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
In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates.	)	Case No. 19-0174-GA-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 19-0175-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs.	)	Case No. 19-1085-GA-AAM
In the Matter of the Application Duke Energy Ohio, Inc. for Tariff Approval	)	Case No. 19-1086-GA-UNC

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 Ohio Supreme Court upheld the recovery of such expenses incurred in rendering public utility service. The Staff of the Public Utilities Commission of Ohio (Staff) continues to misapply law and regulation in a manner inconsistent with both the Ohio Supreme Court's decision and good public policy. Further, Staff's recommendations are based on fundamental misunderstandings of the facts established and accepted by the Commission in the underlying rate proceedings where the Commission first approved recovery of MGP remediation costs. For these reasons, the Commission should reject Staff's recommended cost disallowances.

II. HISTORY OF THESE PROCEEDINGS

Pursuant to an Opinion and Order in Case No. 12-1685-GA-AIR, *et al*.,[1] (Gas Rate Case) The Commission authorized Duke Energy Ohio (the Company) to continue to defer environmental investigation and remediation costs associated with two former MGP operations, referred to as the East End site and the West End site, and to submit annual applications to recover such costs (Opinion and Order).[2] Beginning in 2014, Duke Energy Ohio submitted annual applications to recover costs incurred during the preceding year for remediation of the contamination associated with the former MGP sites. Beginning in 2018, the Attorney Examiner granted the Company's

[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*.
[2] Gas Rate Case, Opinion and Order (November 13, 2013).

motion to consolidate cases filed through 2018, and established a procedural schedule providing that comments be filed.[3] Staff filed its report (2018 Staff Report) on September 28, 2018 and comments were filed by the Company, the Office of the Ohio Consumers' Counsel (OCC), Ohio Manufacturers' Association (OMA) and The Kroger Company. The 2018 Staff Report recommended a disallowance of $11,867,900 in remediation expense.[4]

On March 29, 2019, Duke Energy Ohio submitted its annual application for recovery of the previously year's MGP investigation and remediation costs in Case No. 19-174-GA-RDR, *et al* (2018 Rider MGP Application). For calendar year 2018, Duke Energy Ohio has incurred $19,804,031 in remediation costs for its two former MGP operations, the East End and the West End sites.

On May 10, 2019, Duke Energy Ohio made two MGP-related filings: 1) a motion in the consolidated MGP Rider cases from 2013 through 2017, which seeks to begin recovering remediation costs the Company had incurred since January 1, 2013, and to avoid resetting approved Rider MGP to $0 (Rider Continuance)[5]; and 2) an Application for Continued Deferral Authority of the Company's MGP expenses beyond December 31, 2019 (Deferral Extension).[6] The OCC, OMA and The Kroger Company all submitted memoranda contra to the Company's request to continue Rider MGP. The Commission did not establish a procedural schedule for that case subsequent to the 2018 Staff Report.

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[3] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-0375-GA-RDR, *et al.*, *C*ase Nos. 15-0452-GA-RDR, *et al*., Case Nos. 16-0542-GA-RDR, *et al.*, Case Nos. 17-596-GA-RDR, *et al.*, and *Case* Nos. 18-283-GA-RDR, *et al*., Entry (June 28, 2019).

[4] Staff Report at pg.7.

[5] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-0375, *et al*., Motion to Continue Rider MGP Recovery of Costs Incurred Since 2014 and Memorandum in Support (May 10, 2019).

[6] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Continue Deferral of Environmental Investigation and Remediation Costs*, Case No. 19-1085-GA-AAM, *et al.*, Application of Duke Energy Ohio, Inc., for Authority to Continue Deferral of Environmental Investigation and Remediation Costs and for Approval to Amend Rider MGP (May 10, 2019).

On July 12, 2019, the Staff submitted an additional Staff Report (2019 Staff Report), addressing the Company's 2018 Rider MGP Application, the Rider Continuance, and the Deferral Extension. Among other things, the 2019 Staff Report is similar to the 2018 Staff Report and contains the same errors that were present in the 2018 Staff Report. For 2019, Staff recommends a disallowance of $11,366,243 in remediation expense.[7] The 2019 Staff Report further recommends that the Commission deny both the Company's request for continued deferral authority and its motion to continue the Rider MGP to recover costs incurred from 2013-2017, and recommends that any ongoing recovery should be directly tied to or netted against the insurance proceeds.[8]

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

The 2019 Staff Report contends that "[t]he Rate Case Order made it clear that Duke's recovery . . . was limited to . . . costs incurred within the two original MGP site footprints," and therefore that the Company cannot recover for costs on the so-called "Area West of the West Parcel (WOW)" or any costs of remediation on land "outside the original footprint."[9] However, the Gas Rate Case said no such thing. Rather, in the Gas Rate Case, the Commission held that the "used and useful" standard did not apply to the recoverability of MGP remediation costs and that such costs *were* a current cost of doing business under R.C. 4909.15(A)(4). On appeal, in the context of affirming the Commission's Opinion and Order, the Ohio Supreme Court similarly focused on Duke Energy Ohio's liability for the contamination,[10] which is not limited by property boundaries.

[7] 2019 Staff Report, p. 5.
[8] 2019 Staff Report at 8.
[9] 2019 Staff Report, p.5.
[10] In re Application of Duke Energy Ohio, Inc., 150 Ohio St. 3d 437, p. 443 (June 29, 2017).

In the Gas Rate Case, the Commission rejected the proposition that the Company's recovery of remediation expenses was geographically limited to areas that provide service to customers and limited to property that is used and useful in the provision of utility service. In 2013, the Commission concluded that "the used and useful standard . . . is not applicable to our review . . . of whether Duke may recover the costs associated with its investigation and remediation of the MGP sites."[11] Rather than applying R.C. 4909.15(A)(1), the Commission applied R.C. 4909.15(A)(4)—which does not require utility property to be used and useful in order for costs to be recoverable—to the question of whether MGP remediation costs were recoverable. The Commission explained that this was because state and federal statutes *require* Duke Energy Ohio to remediate the contamination associated with the former MGP operations at both of its sites:

> 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, ... Therefore, in light of the circumstances surrounding the two MGP sites in question and the fact that Duke is under a statutory mandate to remediate the former MGP residuals from the sites, the Commission finds that R.C. 4909.15(A)(1) and the used and useful standard applied to the date certain for rate base costs is not applicable to our review and consideration of whether Duke may recover the costs associated with its investigation and remediation of the MGP sites. 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.[12]

In rejecting the used and useful standard, the Commission explicitly clarified that Duke Energy Ohio's ongoing legal obligation to clean up the MGP contamination and address its liability under CERCLA was the pivotal element of its analysis and that the scope of that obligation determined the scope of recoverable costs.

> 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

[11] Gas Rate Case, Opinion & Order, p.54.
[12] *Id.* p. 54. *Emphasis added.*

> to maintain the usefulness of the properties; therefore, these costs are a current cost of doing business.[13]

Thus, in the Gas Rate Case, the Commission concluded that remediation was a cost to the utility of rendering the public utility service for the test period.[14]

The Commission disallowed recovery of $2,331,580, but this disallowance did not reflect a blanket exclusion of any particular piece of property. Rather, it represented the amount over and above the fair market value that Duke Energy Ohio paid to purchase approximately 9 acres of property located to the west of the West Parcel at the East End site (Purchased Parcel).[15] The Commission explained that this amount "relates to the price Duke paid to purchase the property from a third party and not to the statutorily mandated remediation efforts."[16]

Several parties unsuccessfully appealed the Commission's Opinion and Order to the Ohio Supreme Court.[17] These appellants argued that the MGP remediation expenses were not recoverable under R.C. 4909.15(A), unless they related to property that was presently used and useful in providing public utility service to customers. But the Court sided with the Commission, pointing out that the appellants' interpretations of R.C. 4909.15(A) "runs aground on the plain language of the statute…"[18]

The Court found that operating expenses are recoverable if incurred in rendering utility service under R.C. 4909.15(A)(4) and are prudent.[19] No consideration of whether the property was itself used (and useful, presently or formerly) was held to be required.[20] And indeed, R.C.

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[13] Opinion and Order p.59 *Emphasis added.*
[14] While the Commission's Opinion and Order acknowledged some limitations on recoverability, none of these pertained 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. Gas Rate Case, Opinion and Order, p.72.
[15] Opinion and Order p.73
[16] Opinion and Order p.60.
[17] *In re Application of Duke Energy Ohio, Inc.,* 150 Ohio St. 3d 437. These included the Office of the Ohio Consumers' Counsel, The Kroger Corporation, Ohio Manufacturers' Association and Ohio Partners for Affordable Energy.
[18] *Id.* p. 9.
[19] *Id.* p. 8.
[20] *Id.;* The Court reasoned that Duke Energy Ohio was seeking to recover its costs- and not its capital investment in the MGP property and facilities.

4909.15(A)(4) makes no mention of any tie to property whatsoever. The Court, therefore, appropriately determined that the only statutory requirement for recovery of operating expenses under Ohio law was that the expenses were prudent and incurred in rendering utility service during the test period.[21]

Thus, the Court considered and *rejected* the methodology of limiting the Company's remediation costs to costs related to specific property that is (or was) used and useful in the rate base. Furthermore, the Court confirmed that such legally mandated remediation costs were recoverable if incurred in providing utility service.[22] Because the required MGP remediation is a cost of providing utility service under the law, all such remediation costs should be recoverable. Recoverability does not depend on historic property ownership or whether an actual piece of equipment once was set upon the MGP-contaminated area.

Thus, Staff's position that "Duke's recovery from customers was limited to any investigation or remediation costs incurred within the two original MGP site footprints"[23] is contrary to both Commission precedent in the Gas Rate Case and Ohio Supreme Court precedent. All of the MGP remediation costs sought in this proceeding (1) involve property that is or was owned by the Company and was used as part of MGP operations long ago; and (2) were incurred to address the Company's liability under state and federal environmental laws. Therefore, all such prudently incurred remediation costs should be recoverable.

IV. STAFF'S RECOMMENDED DISALLOWANCE OF REMEDIATION COSTS RESTS ON A MISUNDERSTANDING OF THE EAST END SITE BOUNDARIES.

A. Staff Incorrectly Assumed that the Purchased Parcel Established a Boundary for the East End Site that was Used in the Former MGP Operations.

[21] *Id.*
[22] *Id.*
[23] 2019 Staff Report, p.5.

The 2019 Staff Report recommends excluding, among other things, "all costs directly associated with the WOW parcel, and half of the costs it believed to be partially "equitably assignable to the WOW parcel."[24] However, the 2019 Staff Report betrays a misunderstanding of the relevant boundaries—the internal Duke Energy Ohio designations on which it relies have no bearing on which specific areas were or were not used in the former MGP operations. Moreover, Staff's allocation has no basis in fact as it relates to areas where, and amounts of, actual remediation work was performed during calendar year 2018.

The designations given to areas at the East End and West End sites 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. Duke Energy Ohio made these designations solely for the limited purposes of sequencing remediation work under Ohio's Voluntary Action Program (VAP). Thus, the Company's choice to describe the East End site as including the "East Parcel," the "Middle Parcel," the "West Parcel," and the "Area West of the West Parcel" was merely a matter of internal nomenclature for remediation purposes, allowing for identification of areas to be investigated and remediated for purposes of outlining a prudently sequenced, iterative work plan that would result in complete remediation of the entire East End site.[25] Contrary to Staff's seeming belief, the parcel designations were wholly unrelated to whether current natural gas facilities or historic MGP facilities were present.

Not only does Staff misunderstand the significance of the Company's internal remediation nomenclature, but Staff also confuses the "Purchased Parcel" with the "Area West of the West Parcel," referring to both generically as "WOW."[26] The "Area West of the West Parcel" being remediated by Duke Energy Ohio comprises only a small portion of the approximately 9-acre

[24] 2019 Staff Report, p. 6.
[25] 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.
[26] 2019 Staff Report at p. 5 & n.4.

"Purchased Parcel" that was acquired from DCI Properties, Inc. (DCI) in 2011. The figure in Attachment 2 depicts an aerial view of this same area today that overlays the "Purchased Parcel."[27]

Staff's position ignores that a significant portion of the Area West of the West Parcel was part of the East End site from 1928 to well past the conclusion of MGP operations in 1963.[28] As shown in Attachment 2, this area that was originally owned by Duke Energy Ohio encompasses nearly all of the portions of the Area West of the West Parcel that was remediated (referred to as the Phase 2 Area). The highlighted area in Attachment 2, was acquired by Duke Energy Ohio's predecessors in 1928, at the same time as the northern portion of the West Parcel. And yet, Staff does not contend that the Commission's 2013 Opinion and Order prevents Duke Energy Ohio from recovering any costs associated with remediating the northern portion of the West Parcel at the East End site. This is inconsistent—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 which occurred between 1884 to 1909 and from 1925 to 1963. The fact that the latter was briefly sold and reacquired (in 2006 and 2011 respectively) long after MGP operations had ceased should have no impact on the recoverability of costs incurred as a result of the MGP operations which had concluded over 40 years earlier.[29] Thus, there is no reasonable basis to deny recovery of remediation costs associated with the Area West of the West Parcel and permit recovery of remediation costs associated with the entirety of the West Parcel.

B. Contrary to the 2019 Staff Report's Assertion, 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.

[27] Attachment 2.
[28] Duke Energy Ohio identified this error in its comments on the 2018 Staff Report, but Staff makes no attempt to defend or otherwise reconcile its (mis)understanding.
[29] 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.

The 2019 Staff Report states that it is the "Staff's understanding" that in the Gas Rate Case, the Commission only approved recovery of "MGP remediation costs associated with the East and West End sites," as "defined by current property boundaries,"[30] but this is incorrect. The Commission only decided one issue related to the Purchased Parcel in the Company's Gas Rate Case: whether the Company could recover 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 portions of legacy MGP areas at the East End site) from DCI and the fair market value based on an appraisal conducted for Duke Energy Ohio. The Commission never mentioned current property boundaries as a limiting factor in its Opinion and Order issued in the 2012 Gas Rate Case.

Although the Commission denied recovery of the amount paid above fair market value to acquire the Purchased Parcel 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 costs that would need to be incurred to remediate it.[31] Remediation costs for the Purchased Parcel were not at issue at that time because the Company had not yet commenced the relevant remediation work. Indeed, sampling was still underway at both the Middle Parcel and the Area West of the West Parcel and the extent of remedial actions, if any, had not yet been determined.[32] Therefore, 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 in the Gas Rate Case. Doing so would have constituted an unlawful advisory opinion.[33]

[30] 2019 Staff Report, p. 5.
[31] Opinion and Order at p. 60. *Emphasis added.*
[32] Opinion and Order p. 37.
[33] *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 August 19, 2003; 2003 Ohio PUC LEXIS 368

Moreover, had the Opinion and Order barred the Company from deferring and being able to ultimately recover remediation costs in the Area West of the West Parcel, the contamination discovered in the Area West of the West Parcel could not have served as a basis for the Commission's decision to grant Duke Energy Ohio's application for an extension of its authority to defer environmental investigation and remediation costs at the East End site, including the Area West of the West Parcel, beyond December 31, 2016.[34] In granting Duke Energy Ohio's application, the Commission stated "the Company was unable to reasonably or accurately confirm the level of contamination for [the Middle Parcel] and the area west of the West Parcel, or the specific portions requiring remediation, until site assessments were completed in 2014."[35]

The Opinion and Order does not bar Duke Energy Ohio from recovering the costs of remediating any specific geographic area, including the Area West of the West Parcel, as evident in the Commission's subsequent order approving the extension of the deferral period for the East End site. Although the Commission found 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, these points were not pivotal to its analysis. Nor should they be now, as the Company has liability under state and federal environmental statutes for all MGP-affected areas, which makes remediation a cost of providing utility service.

But even if geography was a pivotal element, incontrovertible evidence demonstrates that most, if not all, of the remediation work performed to date in the area Staff describes as the "WOW" parcel falls within the legacy portion of the East End site inside the Area West of the West Parcel. This legacy portion was owned by the Company when the East End site operated as

[34] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 16-1106-GA-AAM, p. 14
[35] *Id.*

an MGP and all of the remediation work that has occurred is directly attributable to former MGP operations.[36] So not only is remediation itself recoverable as a cost of providing utility service, but the Phase 2 Area remediation costs, which Staff continues to recommend be disallowed in the 2019 Staff Report, actually housed former MGP equipment, including an Iron Tar Tank.[37]

Again, it bears repeating that the Commission unambiguously held in its Opinion and Order the cost of remediating these sites was a legally mandated cost of doing business and met the criteria under R.C. 4909.15(A)(4). Tying the recoverability of costs for remediation to specific geographical locations of such contamination was a limitation that Staff and other parties attempted to impose under R.C. 4909.15(A)(1) (Which contains the "used and useful" limitation) by arguing that only costs incurred in areas directly overlying or necessary to access underground pipelines and other utilities could be recovered in the 2012 Gas Rate Case. But the Commission and the Court declined to apply this provision (R.C.4909.15(A)(1) in the 2012 Gas Rate Case and did not reduce Duke Energy Ohio's recovery of costs based on the Staff's recommended location-specific approach. Staff's recommendation here merely drops the "used and useful" language while repackaging its prior "used and useful" argument by attempting to tie the recoverability of remediation expense to whether the affected property was formerly used and useful.

As discussed above, the 2019 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. Even if the Commission were to adopt the Staff's incorrect interpretation of the Opinion and Order and of R.C. 4909.15(A)(4) by tying recoverable remediation costs to specific geographical locations, the remediated portions of the Area West of the West Parcel include property that was indeed part of the legacy East End site during the MGP operations. This legacy portion contains contamination directly from the existence and provision of that historic MGP

[36] Attachment 2.
[37] *Id.*

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.

The 2018 Staff Report presented the first opportunity for the Commission to consider how Staff was misapplying the logic of the Ohio Supreme Court. Since the Commission did not correct Staff's misunderstanding, Staff perpetuated the error in the 2019 Staff Report with respect to the remediation costs incurred at the Area West of the West Parcel. Last year's rider proceeding was likewise the Company's first opportunity to address Staff's confusion regarding the Company's remediation of MGP impacts associated with the portion of the legacy East End site that was reacquired as part of the Purchased Parcel.[38] As the Commission has not yet addressed these issues, this proceeding offers the Company an additional opportunity to address the mistaken premises, inconsistencies and oversights in Staff's position. Limiting cost recovery to work performed inside the original MGP site borders based upon Staff's perceived threshold test of land that was once used in the historic provision of utility service, and Staff's subsequent disregard of the actual East End site's original boundaries, would be unlawful and unreasonable. Recovery of all prudently incurred MGP 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 Analysis Excluding Remediation Costs Beyond the Current Boundaries of the East End and West End Sites Ignores The Scope Of The Company's Statutory Remediation Obligations And Misallocates Various Costs.

1. State and Federal Law require Duke Energy Ohio to remediate MGP impacts irrespective of their physical location because the MGP byproducts are mobile.

[38] All MGP remediation work at the East End and West End sites is directly related to the former MGP operations and constitutes a current cost of providing utility service irrespective of geographic proximity to legacy MGP facilities. But the causal relationship is especially obvious in regard to the work in the Area West of the West Parcel within the Purchased Parcel. This work was performed within areas that were owned by the Company and were part of the East End site during MGP operations.

Staff misinterprets the Gas Rate Case to prohibit recovering (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.[39] Staff also recommends a disallowance for costs associated with investigation and remediation in the Ohio River associated with the former MGP operations. With respect to the West End site, Staff recommends disallowance of costs associated with relocation of an electric substation and investigation and remediation work performed outside of the West End site boundaries.

Staff erroneously paraphrases the Commission's Opinion and Order as requiring that costs must relate only to the "two original MGP site footprints" (East End and West End).[40] No such word is found at the cited page nor was that part of the testimony or findings in the Gas Rate Case. However, the Commission's directive was much broader, authorizing recovery based on a *causal*—not geographic—limitation: whether costs were prudently incurred remediating MGP contamination in accordance with environmental laws in rendering services:

> [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 incurred in 2008 on the West End site and all carrying costs, should in accordance with R.C. 4909.15(A)(4), be considered cost incurred by Duke for rendering utility service and be treated as expenses incurred during the test year.[41]

The Commission determined that Duke Energy Ohio had liability under CERCLA to remediate the MGP contamination. The Company has liability for and is required to remediate all areas where MGP contaminants are present or have migrated, including areas outside of any past geographic "footprint." The Commission's decision clearly authorized recovery of prudently incurred remediation costs relating to the East End and West End sites. The reference to cost

[39] 2019 Staff Report, pp.5-6.
[40] 2019 Staff Report, p.5.
[41] Opinion and Order at p. 60. *Emphasis added.*

recovery related to these sites is far more general and encompassing than a "footprint" as the Company's liability under CERCLA is not limited to this geographical footprint.

For example, in the Gas Rate Case, Duke Energy Ohio witness Shawn Fiore (VAP Certified Professional) explained there is significant free product (a separate liquid hydrocarbon phase thicker than one one-hundredth of a foot) at the East End and West End sites, in the form of liquid mobile coal tar, which has migrated.[42] 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 far broader reach of the Company's 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.

Even by its own terms, the 2019 Staff Report is inconsistent. Staff states that cost recovery is authorized only "within the two original MGP site footprints,"[43] but it is clear that Staff has not considered or examined the actual original footprint of the East End site. 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. But, even if this was not the case, there is no legal basis to preclude Duke Energy Ohio from recovering its costs to investigate and remediate the MGP impacts, regardless of location, as required under federal and state environmental laws.

Attempting to paper over its misunderstanding of the original footprint in the 2018 Staff Report, Staff now declares its "understanding" that "the southern boundary" of these footprints is "defined by the water's edge . . . and does not extend into the river" or "to an historic property boundary . . . when river levels were different than they are today."[44] This constitutes a tacit concession to the Company's 2018 comments, which pointed out that the original East End site's

[42] Opinion and Order at p. 33.
[43] 2019 Staff Report at p. 5.
[44] 2019 Staff Report, p. 5.

southern boundary extended much farther south and that parts of the original footprint are now under water.[45] Staff offers no basis for its sudden willingness to ignore the "original . . . footprints." But again, this point only illustrates an additional inconsistency in Staff's approach. The fundamental question is not which remediation work lies inside or outside which "footprint," but which remediation work was legally necessitated by the Company's former MGP operations at the East End and West End sites.

With respect to the river, the Ohio VAP requires consideration of, among numerous other things, whether contamination impacts ecological receptors like the Ohio River. As such, under the Ohio VAP, Duke Energy Ohio must investigate whether there are MGP impacts to the Ohio River that do not meet applicable standards. Even if portions of the former MGP sites were not located within the Ohio River today, the Ohio VAP would require the investigation of the Ohio River and the sediments in order for the Company to address its liabilities under environmental laws.

Thus, costs are recoverable for all impacts associated with the former MGP operations at the East End site, including costs incurred investigating and remediating the Ohio River. Staff's recommendation to disallow all river remediation is irreconcilable with the Commission's Opinion and Order, the Court's confirmation thereof, and Staff's own proclaimed goal in issuing its 2019 Staff Report. The Commission should disregard Staff's recommendation altogether.

2. **Staff's methodology in calculating the $11,366,243 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, but does not assign any specific costs to the associated parcels. Instead, Staff imposes

[45] Comments at p. 20 (October 20, 2018).

an across-the-board allocation to the Area West of the West Parcel of 50% of the costs incurred in 2018. As a result, Staff arbitrarily recommends a disallowance of over $11 million.

It is worth repeating that all requested costs are investigation and remediation costs related to the former MGP operations. The Company's inability to differentiate costs associated with certain investigation and remediation activities among the various "parcels" at each site reflects the nature of the work—it does not constitute a basis to deny recovery. For 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. And yet groundwater monitoring is undisputedly a necessary and prudently incurred cost of remediation. Staff's approach grossly over-apportions costs to the Area West of the West Parcel. Just because the Area West of the West Parcel was remediated during the same mobilization as the Middle Parcel does not mean that the costs can be simply 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. Invoices demonstrate that the actual amount of remediation 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, was significantly less than the $11 million arbitrarily allocated by Staff.

Additionally, Staff's allocation methodology for work it believes was performed in the Area West of the West Parcel in 2018 does not align with the facts or invoices that have been produced to Staff. By calendar year 2018, the active remediation, including excavation and *in situ solidification/stabilization*, of the remediated portions of the Area West of the West Parcel (identified and referred to in remediation documents as the Phase 2 Area) had been completed. The environmental work that was physically performed within the Area West of the West Parcel

in 2018 was limited to the installation of one boring and groundwater monitoring well, as well as the collection of groundwater samples from the two groundwater monitoring wells located in the Area West of the West Parcel as part of the annual site-wide groundwater monitoring. The invoices provided to Staff as part of its audit of calendar year 2018, which reference the phases for the remediation work, demonstrate that only a nominal portion of the expenses incurred in 2018 can reasonably be attributed to the Area West of the West Parcel.

By way of example, in 2018, seven soil borings and groundwater monitoring wells were installed at the top of the bank of the East End site, only one of which was installed within the Area West of the West Parcel. The total cost of this work was $102,108.68; therefore, a more reasonable allocation of these costs would attribute only $14,586.95 to the Area West of the West Parcel (one out of seven borings/wells). Similarly, out of fourteen groundwater monitoring wells that were sampled as part of the required site-wide monitoring network at the East End site, only two are located within the Area West of the West Parcel. As the total cost of the annual groundwater monitoring was $32,687.75, only $4,669.68 of these costs could reasonably be allocated to the Area West of the West Parcel.

Given the inconsistencies and methodological errors identified above, Staff's recommended disallowance of more than $9.3 million in "costs associated with remediation of the parcel of land adjacent to the East End site that the Commission denied for recovery, known as the Area West of the West Parcel (WOW)" is both unreasonable and unsupportable under law and fact.

D. Insurance Proceeds Must Be Allocated At the Conclusion of the Remediation Process.

Staff recommends notes that it will "continue to monitor the Company's efforts" and that "any discussion pertaining to Duke's recovery of ongoing MGP costs should be directly tied to or

netted against insurance proceeds collected by the company."[46] But this is not appropriate—any insurance proceeds should be allocated in separate, future proceedings after remediation is complete. Duke Energy Ohio has been conscientious and thorough in pursuing such recoveries, as even Staff acknowledges,[47] so there is no question of a lack of diligence. But because of the uncertainties inherent in the recovery process (including the costs of recoveries), it is premature to begin netting out 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 and Order 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 associated with the former MGPs. 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 as it was based on remediation liability under environmental laws. Therefore, the Commission cannot apportion any insurance proceeds until all remediation

[46] 2019 Staff Report p. 6.
[47] *Id.* ("Duke successfully collected a significant amount of insurance proceeds, net of legal fees, from multiple insurance companies.")

is complete. These insurance proceeds are to settle all liability for all MGP contamination. The Commission's Opinion and Order in the Gas 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."[48]

Even OCC recognized the need to properly apportion the insurance proceeds after remediation was complete. OCC's witness in the Gas Rate Case recommended that insurance proceeds be addressed "in a future proceeding in which its remediation costs are reconciled with its recoveries."[49] In so arguing, OCC explicitly recognized that apportionment could not occur until remediation was complete. Indeed, the Commission's Opinion and 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."[50] 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.

E. THE COMPANY'S APPLICATION FOR CONTINUED DEFERRAL AUTHORITY BEYOND DECEMBER 31, 2019 IS SUPPORTED BY EXIGENT CIRCUMSTANCES BEYOND ITS CONTROL AND MUST BE APPROVED.

The 2019 Staff Report recommends that the Company's request for continued deferral authorization be denied. Staff's recommendation ignores what the Commission previously acknowledged, that Duke Energy Ohio's liability for the MGP contamination is undeniable under

[48] Opinion and Order at p. 66.
[49] Opinion and Order at p. 66.
[50] *Id.* At 67.

the law and the cost to investigate and remediate these impacts is a cost of utility service.[51] The Commission recognized the need to balance the competing interests of limiting exposure to these remediation costs for customers and Duke Energy Ohio's liability under Ohio and federal environmental laws, as well as public health and safety concerns. December 31, 2019 was not an absolute end to remediation, nor was it a final date after which remediation costs were *per se* unrecoverable. Rather, the Commission established a process whereby the Company could demonstrate that additional time for remediation deferral was necessary due to exigent circumstances beyond the Company's control. Had the Commission intended the December 31, 2019 timeframe to be absolute, it would have stated so in its 2016 order granting the Company's first deferral extension request.[52]

In its 2019 Deferral Extension, the Company has demonstrated exigent circumstances exist to warrant further deferral authority at the East End site. Without reciting the entire application, a summary of these circumstances are as follows:

- Safety and reliability concerns coupled with extensive regulatory oversight with performing remediation activities on and around Critical Natural Gas Infrastructure, especially to underground propane storage facilities that are sensitive to vibration, create necessary constraints on remediation activity, or else risk the public health and safety;[53]
- The presence of, and need to continue operating, the Critical Natural Gas Infrastructure located in the East End Middle Parcel makes contaminated areas over, around, and underneath the Critical Natural Gas Infrastructure currently

[51] 2019 Staff Report p. 6.
[52] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 16-1106-GA-AAM.

[53] 2019 Deferral Extension at 12.

inaccessible to perform active remediation safely and in compliance with federal and state regulatory obligations;[54]

- Duke Energy Ohio has a legal obligation to provide safe and adequate utility service to its customers, which today, cannot be ensured without continued operation of the Critical Natural Gas Infrastructure. The unanticipated delays experienced with the Company's Application for a Certificate of Environmental Compatibility and Public Need for the Central Corridor Pipeline before the Ohio Power Siting Board (Siting Board) have prevented the Company from moving forward with retiring and decommissioning propane-related Critical Natural Gas Infrastructure, and accordingly, from performing and completing remediation in these otherwise inaccessible areas; and[55]
- Unique complexities associated with investigation along bodies of water such as the Ohio River necessitate proper sequencing of remediation activities and environmental investigation and thus restrict completion of all remediation, including the sediments and riverbank until completion of the upland areas.[56]

As the Company stated in its 2019 Deferral Extension Application, it is neither safe, nor in the best interests of its customers for the Company to perform excavation, *in situ solidification/stabilization*, or other active and invasive remediation measures in the areas immediately around the underground propane storage cavern prior to its retirement. The risks of damaging the cavern and the potential of not being to repair the cavern (or the propane facilities) in time for the winter heating season (or even at all) is simply too great. The Company cannot

[54] 2019 Deferral Extension at 12.
[55] 2019 Deferral Extension at 13; citing *In re: Application of Duke Energy Ohio, Inc., for a Certificate of Environmental Compatibility and Public Need for the C314V Central Corridor Pipeline Extension Project*, Case No. 16-253-GA-BTX, Application (September 13, 2016).
[56] 2019 Deferral Extension at 13.

retire the propane storage cavern and other aging propane facilities until it has a sufficient replacement to meet the natural gas delivery system capacity and pressure needs to keep customers from freezing in the winter. Staff's recommendation to deny the continued deferral authority because Staff "believes that, in the Rate Case Order the Commission intended for remediation to be concluded in a finite period,"[57] is irreconcilable with the Commission's own Orders that permit continuation of deferral authority due to exigent circumstances. Staff would apparently have preferred the Company (and the Commission) to face the Solomonic decision of maximizing its ability to recover otherwise prudently incurred remediation costs in the Middle Parcel (which is absolutely part of the original East End MGP site) by placing its propane storage infrastructure, employees, contractors, and the local community, and in turn, all natural gas customers, at risk for the sole purpose of meeting a deadline that was not based upon any actual remediation timeline established under the Ohio VAP.

IV. CONCLUSION

For the reasons set forth above, the Company disagrees with the recommended disallowance contained within the 2019 Staff Report and believes that this recommendation was both incorrectly reasoned and incorrectly calculated, 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

[57] 2019 Staff Report at 8.

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. Staff's recommendation to net or tie ongoing recovery against the insurance proceeds fails to take into account that the insurance settlements resolved all of Duke Energy Ohio's claims for liability for all MGP contamination. As such, the insurance proceeds must be appropriately apportioned in a future proceeding. The Company has met its burden with regard to exigent circumstances warranting continued deferral authority for remediation costs incurred at the East End Middle Parcel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 12th day of August, 2019, to the following parties.

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Summary: Comments of Duke Energy Ohio, Inc. electronically filed by Carys Cochern on behalf of Duke Energy