

**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- ATA
)	
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- ATA
)	
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- ATA
)	
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- ATA
)	
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- ATA
)	
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) Case No.19-1085-GA-AAM
Energy Ohio, Inc. for Authority to Defer)
Environmental Investigation and Remediation)
Costs.

In the Matter of the Application Duke Energy) Case No.19-1086-GA-UNC
Ohio, Inc. for Tariff Approval.)

REPLY COMMENTS OF DUKE ENERGY OHIO, INC.

I. INTRODUCTION AND BACKGROUND

It is indisputable that the MGP remediation costs incurred are service-related and recoverable through rates under R.C. 4909.15(A)(4).¹ Moreover, it is also incontrovertible that such costs are mandatory: “[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, Compensation and Liability Act (CERCLA).”² Duke Energy Ohio, Inc.’s (Duke Energy Ohio or the Company) liability is strict³ and the obligation to remediate potentially extends to all areas impacted by its former MGP operations. Furthermore, the Ohio Supreme Court has confirmed that the Company may recover such legally mandated costs incurred in providing service.⁴

Since 2008, Duke Energy Ohio has acted prudently and reasonably in its efforts to investigate and remediate areas impacted by the operation of two former manufactured gas plants

¹ *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, pp. 441-443 (June 29, 2017).

² *Id.*, pg. 438, citing 42 U.S.C. 9601, *et seq.*

³ *Id.*

⁴ *Id.*

(MGP), known as the East End and West End sites. The Company has already performed substantial work and has at all times endeavored to remediate in a timely yet prudent manner, in full compliance with all applicable environmental regulations and processes. This is critical to not only ensuring protection of human health and the environment currently, but also ensuring that the impacts are actually cleaned up so that they do not become a larger problem in the future.

Neither the Ohio Consumers' Counsel (OCC) nor Staff disputes the Company's obligation to remediate the impacted areas; both the Commission and the Ohio Supreme Court have affirmed the existence of the obligation.⁵ MGP investigation and remediation costs "*related to*" the East and West End sites are recoverable.⁶ All investigation and remediation work performed to date *relate to* the East and West End sites, as the original MGP record in Case No. 12-1685-GA-AIR thoroughly explained the mobility of the MGP byproducts at issue. Yet, due to exigent circumstances outside the Company's control and despite its best efforts, the Company will not be able to complete all necessary investigation and remediation by the current Commission-established deadline of December 31, 2019. Although the Company anticipates completing all necessary investigation and remediation of the accessible upland areas of the two MGP sites at issue, there will remain areas that cannot be completed by the December 31, 2019, deadline due to issues of accessibility.

It must first be acknowledged that neither the prior nor the current remediation timelines established by the Commission, were the result of any evidentiary determination. These timelines were not founded upon a scientific or engineering-based assessment of what types and quantities

⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, pp. 70-74 (November 13, 2013). See also *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, pp. 441-443 (June 29, 2017).

⁶ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, pg. 60 (November 13, 2013) (*emphasis added*).

of work would be necessary to perform the required remediation, nor were the timelines based upon the prudent and reasonable processes necessary to complete such work. Rather, the timeline directives were determined solely by the Commission's opinion as to how much time would be "necessary and essential in order to protect the public interest and ensure that remediation efforts were carried out expeditiously, *but also responsibly*." ⁷ And yet, the Commission recognized that exigent circumstances may warrant revising its timelines to provide the Company additional time. ⁸

As explained in the Company's Application in these proceedings, additional deferral authority is necessary to complete remediation work in areas that are currently inaccessible at the East End site, as well as areas, as determined necessary, in and along the Ohio River's sediments and banks at the East End and West End sites. The East End areas are inaccessible due to the presence of in-service natural gas infrastructure, referred to as "Critical Natural Gas Infrastructure," which consists of subterranean propane storage and delivery facilities. If these facilities were inadvertently damaged during the course of remediation, it could not only create a significant safety concern for customers, the Company, its employees, and the surrounding community, but could render the Company's entire natural gas delivery system incapable of supporting winter peaks, resulting in wide-spread system failure and outages in the dead of winter. Such a risk alone warrants grace with respect to timing of completing remediation activities.

In addition to the risks associated with the Critical Natural Gas Infrastructure, substantial additional exigent circumstances support continued deferral. For example, the continued investigation in areas along the Ohio River's sediments and banks is also necessary due to the inability to perform such work until upland areas were complete or else risk

⁷ *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, *et al.*, Finding and Order ¶36 (December 21, 2016).

⁸ *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, *et al.*, Finding and Order, ¶1 (December 21, 2016).

contamination/recontamination due to the mobility of the MGP byproducts.⁹ It is simply impossible for the Company to address all of these issues thoroughly and responsibly before December 31, 2019.

Yet the OCC does not seem concerned that the work is performed responsibly and safely. In their Comments submitted September 13, 2019, OCC not only opposes the Company's request for additional deferral authority and seeks to relitigate whether the Company should have received any cost recovery for investigation and remediation of MGP impacts, but also criticizes the Company for not performing work in these inaccessible areas to date. OCC would have the Company take unnecessary risks to fit all of the legally mandated remediation work into an arbitrarily compressed timeframe established long before the scope of work was fully understood, without regard to whether or not such work can be performed responsibly and safely (much less prudently).

Fortunately, with regard to the safety of Duke Energy Ohio's customers, the Commission is not so myopic. The Commission preserved the necessary flexibility to respond to, and consider, circumstances that would require remediation work to continue, and deferral of expenses to persist, beyond the dates it previously established. The Commission itself has acknowledged its use of "a *broad definition* of what constitutes an exigent circumstance" in order to "afford flexibility" due to circumstances falling outside the Company's control.¹⁰ Here again, circumstances beyond the Company's control support additional time for MGP investigation and remediation, necessitating additional extension of such deferral authority.¹¹ For the reasons stated below, the Commission

⁹ 2019 Deferral Extension, pp. 25-27.

¹⁰ *Id.*, pg. 6 (emphasis added).

¹¹ *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, *et al.*, Finding and Order at ¶36 (December 21, 2016).

should extend the existing deferral authority for these exigent circumstances and disregard OCC's opposition.

II. EXIGENT CIRCUMSTANCES SUPPORT CONTINUED DEFERRAL AUTHORITY

A. THE COMPANY HAS DEMONSTRATED EXIGENT CIRCUMSTANCES

In its application filed in Case Nos. 19-1085-GA-AAM and 19-1086-GA-UNC (2019 Deferral Application), the Company demonstrated that exigent circumstances exist to warrant further deferral authority.¹² Without repeating the entire application, a summary of these circumstances are as follows:

- Safety and reliability concerns coupled with extensive regulatory oversight concerning remediation activities on and around Critical Natural Gas Infrastructure, especially with regard to underground propane storage facilities that are sensitive to vibration, create necessary constraints on remediation activity. Without such constraints, the Company would unavoidably risk public health and safety.¹³
- 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 inaccessible to perform active remediation safely and in compliance with federal and state regulatory obligations.¹⁴

¹² *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, Application, pg. 12 (May 10, 2019).

¹³ *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, Application, pg. 12 (May 10, 2019).

¹⁴ *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 *e al.*, Finding and Order, pp. 12-13 (December 21, 2016).

- Duke Energy Ohio has a legal obligation to provide safe and adequate 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 its Central Corridor Pipeline¹⁵ 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.¹⁶
- 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.¹⁷

Any one of the aforementioned reasons independently qualifies as an exigent circumstance warranting continued deferral authority. In the aggregate, the evidence supporting continued deferral is sound even under the strictest of scrutiny.¹⁸ The Commission should disregard OCC's objections to the Company's Application.

¹⁵ The proposed Central Corridor Pipeline is a 13- to 14-mile, high-pressure natural gas distribution line, 20 inches in diameter, designed for a typical operating pressure of 400 psig and an MAOP of 500 psig, and would allow the Company to begin the process of retiring its outdated propane-air facilities, to improve the balance of supply into its system, and to more efficiently upgrade and replace other aging distribution infrastructure.

¹⁶ *In the Matter of the 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).

¹⁷ *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, *et al.*, Finding and Order, pg. 13 (December 21, 2016).

¹⁸ *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 *et al.*, Finding and Order, pg.14 (December 21, 2016) (finding that any future request submitted by the Company for an additional extension of deferral authority beyond December 31, 2019 will be "heavily scrutinized")

B. DUKE ENERGY OHIO HAS ACTED IN A TIMELY MANNER IN PERFORMING NECESSARY REMEDIATION ACTIVITIES

OCC's opposition to the Company's Application in these proceedings is founded upon an unsupportable premise: that the Company has had more than enough time to complete necessary remediation activities at the two MGP sites.¹⁹ OCC regurgitates an argument from prior cases that Duke Energy Ohio has known about the need to clean up the MGP sites since 1988 and criticizes the Company for not performing any investigation until 2007.²⁰ OCC selectively omits key facts from its recitation of the history of these MGP sites. While OCC would have the Commission believe the Company delayed remediation activities out of indifference, such is not the case.

The Commission should ignore OCC's attempts to relitigate the Company's response time for initiating MGP remediation activities because the Commission has already determined that the Company "acted appropriately in responding in a proactive manner to addressing its obligations to remediate the MGP sites in Ohio."²¹ Accordingly, OCC's attempts to impugn the Company's timing in commencing remediation should be ignored.

OCC notes that the Commission's Order in Case No. 12-1685-GA-AIR *et al.*, (2012 Gas Rate Case Order) established a time frame for the Company to complete its remediation activities,²² but ignores that, in establishing its timeline, the Commission also recognized that additional time might be needed and could be justified by exigent circumstances.²³ OCC's insinuation that the Commission's timelines were absolute contradicts the plain language of the Commission's Gas Rate Case Order that first authorized recovery of MGP remediation costs. Similarly, as part of its

¹⁹ OCC Comments, pg.6.

²⁰ *Id.*, pg. 7.

²¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, pg. 47 (November 13, 2013).

²² OCC Comments, pg.7, citing the Gas Rate Case Order, pg. 72.

²³ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, pg. 72 (November 13, 2013).

2016 Order granting the Company's initial request for extension of deferral authority in Case No. 16-1106-GA-AAM (2016 Extension Order), the Commission once again recognized that circumstances beyond the Company's control could support a request for additional time for MGP investigation and remediation and explicitly provided an opportunity for the Company to seek additional deferral authority as warranted by exigent circumstances beyond the Company's control. The Commission has explicitly adopted a "broad definition" of what constitutes exigent circumstances, thereby providing it (and the Company) much needed flexibility to ensure that the legally required MGP remediation can be performed safely, efficiently, and responsibly.²⁴

Precisely as the Commission envisioned, Duke Energy Ohio has continued to balance its legal obligation to remediate these areas within the Commission's timelines with the relative risks and costs of doing so. And yet, OCC remains critical of the Company's efforts while itself never having had to perform such complex remediation work. While Duke Energy Ohio has been performing remediation work for many years, performing such work in a responsible manner does take time, especially when one considers the complexity of this work, the mobility of the byproduct at issue, and the risks of contamination and recontamination if the work is rushed and not properly sequenced. OCC's position, on the other hand, implies that expediency should take precedence over all else, including responsibility and safety.

C. REGULATIONS SIGNIFICANTLY LIMIT THE COMPANY'S ABILITY TO REMEDIATE WITHIN THE CURRENT TIMEFRAME AND JUSTIFY EXTENSION

OCC misstates the Company's citation to regulations as a contributing factor to the myriad of exigent circumstances justifying continuation of its deferral authority.²⁵ The Company does not

²⁴ *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, *et al.*, Finding and Order, pg. 13 (December 21, 2016).

²⁵ OCC Comments, pg. 9 (*citing* 2019 Extension Application at 14-15).

claim that its status as a regulated utility constitutes an exigent circumstance. Rather, the Company is stating that the requirement to comply with the cited safety regulations adds to the time required to complete remediation activities. It is true that the Company would likely be able to perform the work faster if it disregarded—as perhaps OCC would prefer—all applicable safety laws and regulations. The Commission never intended to encourage such a reckless approach simply as a result of setting a timetable.

As the Company explained in its Application, Ohio law and Commission regulations do provide a regulatory framework within which Duke Energy Ohio must operate its natural gas business.²⁶ O.A.C. 4901:1-13 establishes minimum safety standards and O.A.C. 4901:1-16 establishes a pipeline safety code, by both of which Duke Energy Ohio must abide. State and federal laws and regulations preclude Duke Energy Ohio from engaging in activities that could threaten the safe operation of its natural gas infrastructure, expose its employees and contractors or the public to unreasonable risk or danger, or compromise its obligation to make available to all consumers safe, adequate, and reliable service.

Notwithstanding these limitations, the Company has continued to make impressive progress. As described in the 2016 Extension Application,²⁷ the Company has proceeded with its efforts to responsibly and expeditiously remediate the impacts at the East End site, while implementing programs to ensure the safety of the community and its employees in observation of the significant risks associated with remediating in the vicinity of the Critical Natural Gas Infrastructure. As a result of those efforts, the Company will have completed all of the remediation

²⁶ 2019 Deferral Extension, pp. 15-16.

²⁷ *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, *et al.*, Application pp. 5-6 (May 16, 2016).

in the upland areas of the West End site and all of the accessible upland areas at the East End site by December 31, 2019.²⁸

Nonetheless, as it relates to the East End Middle Parcel, due to the presence and current operation of Critical Natural Gas Infrastructure, namely subterranean propane storage facilities located on a portion of both the upland area and extending into the Ohio River,²⁹ certain areas are currently inaccessible. Remediation work cannot proceed in these areas until they become accessible, which requires the Company to be able to complete the retirement and decommissioning of the propane facilities. As explained in the Company's Application,³⁰ there is significant risk for excessive vibrations from required remediation activities to damage the integrity of Critical Natural Gas Infrastructure present on site, including the sensitive underground propane storage and pipeline structures. Such damage could present natural gas system reliability risks and potential safety risks to the general public and Company employees, thereby precluding commencement of remedial work until those structures are safely taken out of service. The aforementioned regulations are in place to ensure Duke Energy Ohio (and other natural gas utilities) do not find themselves pursuing complete remediation within the established time frame, as OCC advocates, regardless of costs, safety, or other risks.

The Commission's Orders intentionally provide flexibility regarding timing, so as to encourage the Company to perform this necessary work in a "responsible" and prudent manner, which includes compliance with applicable safety laws and regulations.³¹

²⁸ 2019 Deferral Extension, pg. 6.

²⁹ Due to the construction of the Markland Dam, the Ohio River is at a higher level than when the former MGP plants were in existence and operating.

³⁰ 2019 Deferral Extension, pg. 12.

³¹ *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, *et al.*, Finding and Order pp. 12-13 (December 21, 2016).

D. DUKE ENERGY OHIO'S OBLIGATION TO PROVIDE SAFE AND RELIABLE UTILITY SERVICE LIMIT THE COMPANY'S ABILITY TO REMEDIATE IN AREAS AROUND IN-SERVICE PROPANE AIR FACILITIES.

OCC does not respond to the Company's central point regarding the propane storage facilities: that the East End site cannot be fully remediated until the propane storage facilities are retired.³² Nor does OCC consider the impact on customers of retiring these facilities immediately. Instead, OCC contends that Duke Energy Ohio did not do everything that it could have to remediate in these areas, and therefore no exigent circumstances exist.³³ OCC's critiques of the Company's remediation efforts to date are uninformed and unsupported. But even if OCC were correct that the Company should have done more in the vicinity of the propane storage facilities (which it is not), any such additional efforts would not have even come close to achieving full remediation at the East End site³⁴ by December 31, 2019, or indeed by any date prior to the facilities' retirement.

Duke Energy Ohio's natural gas distribution system in southwestern Ohio relies on the injection of a mixture of propane and air into the system in order to have both sufficient capacity and sufficient pressure to serve customers on cold, winter days. This propane-air is provided by the propane facilities, which rely on the storage of propane in manmade, unlined caverns lying deep within bedrock. Although the Company has inspected, repaired, and maintained the above-ground portions of the peaking facilities through the years, the Company cannot predictably continue to rely on the storage caverns indefinitely. The caverns cannot be inspected and, if a leak in the containment of the propane were to occur, the Company would not be able to repair the

³² 2019 Deferral Extension, pp. 18-19.

³³ OCC Comments, pp. 10-11.

³⁴ Contrary to OCC's implication, the Company has never argued that the propane storage facilities at the East End site pose an obstacle to remediation at the West End site. OCC Comments, pg. 11. The deferral extension covers both due to the total sum of exigent circumstances of which the propane facilities are only one.

caverns. The Company would have to simply abandon a leaking propane cavern, regardless of what need there might be for additional fuel on a cold, winter day.

As the Company stated in its 2019 Deferral Application, it is neither safe nor in the best interests of its customers, employees or community, 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.³⁵ The risks of damaging the cavern and causing a release and creating an unsafe situation for its employees or the surrounding community, and the potential of not being able to replace the storage capacity of the damaged cavern or repair the propane facilities in time for the winter heating season (or even at all) is simply too great. Despite the unsupportable claims by OCC, it is not simply a matter of whether the Company could have performed the necessary remediation work over and around these propane facilities during the summer months.³⁶ The risk of damage to the underground propane facilities is the same in the summer as it is in the winter. Geological failure of the cavern due to remediation activity would be catastrophic and render the cavern permanently unusable, meaning the Company would not have the capability to meet customer demand during the winter. The result of geological failure would be immediate and irreparable loss of operation. The Company cannot perform *any* remediation work in these areas while the caverns and related facilities continue to be in use. The risk is too great.

The Commission itself has previously identified this risk of permanent propane cavern geological failure at the Company's East End Gas Works propane facility (the same facility that is located under the Middle Parcel of the East End MGP site), and correlated the risk to other cavern failures and impacts to utility operations. As the Commission recognized in its Order in Case No.

³⁵ 2019 Deferral Extension, pp. 17-19.

³⁶ OCC Comments, pg. 10.

15-218-GA-GCR, *et al.*, “Duke’s Dicks Creek Plant propane facility is no longer operational, because of a geological failure at the Todhunter Propane Cavern.”³⁷ Duke Energy Ohio has taken steps to facilitate the retirement of its aging propane facilities by seeking approval of other infrastructure. Again, the delays experienced in obtaining approval of this infrastructure at the Siting Board constitute further exigent circumstances, as more fully described in the Company’s Application and below.

Staff of the Ohio Power Siting Board (OPSB Staff) has also acknowledged this risk and is supportive of the Company’s need to retire these propane facilities.³⁸ OPSB Staff inspected the Company’s propane-air plant and observed risks to the critical propane-air facilities, stating that: “[i]f propane-air peaking plants would become unavailable, the loss of supply from these plants on a high demand day could result in widespread service outages.”³⁹ There is no remedy or repair for a geological failure of the subterranean propane cavern.

The Company cannot 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. Since 2016, the Company has been trying to obtain approval of a plan to do just that. And despite the Company’s best efforts, a regulatory decision has not yet been made on the plan, and the Company’s ability to proceed with such retirement strategies must wait.

³⁷ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Duke Energy Ohio, Inc., and Related Matters*; Case No. 15-218-GA-GCR *et al.*, Order, pg. 12 (September 7, 2016).

³⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for a Certificate of Environmental Compatibility and Public Need for the C314 V Central Corridor Pipeline Extension Project*, Case No. 16-253-GA-BTX (Amended Staff Report of Investigation, pg. 29) (March 5, 2019).

³⁹ *In the Matter of the Application of Duke Energy Ohio, Inc., for a Certificate of Environmental Compatibility and Public Need for the C314 Central Corridor Pipeline Extension Project*, Case No. 16-253-GA-BTX, Reply Brief Submitted on Behalf of the Staff of the Ohio Power Siting Board, pg. 8 (June 10, 2019). *Citing* Staff Ex. 9 (Conway Direct), pg. 4.

Likewise, Duke Energy Ohio cannot simply perform shallow digging or pave over the areas at issue and meet requirements under the VAP process as OCC seems to believe.⁴⁰ OCC's claim that there is no evidence to support the Company's remediation strategy is false. OCC made similar arguments as part of the Company's 2012 Natural Gas Rate Case,⁴¹ which the Commission rejected, finding that "Duke acted appropriately in responding in a proactive manner to addressing its obligations to remediate the MGP sites in Ohio."⁴² The Company explained both then, and more recently in related MGP cases pending before the Commission, why shallow digging and asphalt capping are not viable strategies and are insufficient in these circumstances to meet Ohio VAP requirements.⁴³ The Company has submitted testimony of Ohio VAP Certified Professionals with experience managing projects like the MGP sites at issue, and both conclusively state that asphalt or concrete capping and shallow digging will not meet all applicable standards necessary for a "No Further Action" letter under the Ohio VAP.⁴⁴ The Commission must disregard OCC's claims today as it did years ago.

E. DUKE ENERGY OHIO HAS AGGRESSIVELY AND PROACTIVELY PURSUED RETIREMENT OF THE PROPANE FACILITIES THAT PREVENT COMPLETION OF REMEDIATION ACTIVITIES IN THE EAST END MIDDLE PARCEL.

OCC's assertion is that Duke Energy Ohio has not taken all reasonable steps to retire its propane facilities in a timely manner is also untrue.⁴⁵ As the Company explained in its Application,

⁴⁰ OCC Comments, pg. 10.

⁴¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, pg. 33 (November 13, 2013).

⁴² *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, pg. 47 (November 13, 2013).

⁴³ See e.g., *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, pg. 32 (November 13, 2013); See also, *In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case No. 19-174-GA-RDR, Direct Testimony of Shawn S. Fiore, pp. 17-19 (March 29, 2019); and Direct Testimony of Dan B. Brown, pp. 24-25 (March 29, 2019).

⁴⁴ *Id.*

⁴⁵ OCC Comments, pg. 11.

Duke Energy Ohio has proactively attempted to address and resolve the restrictions that prohibit completing remediation in the inaccessible areas.⁴⁶ Since 2016, Duke Energy Ohio has pursued natural gas delivery system enhancements that, if approved, would facilitate the decommissioning and retirement of these propane facilities that are near the end of their useful life.⁴⁷ However, to date and due to reasons beyond its control, the Company has not received necessary regulatory approval to begin such system enhancements. In 2016, the Company petitioned for construction approval of the Central Corridor Pipeline Extension Project (Central Corridor Pipeline) that, among other things, will enable the shutdown and eventual retirement of the underground propane storage and associated delivery facilities. Once the Central Corridor Pipeline is approved, constructed, and in service, these currently inaccessible areas are expected to become accessible. And, once the propane storage and pipeline facilities are able to be safely retired and decommissioned, Duke Energy Ohio will be able to complete the remediation as it is obligated by state and federal environmental laws.

OCC, again, would have the Commission believe that the Company intentionally put off addressing the need to remediate the areas surrounding its propane facilities, claiming that the Company intentionally waited nearly a decade to file its Central Corridor Pipeline Application.⁴⁸ First, OCC's timeline is significantly off the mark. The Commission did not establish a timeframe for remediation until its Gas Rate Case Order issued in late 2013.⁴⁹ It was only at that point that the Company first became aware that the Commission desired any time limitation whatsoever.

⁴⁶ 2019 Deferral Application pp. 11-12.

⁴⁷ *In the Matter of the 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).

⁴⁸ OCC Comments, pg. 12.

⁴⁹ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, pp. 72-73 (November 13, 2013).

After the Commission established a remediation deadline of December 31, 2016, in the Gas Rate Case Order, the Company began to work diligently to develop a safe and compliant plan for replacing the propane storage facilities without impacting system reliability for customers. Designing a natural gas pipeline and performing routing studies that met natural gas system requirements, including supporting the retirement of the aging propane infrastructure, took time. The Company filed its proposal in 2016, less than thirty-six months after the Commission first established a remediation deadline.⁵⁰

While OCC is correct that the Company did seek a continuance of the Central Corridor Pipeline proceeding due to the discovery of “potential concerns with engaging in construction activities in the vicinity of property on which environmental remediation has occurred”⁵¹ known as the Pristine Superfund site, OCC’s characterization of the Company’s request is misleading in numerous respects. First, the Company opposed previous delays of the evidentiary proceeding.⁵² The Company’s request for a delay came only after discovery of a significant concern related to the route selected by the OPSB Staff more than a year after the Company filed its Central Corridor Pipeline Application.⁵³ Nonetheless, upon discovery of the potential issues with the Pristine Superfund site, the Company acted prudently in suspending the proceeding to conduct additional

⁵⁰ *In the Matter of the 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).

⁵¹ *In the Matter of the 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, Motion for Suspension of Procedural Schedule by Duke Energy Ohio, pg. 2 (August 23, 2017)

⁵² *In the Matter of the 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, Memorandum Contra Kenwood’s and Sycamore Plaza’s Motions for Continuance of the Adjudicatory Hearing and Request for Expedited Ruling (June 20, 2017).

⁵³ *In the Matter of the 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, Motion for Suspension of Procedural Schedule by Duke Energy Ohio, Inc., and Request for Expedited Treatment (August 23, 2017).

investigation so as to assuage any concerns that the route recommended by the OPSB Staff unknowingly created additional environmental exposure.

Now, OCC alleges that the Company did nothing until February 2018 regarding the Pristine Superfund site, referring to email correspondence contained in the Company's April 13, 2018, Motion to Reestablish the Procedural Schedule.⁵⁴ Once again, OCC is misconstruing facts, on the basis of no knowledge of actual facts. The communications contained in that filing did not comprise the entirety of the Company's investigation into the Pristine Superfund site.

The evidentiary record in the Central Corridor Pipeline proceeding confirms that the Company took substantial additional steps. OCC ignored the Direct Testimony of Ms. Julianne Schucker of Jacobs Engineering Group, formerly CH2M HILL, who detailed the scope of the investigation she performed into the Pristine Superfund site upon the Company's discovery of its existence.⁵⁵ Ms. Schucker testified to the voluminous documents she reviewed regarding the Pristine Superfund site to determine that the Central Corridor Pipeline would not impact the site.⁵⁶ These documents included consent orders, remedial investigation reports, record of decision (ROD) reports, post-ROD sampling reports, Five-Year Review reports, and soil sampling tests performed by another Company witness, Daniel P. Earhart of Burns & McDonnell.⁵⁷ It was only after completing this extensive document review, and performing the necessary soil sampling, that the Company sought to confirm its findings with the U.S. Environmental Protection Agency as was indicated in the emails referenced by the OCC. The Company also performed numerous soil-sampling tests in other portions of the route, as testified to by Mr. Earhart. The Company sought

⁵⁴ OCC Comments, pg. 12.

⁵⁵ *In the Matter of the 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, Direct Testimony of Julianne Schucker, pg. 4 (March 26, 2019).

⁵⁶ *Id.* pg. 8.

⁵⁷ *Id.* pg. 4.

to reinstate a procedural schedule on an expedited basis only upon confirming that OPSB Staff's recommended route was safe.⁵⁸

The evidentiary hearing in the Central Corridor Pipeline proceeding did not commence until April 9, 2019, nearly a year after the Company requested that the Siting Board reinstate a procedural schedule. And Duke Energy Ohio continues to anxiously await a decision on its application to construct its Central Corridor Pipeline still today, more than three years after its application was filed. The procedural delays and uncertainty as to when construction of the Central Corridor Pipeline may commence, without which retirement and decommissioning of the Critical Natural Gas Infrastructure cannot occur, constitutes significant exigent circumstances that are beyond the Company's control and directly impact and prevent the Company from completing MGP remediation within the currently inaccessible areas in the Middle Parcel of the East End site. These exigent circumstances support the continuation of the MGP remediation deferral authority.

F. THE NEED TO PROPERLY SEQUENCE REMEDIATION ACTIVITY JUSTIFIES CONTINUED DEFERRAL AUTHORITY FOR THE EAST AND WEST END SITES.

OCC contends that the need to properly sequence remediation activity cannot be an exigent circumstance justifying continued deferral authority because the Company should have anticipated the need for sequencing.⁵⁹ But OCC overlooks the complexity and inherently iterative nature of

⁵⁸ *In the Matter of the 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, Motion by Duke Energy Ohio, Inc., for Reestablishment of Procedural Schedule and Request for Expedited Review (April 13, 2018). See also Supplemental Information (April 13, 2018).

⁵⁹ OCC Comments, pg. 13.

MGP remediation. In fact, it would have been downright irresponsible for the Company to accelerate remediation indiscriminately as OCC appears to suggest.

The two MGP sites at issue are extremely complex and unique in terms of their size, history, and proximity to the Ohio River, as well as, due to the presence of sensitive and critical underground utility infrastructure. Proper sequencing of MGP investigation and remediation work is essential to responsibly and prudently addressing contamination and preventing potential recontamination. The areas at issue, the East End Middle Parcel surrounding the propane facilities and the banks and sediments along the Ohio River, are part of the original MGP sites and relate to the East End and West End sites. Moreover, until the inaccessible areas become accessible, a significant portion of the uplands located immediately adjacent to the Ohio River and riverbank at the East End site is inaccessible due to the sensitive and critical underground utility infrastructure and the cavern. Duke Energy Ohio would not have been able to complete remediation in these inaccessible areas, even if it were to have “accelerated remediation” in other areas.⁶⁰

While Duke Energy Ohio has begun its investigation of the Ohio River sediments and bank, by proceeding with remediating the Ohio River sediments and bank without addressing the inaccessible areas, there could be risk in recontamination of remediated areas.

The areas at issue, the East End Middle Parcel surrounding the propane facilities and the banks and sediments along the Ohio River are part of the original MGP sites and relate to the East and West End MGP sites. The Company’s Application herein again explained how properly sequenced work was necessary for efficiency, cost management, and to not create unreasonable risks or threat to human health or the environment.⁶¹

⁶⁰ 2019 Deferral Extension, pp. 25-26.

⁶¹ 2019 Deferral Extension, pp. 25-26.

Proper sequencing of the site remediation, particularly around the Ohio River is essential due to the mobility of the free product. This necessitates that upland areas be completed before lower areas (*e.g.*, in and along the banks of the Ohio River) are started or else risk further contamination and a need to re-remediate. Such an all at once remediation strategy, as suggested by the OCC, would be imprudent, irresponsible, and costly.

As the Company explained in its Reply Comments filed in Case No. 18-283-GA-RDR, *et al.*, and in its Application herein,⁶² due to the construction of the Markland Dam in the 1960s, the elevation of the Ohio River near the remediation sites is much higher today than it was during the operation of the MGPs at the East End and West End sites decades ago. Prior to the change in the depth of Ohio River at these sites, the original southern boundaries of the upland portions of the East End (and West End) sites were located more than two hundred feet farther into what is now within the Ohio River. The Company's investigation work within the Ohio River, is necessary under applicable law, in order to evaluate impacts associated with the former MGP operations to the Ohio River.

Duke Energy Ohio has acted responsibly and prudently in conducting its MGP investigation of the "facilities" as that term is defined by CERCLA.⁶³ Through this deliberate and customary sequencing approach for work, the Company has prudently managed costs so as to perform only work in areas that are determined necessary for investigation and eventually remediation. As a result of the sequencing of investigation activities the Company has been led to

⁶² 2019 Deferral Extension, pg. 26.

⁶³ 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).

areas along the bank of the Ohio River and in sediments at the East End and West End sites. More time is needed to determine what, if any remediation may be required in these areas.

III. OTHER MGP ISSUES IRRELEVANT TO THE COMPANY'S DEFERRAL EXTENSION REQUEST

A. OCC'S COMMENTS ADDRESS ISSUES THAT ARE BEYOND THE SCOPE OF THE COMPANY'S 2019 DEFERRAL EXTENSION.

On August 13, 2019, the Commission, by Entry, consolidated twelve of the Company's pending MGP-related cases and established a procedural schedule to address the cost recovery issues that have been pending since 2014 (Consolidation Entry).⁶⁴ The Consolidation Entry did not include the Company's 2019 Deferral Extension. Rather, on that same day, the Commission, again by separate Entry, issued a procedural schedule as it relates to the 2019 Deferral Extension, establishing dates for the submittal of comments and reply comments.⁶⁵ Therefore, all cost recovery issues, including the scope of remediation and the insurance proceeds, are the subject of a separate, upcoming evidentiary hearing scheduled for November 18, 2019.

Although Commission Staff issued its Report of Recommendation (Staff Report) on July 12, 2019, addressing all pending MGP-related issues, including the Company's annual Rider MGP recovery applications for calendar years 2013 through 2018 and the deferral extension at issue here, OCC's Comments include issues beyond the scope of the Company's 2019 Deferral Extension. These extraneous issues include the scope of recovery of the Company's MGP remediation since 2013 and issues involving insurance proceeds. As those aforementioned issues are the subject of a separate regulatory proceeding before the Commission, they should not be comingled here. The cost recovery and the deferral extension issues should remain separate. All

⁶⁴ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case No. 19-174-GA-RDR *et al.*, Entry (August 13, 2019).

⁶⁵ *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, Entry (August 13, 2019).

parties, including OCC, Staff and the Company, will have their opportunities for due process, and the Commission will have the benefit of all evidence to address those scope and insurance recovery/allocation issues in the consolidated MGP cost recovery cases.

B. DUKE ENERGY OHIO'S SHAREHOLDERS HAVE SHARED IN MGP REMEDIATION COSTS.

OCC argues that the Company must be held accountable for its remediation and that its shareholders should be responsible for cleaning the East End and West End sites.⁶⁶ In making such claims, OCC ignores that Ohio and federal law hold Duke Energy Ohio accountable for performing the remediation of the two former MGP sites at issue and that the prior litigation and rulings by the Commission and the Court have confirmed such responsibility. As the owner and operator of the facilities from which there is a release or threatened release of hazardous material, Duke Energy Ohio is “strictly” liable for remediation of these areas under CERCLA.⁶⁷ In its Order in Case No. 12-1685-GA-AIR, *et al.*, the Commission left little doubt about Duke Energy Ohio’s obligation to clean up contamination caused by the former MGP sites finding that “[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 and in order to maintain the usefulness of the properties; therefore, these costs are a current cost of doing business.”⁶⁸ The Court confirmed that such legally mandated costs incurred in providing service are recoverable.⁶⁹ It is hard to imagine that any party to this case questions whether there is a societal benefit to cleaning up known environmental contamination no matter where it exists.

⁶⁶ OCC Comments, pg. 2.

⁶⁷ *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, pg. 438 (June 29, 2017).

⁶⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, pg. 59 (November 13, 2013).

⁶⁹ *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, pp. 441-443 (June 29, 2017).

The MGP remediation costs at issue are and will continue to be costs of utility service appropriate for recovery as previously determined by the Ohio Supreme Court. The Ohio Supreme Court has affirmed that the Company's MGP remediation costs are service-related costs and recoverable through rates under R.C. 4909.15(A)(4).⁷⁰ The simple passage of time does not change such facts.

Nonetheless, Duke Energy Ohio's shareholders have borne, and continue to bear, their fair share of responsibility for the remediation costs incurred to date. As OCC is aware, after previously permitting the Company to accrue carrying costs on the MGP remediation costs, the Commission later denied the Company recovery of such carrying costs.⁷¹ Duke Energy Ohio has continued to perform the required remediation since 2013, making annual filings with the Commission detailing such expenditures for recovery. Yet, to date, the Commission has not ruled upon any of the Company's annual applications for recovery of its MGP remediation costs. Therefore, Duke Energy Ohio's shareholders have been financing all MGP remediation since the outset of remediation activities.

Those expenses, totaling approximately \$46 million through December 31, 2018, represent cash outlays by the Company's shareholders. It has been more than five years since the Company first sought recovery of 2013 remediation expenses (*i.e.*, filed in March 2014 for 2013 expenses). The Company's shareholders have lost five years' worth of the time value of money. As explained by Duke Energy Ohio's witness Ms. Sarah Lawler in her Direct Testimony filed in Case No. 19-174-GA-RDR, the Commission's Opinion and Order in the 2012 Natural Gas Rate Case resulted in an immediate charge of over \$5 million for the carrying costs accrued through December 31,

⁷⁰ *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, pp. 441-443 (June 29, 2017).

⁷¹ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, at pp. 59-60 (November 13, 2013).

2012. And, for the costs that have been incurred and deferred after December 31, 2012, the Commission's decision on carrying costs has cost the Company's shareholders an additional \$4.7 million through December 31, 2018.⁷²

OCC's claim that Duke Energy Ohio's shareholders should be held accountable for MGP remediation costs does not justify denying the Company's deferral extension request. The Company has demonstrated that exigent circumstances exist that warrant extension. As it relates to the areas in the East End Middle Parcel surrounding the propane infrastructure, completion of remediation activities is prevented due to the existence of those underground propane facilities, the sensitive nature of this equipment, the attendant risks of performing any remediation activities whatsoever in these areas. Inadvertent damage to the subterranean cavern from remediation activities would have a serious risk of health and safety of the general public, not to mention the well documented risk that the Company's natural gas distribution system would be unable to meet its basic needs to provide natural gas for heating during winter peaking seasons. These areas are indisputably part of the original East End MGP site and such remediation work will eventually be performed once these areas become accessible.

C. THE COMPANY'S OBLIGATION TO REMEDIATE EXTENDS TO ALL AREAS IMPACTED BY FORMER MGP OPERATIONS.

OCC argues that the Commission's 2012 Gas Rate Case Order prohibits Duke Energy Ohio from charging customers for remediation that occurs outside the bounds of the MGP sites from 2013 onward.⁷³ As mentioned above, this issue is the subject of a separate matter before the Commission and is unrelated to the 2019 Deferral Extension at issue here. Nonetheless, the Commission's 2012 Gas Rate Case Order does not contain such a blanket exclusion. The

⁷² *Id.*

⁷³ OCC Comments, pg. 14.

Commission's 2012 Gas Rate Case Order does not define what constitutes the East End and West End sites. Indeed, the legal obligation for remediation extends to all areas impacted by the presence of contamination due to past MGP operations at the East End and West End sites. OCC parses the Commission's Order to suit its purposes but misses the most compelling statement in the Commission's Order initially approving recovery of MGP costs. As noted above, the Commission stated in the 2012 Gas Rate Case Order that "[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 and in order to maintain the usefulness of the properties; therefore, these costs are a current cost of doing business."

Following OCC's logic, forgetting for now that the applicable state and federal laws require remediation of the impacts regardless of property boundaries, the "societal obligation" and the "safety and prosperity of the communities in the areas" of the MGP sites must end at some geographic boundary. Apparently, in OCC's view, there is no societal benefit or legal obligation to remediate any area beyond an arbitrarily defined geographic boundary. It is difficult to imagine that the Commission intended for the Company to ignore its obligation to clean up property outside of some boundary. It would be just as beneficial to society and there is no less legal obligation to clean up contaminated property regardless of which side of a boundary the contamination exists. Both the Commission and the Court found that such costs are a current cost of doing business and both the Commission and the Court found that the used and usefulness of the property at issue is irrelevant. This finding means that it does not matter whether the property at issue is, was, or ever will be used and useful in the provision of utility service. If the used and useful standard does not apply, then OCC's argument that only costs to remediate property that had been used to provide

service completely contradicts the Commission's and the Court's express finding that the "used and useful" standard does not apply to recovery of MGP investigation and remediation costs.

The 2012 Gas Rate Case Order disallowed recovery of \$2,331,580 related to the area described as the Purchased Parcel, but this disallowance did not reflect a blanket exclusion of any particular piece of property. Rather, it only represented the expense the Commission determined was paid to separately purchase approximately nine acres of property located to the west of the West Parcel at the East End site.⁷⁴ 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."⁷⁵

Moreover, in its 2016 Deferral Order, the Commission found that, among other things:

[T]he Company was unable to reasonably or accurately confirm the level of contamination for that parcel and the area west of the West Parcel, or the specific portions requiring remediation, until site assessments were completed in 2014. According to Duke, the site assessments confirmed that there are unique complexities present in these areas that will require further investigation and remediation. We agree with Duke that these are unexpected circumstances beyond the Company's control.⁷⁶

Thus, the Commission explicitly based its decision to extend the Company's deferral authority in 2016, in part, upon investigation that needed to continue in the area west of the West Parcel. No party sought rehearing on that issue.

Moreover, referring back to the Commission's decision in the 2012 Gas Rate Case, on rehearing, the consumer advocates then argued that Duke Energy Ohio's decision to sell property located to the west of the West Parcel should have disqualified the Company from charging

⁷⁴ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, (Opinion and Order, at pg. 73) (November 13, 2013).

⁷⁵ *Id.*, pg. 60.

⁷⁶ *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 *et al.*, Finding and Order, pg. 14 (December 21, 2016).

customers any costs of remediation from the site's change in use. The Commission denied the consumer advocates assignment of error and found "that the Consumer Advocates' conjecture pertaining to the sale of the parcel west of the East End site and the effect of such sale on the commencement of the need to remediate the site is not based on any evidence presented on the record" and that "the record reflects that the property sold by Duke represents only a small portion of the overall nine-acre purchased parcel . . ."⁷⁷ The Commission noted its denial of the Company's "request to include approximately \$2.3 million associated with the purchased parcel in the MGP costs to be recovered in these cases."⁷⁸ The Commission's Entry on Rehearing further stated that the \$2.3 million was excluded because the record did not distinguish the portion of the nine acre parcel "which had been associated with the MGPs and the remainder of the nine-acre purchased parcel that had not been related to MGPs."⁷⁹ By justifying the exclusion this way, the Commission demonstrated that the key factual inquiry was whether the costs in question were "associated with" or "related to" MGPs. Accordingly, costs that the record demonstrates to be "associated with the MGPs," including at the area west of the West Parcel, must also be recoverable.

D. INSURANCE PROCEEDS MUST BE ALLOCATED TO FAIRLY REIMBURSE RATEPAYERS FOR *RECOVERED* MGP INVESTIGATION AND REMEDIATION COSTS.

The 2019 Deferral Application does not implicate the question of how the Company must allocate insurance proceeds recovered for MGP investigation and remediation.⁸⁰ Nonetheless, OCC argues in this proceeding that the Company must immediately refund to customers *all* of the

⁷⁷ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Entry on Rehearing, pg. 21 (January 8, 2014).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ The Commission is considering the appropriate manner of allocating these proceeds in another pending proceeding. See Case No. 19-174-GA-RDR.

insurance proceeds it has received for its MGP investigation and remediation claims, even if a substantial portion of such proceeds turns out to stem from investigation and remediation costs that ratepayers will never bear.⁸¹ Not only does OCC misinterpret the Gas Rate Case Order, but it propounds an interpretation that would conflict with basic cost recovery principles.

1. The Commission anticipated that ratepayers be reimbursed only for costs they paid for MGP investigation and remediation.

OCC's entire argument rests on a single sentence in the Gas Rate Case Order: "[a]ny proceeds paid by insurers . . . for MGP investigation and remediation should be used to reimburse the ratepayers."⁸² Even in isolation, it is clear that the Commission anticipated allocation of insurance proceeds because it used the term "reimburse." A directive to "reimburse" ratepayers indicates that the Commission anticipated that the Company would return to ratepayers those MGP investigation and remediation costs *which ratepayers had paid*. But a broader look at the 2012 Gas Rate Case Order makes this even clearer.

The Commission's directive "to reimburse the ratepayers" mirrored language from Staff's recommendation, indicating that the Commission, like Staff, anticipated that ratepayers would only receive insurance proceeds commensurate with the costs they incurred. Prior to its conclusion, the Commission summarized Staff's recommendation, stating that "any 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*."⁸³ The Commission adopted Staff's language of "reimburse[ment]" in its ultimate conclusion, and did not direct the Company to simply credit all insurance recoveries to customers,

⁸¹ OCC Comments, pp. 20-22 (emphasis added).

⁸² *Id.*, pg. 21 (quoting Gas Rate Case Order, pg. 67).

⁸³ Gas Rate Case Order, pg. 66 (emphasis added).

as OCC advocates here. Thus, the Gas Rate Case Order is properly read as anticipating “fully reimburs[ing]” customers for their fair share of MGP costs via allocation.

2. The insurance proceeds include compensation for MGP investigation and remediation efforts for which Staff has recommended denial of cost recovery.

To date, there has been no recommendation by the Staff to disallow any of the MGP costs incurred from 2013 through 2018 for any reason other than *where* the costs were incurred. OCC does not dispute that the insurance proceeds include compensation for all of the Company’s MGP investigation and remediation costs, including costs related to geographic sites that may ultimately be disallowed for cost recovery. The Company could never have obtained the same amounts in insurance proceeds if its investigation and remediation expenses were, for example, limited to the expenses recommended for cost recovery by Staff,⁸⁴ and OCC does not attempt to argue otherwise.

As Duke Energy Ohio Witness Michael Lynch explains, the general liability policies under which the Company has already recovered provided broad coverage for “all environmental liabilities arising from the former operations at the MGP Sites,”⁸⁵ not only for environmental liabilities on the Company’s property or only for MGP-specific environmental liabilities. The policies covered the Company’s costs to “investigate and/or remediate environmental damage to soils of neighboring landowners, to the sediments of the Ohio River . . . and/or to groundwater under or beyond the Company’s property boundaries.”⁸⁶ Additionally, the insurance settlements provided coverage “for all types of environmental property damage . . . , regardless of the types of contaminants that caused the damage,” and compensated the Company for costs of remediating

⁸⁴ Staff Report, pp. 5-6, 8-9.

⁸⁵ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case No. 19-174-GA-RDR, Direct Testimony of Michael J. Lynch, pg. 4 (March 29, 2019).

⁸⁶ Id.

future migration of contaminants, which may last decades.⁸⁷ In exchange for the settlement proceeds, the Company gave up its rights to any further claims on the general liability policies for *all* of the above-described expenses.

Not only would it be unfair and inaccurate to attribute 100 percent of the insurance proceeds to (potentially) only a portion of the Company's claims, it would effectively punish the Company for pursuing an optimal settlement strategy. Attempting to negotiate separate settlements with each insurer for each geographic component of the required MGP investigation and remediation would have been inconsistent with the policies and greatly complicated matters, causing the Company to incur far higher litigation expenses. Instead, the Company settled all of its claims on the general liability policies in a single set of settlements, consistent with its goal to maximize the amount of the settlement under the general liability policies in a cost-efficient manner.⁸⁸ However, the Company's cost-efficient approach should not preclude a fair allocation after settlement proceeds are netted.

To the extent that the Commission finds certain of the Company's MGP investigation and remediation expenses to be ineligible for cost recovery, shareholders will be the ones to bear those expenses. Commensurately, the insurance proceeds meant to compensate the Company for the expenses it bears should be allocated to the shareholders.

E. INSURANCE PROCEEDS CANNOT BE ALLOCATED UNTIL REMEDIATION IS COMPLETE AND THE COMMISSION HAS ADJUDICATED ALL OUTSTANDING MGP COST RECOVERY APPLICATIONS.

Based on the false premise that allocation of insurance proceeds is unnecessary, OCC goes on to argue that the Company should "immediately" pass on all insurance proceeds to customers

⁸⁷ *Id.*, pg. 7.

⁸⁸ *Id.*, pg. 6.

because all pending settlements have been reached.⁸⁹ However, as explained above, a fair and accurate allocation of insurance proceeds will be required if the Commission disallows any of the Company's MGP investigation and remediation costs. The fact that the Company has reached settlements with the insurers does not change this.

There are two other key variables that must be determined before the Company can fairly allocate the proceeds. First, the Company will not be able to fairly and accurately allocate insurance proceeds until it completes investigation and remediation, and knows its final total costs. This is because the insurance proceeds did not cover merely costs to date, but also future costs, including for areas and amounts of contamination that are currently unknown.⁹⁰ Second, the Company must know which MGP costs customers will bear. If the Commission only allows recovery of costs incurred only within a fixed geographical boundary, regardless of whether the costs are incurred before December 31, 2019, whether there is a legal obligation to remediate all impacted areas, or whether there is a societal benefit from cleaning up all impacted areas, customers should only receive the portion of insurance proceeds associated with these costs. The insurance proceeds reimbursed costs incurred to remediate property inside and outside the geographic boundary; consequently, the insurance proceeds should be allocated between the allowed and disallowed sites in the same proportion that the total costs are ultimately allocated. Because that proportionality will not be known until the remediation is complete, it is only then that the Company can properly allocate the insurance proceeds and refund a corresponding amount to customers.

⁸⁹ OCC Comments, pg. 22.

⁹⁰ Direct Testimony of Michael J. Lynch, pg. 7.

IV. CONCLUSION

The Company has demonstrated that exigent circumstances exist to justify continued deferral authority. The Company has performed the required remediation work in an expeditious and responsible manner, in full compliance with necessary safety regulations and in accordance with the law. Commission-determined remediation timelines must continue to balance the desire to complete the work in a timely manner with the need to perform the work in a safe and responsible manner that does not put the public health at risk. This is especially true with respect to the Middle Parcel at the East End site where the Company cannot complete the required remediation activities until it is safe to work around the underground propane facilities without risk of irreparably compromising the Company's ability to deliver natural gas during the winter months. As long as these facilities are necessary to maintain natural gas system pressure and capacity, performing any remediation in these areas is not in the best interests of customers.

Likewise, the mobility of the MGP impacts has limited and prevented the Company from completing remediation in areas in and along the banks of the Ohio River at both the East End and West End sites until the upland portions were complete because of the risk for further contamination or recontamination. All of the areas impacted and that require investigation and potential remediation relate to the East and West End sites as was contemplated by the Commission's Order.

Accordingly, the Commission should grant the Company's application to continue its deferral authority for MGP contamination investigation and remediation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Rocco D'Ascenzo', is written over a horizontal line.

Rocco D'Ascenzo

Deputy General Counsel

Elizabeth H. Watts (0031092)(counsel of record)

Associate General Counsel

Jeanne W. Kingery

Associate General Counsel

Larisa M. Vaysman

Senior 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

Jeanne.Kingery@duke-energy.com

Larisa.Vaysman@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 2nd day of October 2019, by U.S. mail, postage prepaid, or by electronic mail upon the parties listed below.



Rocco O. D'Ascenzo

Thomas McNamee
Robert A. Eubanks
Assistant Attorneys General
Public Utilities Section
30 East Broad St., 16th Floor
Columbus, Ohio 43215
Robert.eubanks@ohioattorneygeneral.gov
Thomas.McNamee@ohioattorneygeneral.gov

Counsel for Staff of the Public Utilities
Commission of Ohio

Angela Paul Whitfield
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
paul@carpenterlipps.com

Counsel for The Kroger Co.

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

Counsel for The Ohio Manufacturers' Association
Energy Group

Christopher M. Healey
Assistant Consumers' Counsel
Office of the Ohio Consumers'
Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Christopher.healey@occ.ohio.gov

Counsel for Office of the Ohio
Consumers' Counsel

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

Counsel for Ohio Partners for Affordable
Energy

David F. Boehm
Michael L. Kurtz
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkylercohn@BKLawfirm.com

Counsel for Ohio Energy Group

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/2/2019 4:14:43 PM

in

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

Summary: Reply Reply Comments of Duke Energy Ohio, Inc. electronically filed by Mrs. Debbie L Gates on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco O. Mr. and Watts, Elizabeth H and Kingery, Jeanne W and Vaysman, Larisa