DO DUKE ENERGY OHIO'S HISTORICAL**
6 **GENERAL LIABILITY POLICIES PROVIDE?**

7 A. Duke Energy Ohio's historical general liability policies (the Policies) provide broad
8 coverage for liabilities imposed upon the Company arising from, among other
9 things, property damage. In the Coverage Action, Duke Energy Ohio contended
10 that the Policies provided coverage for the environmental property damage that the
11 Company is investigating and remediating at the MGP Sites.

12 **Q. DO THE POLICIES PROVIDE COVERAGE JUST FOR**
13 **ENVIRONMENTAL DAMAGE TO DUKE ENERGY OHIO'S OWN**
14 **PROPERTY AT THE MGP SITES?**

15 A. No. The Policies provide coverage for all environmental liabilities arising from the
16 former operations at the MGP Sites, including liability for addressing property
17 damage that extends beyond the boundaries of Duke Energy Ohio's property. Thus,
18 the Company's costs to investigate and/or remediate environmental damage to soils
19 of neighboring landowners, to the sediments of the Ohio River (which is adjacent
20 to the MGP Sites) and/or to groundwater under or beyond the Company's property
21 boundaries are covered by the Policies.

1 **Q. ARE THERE ANY LIMITS OR RESTRICTIONS ON THE COVERAGE**
2 **THE POLICIES PROVIDE FOR ENVIRONMENTAL PROPERTY**
3 **DAMAGE AT THE MGP SITES?**

4 A. Yes. Each of the Policies has an attachment point, *i.e.*, a minimum amount of costs
5 that must be incurred before the Policy starts to provide coverage, and a per
6 occurrence limit, *i.e.*, the maximum amount of coverage that the Policy will provide
7 for one occurrence. In addition, the Historical Insurers contended that certain
8 provisions, definitions and exclusions in the Policies, and various aspects of Ohio
9 law, provided them with defenses that reduced or eliminated the amount of
10 coverage that the Policies were required to provide.

11 **Q. DID THE HISTORICAL INSURERS AGREE TO PROVIDE COVERAGE**
12 **WHEN DUKE ENERGY OHIO GAVE THEM NOTICE OF ITS CLAIMS**
13 **RELATING TO THE ENVIRONMENTAL LIABILITIES AT THE MGP**
14 **SITES?**

15 A. No. Duke Energy Ohio provided notice to its Historical Insurers and requested that
16 they provide coverage for the investigation and remediation costs that the Company
17 was incurring and would incur for environmental property damage at the MGP
18 Sites. The Historical Insurers initially refused to provide coverage, purportedly
19 based on the various limitations and defenses allegedly provided by their Policies
20 and Ohio law. It was this refusal to provide coverage that caused Duke Energy Ohio
21 to file the Coverage Action.

1 **Q. HAS DUKE ENERGY OHIO BEEN ABLE TO OBTAIN COVERAGE**
2 **FROM ITS HISTORICAL INSURERS FOR SOME OF ITS CLEANUP**
3 **COSTS AT THE MGP SITES?**

4 A. Yes. Following years of negotiation, Duke Energy Ohio's filing of the Coverage
5 Action, more than 18 months of aggressive litigation, the production of over one
6 million documents, a motion to compel, numerous fact and expert depositions and
7 months of mediation, Duke Energy Ohio was able to reach settlements with all of
8 the Historical Insurers that it sued. Pursuant to those settlements, the Historical
9 Insurers have paid a portion of Duke Energy Ohio's past and future investigation
10 and remediation costs at the MGP Sites. Duke Energy Ohio's settlement objective
11 was to maximize the amount of settlement in a cost-efficient manner. However, to
12 obtain these settlements, the Company was required to incur legal fees and costs.

13 **Q. DO THE INSURANCE SETTLEMENTS PROVIDE COVERAGE ONLY**
14 **FOR THE COSTS OF INVESTIGATING AND REMEDIATING**
15 **PROPERTY OWNED BY DUKE ENERGY OHIO?**

16 A. No. The settlement amounts paid by the Historical Insurers have also been for the
17 costs that Duke Energy Ohio has incurred and will incur to address its liability to
18 investigate and remediate environmental damage allegedly caused by the
19 Company's historical operations at the MGP Sites, including to neighboring
20 landowners, to the groundwater, including groundwater beyond Duke Energy
21 Ohio's property boundaries, and to the sediments of the Ohio River. If determined
22 to be sufficiently impacted or damaged by releases from the former MGP
23 operations, all of these areas must be remediated under applicable environmental

1 laws, including the federal Comprehensive Environmental Response,
2 Compensation, and Liability Act, even though they are not owned by Duke Energy
3 Ohio.

4 **Q. DID THE SETTLEMENTS PROVIDE COVERAGE ONLY FOR**
5 **PARTICULAR TYPES OF CONTAMINANTS OR ONLY FOR PROPERTY**
6 **DAMAGE THAT OCCURRED IN CERTAIN YEARS?**

7 A. No. The coverage obtained through the settlements was for all types of
8 environmental property damage at the MGP Sites, regardless of the types of
9 contaminants that caused the damage, and for all property damage that occurred,
10 regardless of the year in which the damage occurred. In exchange for the settlement
11 amounts paid by each of the Historical Insurers, Duke Energy Ohio released each
12 insurer from covering all past, present and future environmental cleanup costs at
13 the MGP Sites, no matter (i) when the costs were or are incurred; (ii) when the
14 environmental property damage giving rise to the costs occurred; (iii) what
15 contaminants caused the property damage; and (iv) whether the property damage
16 that is the subject of the cleanup is within or beyond the boundaries of the property
17 currently owned by Duke Energy Ohio. The coverage provided by the settlement
18 agreements is for all known and unknown areas and amounts of contamination
19 stemming from past operations by the Company at the MGP Sites. These
20 settlements recognize that many of the contaminants at issue continue to migrate
21 through soil, groundwater and sediments until they have been remediated. The
22 migration of contaminants has occurred over decades, will likely continue to occur
23 until the remediation is complete and is not restricted by property boundaries.

1 **Q. HAS DUKE ENERGY OHIO COMPLETED ITS INVESTIGATION AND**
2 **REMEDiation OF THE MGP SITES?**

3 A. No. Investigation and remediation work at both MGP Sites is continuing. Among
4 other areas, the Company is continuing to investigate whether and to what extent
5 the sediments of the Ohio River have been impacted by constituents from the
6 former operations at the MGP Sites. Because that investigation is still ongoing, the
7 Company does not know whether it will be required to perform remediation work
8 regarding those sediments and, if so, how extensive such remediation may be. As
9 stated above, the investigation and remediation of the Ohio River are within the
10 scope of the releases of coverage included in the settlement agreements reached
11 with the Historical Insurers.

12 **Q. HAS DUKE ENERGY OHIO REACHED SETTLEMENTS WITH ALL OF**
13 **ITS HISTORICAL INSURERS WHOSE POLICIES MAY BE TRIGGERED**
14 **BY THE PROPERTY DAMAGE AT THE MGP SITES?**

15 A. No. Duke Energy Ohio is still negotiating with Safety National, whose Policy
16 contained a mandatory arbitration provision.

III. CONCLUSION

17 **Q. DOES THIS CONCLUDE YOUR PRE-FILED DIRECT TESTIMONY?**

18 A. Yes.

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Summary: Testimony Testimony of Michael J. Lynch electronically filed by Mrs. Debbie L
Gates on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco O. Mr. and Watts, Elizabeth
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