

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matters of the Applications of Duke)	Case No. 14-375-GA-RDR
Energy Ohio, Inc., for Adjustments to Rider)	Case No. 15-452-GA-RDR
MGP Rates.)	Case No. 16-542-GA-RDR
)	Case No. 17-596-GA-RDR
)	Case No. 18-283-GA-RDR
)	Case No. 19-174-GA-RDR

In the Matters of the Applications of Duke)	Case No. 14-376-GA-ATA
Energy Ohio, Inc. for Tariff Approval.)	Case No. 15-453-GA-ATA
)	Case No. 16-543-GA-ATA
)	Case No. 17-597-GA-ATA
)	Case No. 18-284-GA-ATA
)	Case No. 19-175-GA-ATA

**INITIAL POST-HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Public Utilities Commission of Ohio (“PUCO”) should not allow Duke to charge its customers excessive amounts to clean up the hazardous waste left behind by Duke’s long-defunct, 19th-century manufactured gas plants (“MGPs”). Duke wants to charge its customers nearly \$46 million from 2013 to 2018 after already charging them \$55 million for remediation that took place from 2008 to 2012. This \$46 million includes \$23 million to clean up the Ohio River and a plot of land called the “Area West of the West” or “WOW” parcel. But Duke doesn’t own the Ohio River, Duke doesn’t use the WOW parcel for utility service, and the WOW parcel was never used by Duke or its predecessors as part of the MGP sites.

The PUCO Staff and the Office of the Ohio Consumers’ Counsel (“OCC”) recommend that Duke not be allowed to charge customers to clean up the WOW parcel and the Ohio River, thereby reducing Duke’s proposed charges by \$23 million. The law (R.C. 4909.15(A)(4)) does not allow Duke to charge customers to clean these offsite properties because Duke does not use

these properties to provide public utility service. The Order in Duke's most recent natural gas base rate case¹ (the "Rate Case") similarly prohibits Duke from charging customers to clean these offsite properties because they were not part of the MGP sites.

OCC recommends further protection for consumers in this case. Duke is currently holding more than \$50 million in insurance proceeds in a bank account. The PUCO already ruled in the Rate Case that all of this money belongs to customers. It should be immediately given to them as a bill credit to provide relief from the millions of dollars they have paid (and might pay in the future) for Duke's environmental cleanup.

Further, Duke spent substantially more than was necessary to clean up the sites. To be clear, OCC agrees that Duke should protect its Cincinnati-area customers from the negative effects of hazardous waste. But Duke could have done so while spending substantially less than \$46 million. OCC expert James Campbell is a Ph.D. environmental engineer with 30 plus years of experience at more than 50 MGP sites who is certified by the State of Ohio to evaluate MGP cleanup projects like Duke's. He testified that Duke is cleaning up these properties far beyond what is required by law, and far beyond what is necessary to protect human health and the environment: Duke could have cleaned everything up for around \$10 million, with less than \$4 million charged to customers for the MGP sites themselves (the remaining \$6 million being for offsite areas that customers should not pay for).²

¹ Case No. 12-1685-GA-AIR.

² See generally OCC Ex. 21 (Campbell Testimony).

The PUCO has consistently emphasized that Duke’s shareholders should be held accountable for some of the costs to clean up the mess left behind by Duke’s defunct MGP sites:

- “[W]e find intervenors’ argument that the shareholders should bear some of the responsibility for the remediation costs persuasive.”³
- “[I]t is incumbent upon the utility to commence its investigation and remediation, and request for recovery in a timely manner, so as to minimize the ultimate rate burden on customers.”⁴
- It is necessary to “ensure the Company and its shareholders are held accountable.”⁵
- It is necessary to “ensure that the Commission’s original intent to protect the public interest and hold Duke and its shareholders accountable, in part, for the remediation”⁶

The time for Duke to be held accountable is now. Customers have shouldered their fair share of the burden—more than \$55 million to date. They should not be required to pay to clean up land and water that Duke doesn’t use for utility service and doesn’t even own. They should not be required to pay extra because Duke chose to ignore more cost-effective cleanup methods. And they should immediately get the benefit of \$50 million in insurance money that Duke has recovered but is holding hostage in one of its bank accounts.

I. BACKGROUND

A. The Manufactured Gas Plant Sites

Duke and its predecessors previously operated two manufactured gas plants in Duke’s Ohio service territory.⁷ One was located at what is referred to as the “West End Site” and the

³ Rate Case, Opinion & Order at 59 (Nov. 13, 2013) (the “Rate Case Order”).

⁴ *Id.* at 59.

⁵ *Id.* at 72.

⁶ *In re Application of Duke Energy Ohio, Inc.*, Case No. 16-1106-GA-AAM, Finding & Order ¶ 37 (Dec. 21, 2016).

⁷ Rate Case Order at 25.

other at a location referred to as the “East End Site.”⁸ Together, they comprise the “MGP Sites.” The West End Site produced gas from 1843 to 1909, and then again from 1918 to 1928.⁹ The East End Site produced gas from 1884 to 1909, and then again from 1925 to 1963.¹⁰ Both sites are now long defunct.

The East End Site consists of three separate parcels of land: the East Parcel, the Middle or Central Parcel, and the West Parcel.¹¹ To the west of the East End Site are two other pieces of property. Immediately to the west of the West Parcel at the East End Site is the “Area West of the West Parcel,” sometimes referred to as the “WOW” or “WOW parcel.”¹² Prior to 2006, Duke owned only the eastern portion of the WOW.¹³ In 2006, Duke sold that portion to DCI Properties, a real estate developer.¹⁴ To the west of the WOW parcel is property that Duke now calls the “Riverside Drive Property.”¹⁵ In 2011, Duke purchased the Riverside Drive Property and the entire WOW parcel from DCI;¹⁶ thus, the Riverside Drive Property plus the WOW parcel are collectively referred to as the “Purchased Parcel” or “Purchased Property.”¹⁷ Prior to 2011, Duke and its predecessors never owned the Riverside Drive Property or the western portion of the WOW parcel.¹⁸

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Staff Ex. 8 (Crocker Testimony) at 3; Duke Ex. 8 (Bednarcik), JLB-1 Attachment.

¹² Duke Ex. 8 (Bednarcik Supp. Testimony), JLB-1 Attachment.

¹³ Tr. Vol. I at 143 (Bednarcik).

¹⁴ Tr. Vol. I at 71 (Bednarcik).

¹⁵ Duke Ex. 8 (Bednarcik Supp. Testimony), JLB-1 Attachment.

¹⁶ Tr. Vol. I at 70-71 (Bednarcik).

¹⁷ Tr. Vol. I at 227 (Bachand).

¹⁸ Tr. Vol. I at 71, 143 (Bednarcik).

The manufactured gas process created toxic waste that Duke, or its predecessors dumped onsite at the plants, causing contamination of soil and groundwater.¹⁹ Duke began investigating and cleaning up the MGP Sites in 2007 (East End) and 2010 (West End).²⁰

B. The 2012 Rate Case

In 2012, Duke filed the Rate Case. In that case, Duke, OCC, the PUCO Staff, and others resolved most of the contested issues, with the exception of Duke's proposal to charge customers to investigate and clean the MGP Sites.²¹ The PUCO ultimately ruled largely in favor of Duke, allowing it to charge customers about \$55.5 million for MGP-related costs incurred through December 31, 2012, though the PUCO did disallow certain costs related to the Purchased Parcel and the West End Site.²²

Duke has now charged customers the entire \$55.5 million authorized in the Rate Case and has reset Rider MGP to zero.²³ The Rate Case Order also allowed Duke to defer costs related to MGP cleanup after December 31, 2012 and file annual applications for prudently-incurred MGP costs under Rider MGP.²⁴ But the PUCO placed certain limitations on Duke before the utility could charge its customers for the deferred cleanup costs.²⁵

First, the PUCO limited Duke's deferral authority to just those costs incurred to remediate the East End and West End MGP sites: the Rate Case Order ruled that Duke's deferral

¹⁹ Rate Case Order at 25.

²⁰ *Id.* at 26.

²¹ *See generally* Rate Case Order.

²² Rate Case Order at 58-60, 63-65, 67, 71-79.

²³ Tr. Vol. III at 720 (Lawler).

²⁴ Rate Case Order at 71-72.

²⁵ *See* OCC Ex. 19 (Adkins Testimony) at 5 (summarizing the limitations in the Rate Case Order).

authority was “*limited to the East and West End sites.*”²⁶ Second, the PUCO prohibited Duke from charging customers carrying costs on the deferred amounts.²⁷ Third, in each annual application, the PUCO ruled that “Duke shall bear the burden of proof to show that the costs incurred from the previous year were prudent.”²⁸ Fourth, the PUCO limited the amount of time that Duke could charge customers for MGP cleanup “so that recovery through Rider MGP will be finite.”²⁹

C. The Parties’ Positions in these Cases

Duke filed six annual applications to charge customers for MGP-related costs from 2013 to 2018.³⁰ In total Duke seeks to charge customers about \$45.8 million for MGP cleanup costs from 2013 to 2018, summarized as follows:³¹

Year	Amount
2013	\$8,282,966
2014	\$686,031
2015	\$1,061,056
2016	\$1,296,160
2017	\$14,651,798
2018	\$19,804,031
Total	\$45,781,966

The PUCO Staff performed a thorough audit of Duke’s proposed charges from 2013 and 2018 and found that a substantial portion of those charges did not comply with the Rate Case

²⁶ Rate Case Order at 71 (emphasis added).

²⁷ *Id.*

²⁸ *Id.* at 72.

²⁹ *Id.* at 59.

³⁰ See Duke Ex. 1 through 6.

³¹ See Duke Ex. 30 (Lawler 19-174 Testimony), Attachment SEL-2 (summarizing charges for 2013 to 2018); OCC Ex. 19 (Adkins Testimony) at 7 (Table KA-1). Staff witness Crocker uses a slightly different number, \$45,846,043. See Staff Ex. 8 (Crocker Testimony) at Table 3. Ms. Crocker used a slightly higher number for 2013, \$8,346,697. *Id.* This higher number is found in Duke’s testimony in Case No. 14-375-GA-RDR. Duke subsequently corrected this number to the lower \$8,282,966. See Duke Ex. 30 (Lawler 19-174 Testimony), Attachment SEL-2. Thus, the PUCO should use \$45,781,966 as the total amount that Duke is seeking to charge customers in these cases.

Order. In particular, Staff found that Duke is trying to charge customers tens of millions of dollars to clean up the WOW parcel and the Ohio River (together, the “Offsite Areas”), neither of which is part of the MGP Sites.³² The PUCO Staff also found other inappropriate costs in Duke’s applications. These include costs related to (i) relocation of an electric substation, (ii) disposal of soil that had previously been remediated, and (iii) construction of a staircase.³³ As a result of these inappropriate charges, Staff recommended cutting Duke’s proposed charges in half from \$45.8 million to \$23.0 million.³⁴

OCC agrees with all of Staff’s recommended disallowances. OCC witness Kerry Adkins—who was formerly a member of Staff primarily responsible for MGP issues—testified that Ms. Crocker’s analysis was consistent with the Rate Case Order.³⁵ As Mr. Adkins testified, the Rate Case Order does not allow Duke to charge customers to clean up properties outside the bounds of the MGP Sites themselves.³⁶ Thus, Mr. Adkins agreed with Staff’s recommendation to reduce Duke’s proposed charges to customers to eliminate all charges for the Offsite Areas.³⁷

But OCC recommends that the PUCO do even more to protect consumers. As OCC witness Dr. James Campbell testified, Duke spent substantially more than it needed to on the MGP Sites.³⁸ The gist of Dr. Campbell’s testimony is that Duke’s remediation efforts were excessive and unnecessary; Duke could have remediated the MGP Sites at substantially lower

³² See Staff Ex. 1 (2018 Staff Report); Staff Ex. 2 (2019 Staff Report).

³³ Staff Ex. 1 (2018 Staff Report) at 5; Staff Ex. 2 (2019 Staff Report) at 6.

³⁴ Staff Ex. 8 (Crocker Testimony) at 14.

³⁵ OCC Ex. 19 (Adkins Testimony) at 8.

³⁶ *Id.*

³⁷ OCC Ex. 19 (Adkins Testimony) at 8 (“I recommend that the PUCO deny Duke recovery of any MGP environmental investigation or remediation costs incurred in the area known as the ‘Purchased Parcel’ at the East End site (including the segment known as the ‘area West of the West’ or ‘WOW’), the Ohio River, or any other area outside the geographic bounds of the East End and West End MGP sites themselves.”).

³⁸ See generally OCC Ex. 21 (Campbell Testimony).

cost while still complying with all applicable standards under Ohio’s Voluntary Action Program (“VAP”) and adequately protecting human health and safety.³⁹ Dr. Campbell—a VAP certified professional or “CP” whom the PUCO itself has described as a “learned environmental consultant and professional⁴⁰—testified that Duke could have remediated the MGP Sites for a total of \$3,876,102.⁴¹ And even if Duke were allowed to charge customers to remediate the Offsite Areas, Dr. Campbell testified that total costs should be no more than \$10,059,313—less than a quarter of the \$45.8 million that Duke actually spent on its excessive remediation methods.⁴²

Altogether, if the PUCO adopts OCC’s consumer-protection recommendations, customers should receive a **\$46,653,134 credit** on their bills through Rider MGP (\$3,876,102 in charges based on Dr. Campbell’s testimony minus \$50,529,236 in insurance proceeds).

II. RECOMMENDATIONS

A. The PUCO should direct Duke to immediately provide a \$50,529,236 credit to consumers, which is the amount of net proceeds from insurance claims.

Duke located numerous historical insurance policies from 1940 through 1986 that it believed to provide coverage for the MGP Sites.⁴³ Duke recovered insurance proceeds from various insurers by filing a lawsuit, pursuing claims in insolvency proceedings, and through arbitration.⁴⁴ Duke has collected \$50,529,236 in insurance proceeds, net of costs (\$56,231,987 in

³⁹ OCC Ex. 21 (Campbell Testimony) at 25-29.

⁴⁰ Rate Case, Entry on Rehearing ¶ 29 (Jan. 8, 2014).

⁴¹ OCC Ex. 21 (Campbell Testimony) at 28.

⁴² OCC Ex. 21 (Campbell Testimony) at 29.

⁴³ Duke Ex. 24 (Lynch Testimony) at 3.

⁴⁴ Duke Ex. 24 (Lynch Testimony) at 5-6; Duke Ex. 20 (Bone 17-596 Testimony) at 4-5; Duke Ex. 22 (Butler 19-174 Testimony) at 7.

proceeds minus \$5,702,751 in legal and other fees).⁴⁵ Duke has completed its pursuit of insurance proceeds; there are no more policies or insurers to pursue.⁴⁶ Yet Duke has not passed one cent of this money to customers. Instead, Duke has this money—\$50.5 million—sitting in a non-interest-bearing bank account.⁴⁷

Duke argues it should not be required to pass any insurance proceeds on to customers until the entire remediation is complete, which could be years from now. Duke also believes that its shareholders should get to keep some of the insurance money.⁴⁸ Neither of these arguments has merit.

The Rate Case Order requires Duke to pass the entire \$50,529,236 on to its customers to offset the costs that customers paid or will pay for Duke’s MGP cleanup:

We find that any proceeds paid by insurers ... for MGP investigation and remediation should be used to reimburse the ratepayers. The Commission also concludes that any proceeds returned to ratepayers should be net of the costs to achieve those proceeds, *e.g.*, litigation costs. ... Finally, we agree that, to the extent the proceeds collected from insurers ... exceed the amount recoverable from ratepayers, Duke should be permitted to retain such amount.⁴⁹

This language is unambiguous: all insurance proceeds are to be used “to reimburse the ratepayers” (*i.e.* customers), and Duke gets to keep insurance proceeds *only* if those proceeds are greater than the amount charged to customers. Customers have already paid more than

⁴⁵ OCC Ex. 19 (Adkins Testimony) at 22, footnotes 24-25; Tr. Vol. III at 630 (Lynch).

⁴⁶ Duke Ex. 23 (Butler Supp. Testimony) at 6. Duke reached a settlement with one insolvent UK insurer, Orion. Orion still owes another payment to Duke through its insolvency proceeding. That payment is not expected to materially increase the \$50.5 million in net insurance proceeds that Duke currently holds.

⁴⁷ Duke Ex. 23 (Butler Supp. Testimony) at 8.

⁴⁸ *Id.*

⁴⁹ Rate Case Order at 67.

\$55 million for MGP cleanup costs, and the net insurance proceeds are \$50.5 million.⁵⁰ Thus, there is no chance that the insurance proceeds will “exceed the amount recoverable from ratepayers,” and no possibility that there will be any insurance money for Duke to keep.

According to Duke witness Butler, “Until MGP investigation and remediation is complete and the amounts to be recovered by the Company through Rider MGP are finalized, the Company will not be able to begin to determine the appropriate amounts to be disbursed.”⁵¹ As OCC witness Adkins testified, Duke is wrong.⁵² The “appropriate amount” to be disbursed to customers is \$50,529,236, which is the total of all insurance proceeds, net of costs.⁵³ That number is not going to change based on Duke’s future investigation and remediation efforts. Those efforts have nothing to do with insurance recovery, as Duke has finished pursuing insurance proceeds. The Rate Case Order requires Duke to provide all of the insurance proceeds to customers. As OCC witness Adkins concluded, “It is high time that customers benefit from the insurance proceeds that have been collected. And there is no reason for further delay.”⁵⁴

B. The Rate Case Order prohibits Duke from charging customers to remediate areas outside the bounds of the MGP Sites.

Duke’s proposed charges to consumers to clean up the Offsite Areas are unlawful under the Rate Case Order. Based on the plain language of the Rate Case Order, Duke cannot charge customers to clean up the Offsite Areas because the evidence shows that these areas were not

⁵⁰ OCC Ex. 19 (Adkins Testimony) at 22 (\$50.5 million in net insurance proceeds is less than the amount customers have already paid).

⁵¹ Duke Ex. 23 (Butler Supp. Testimony) at 8.

⁵² OCC Ex. 19 (Adkins Testimony) at 24.

⁵³ OCC Ex. 19 (Adkins Testimony) at 22.

⁵⁴ OCC Ex. 19 (Adkins Testimony) at 22. *See also* Tr. Vol. IV at 918 (Crocker) (stating Staff’s position that Rider MGP can be used to provide a credit to customers).

part of the MGP Sites, and the Rate Case Order limited charges to customers to the MGP Sites themselves.

1. Duke is seeking to charge customers for amounts previously deferred. Those deferrals were explicitly limited to the MGP Sites themselves and not offsite properties.

In the Rate Case Order, the PUCO made two separate rulings as it pertains to MGP remediation. First, the PUCO allowed Duke to charge customers about \$55.5 million in remediation costs incurred from 2008 to 2012.⁵⁵ Second, the PUCO ruled that Duke could defer certain remediation costs from 2013 onward and charge customers for prudently-incurred costs.⁵⁶ The second category is at dispute in the current cases. Critically, however, the PUCO ruled that any deferral for costs beginning January 1, 2013 would be “*limited to* the East and West End sites.”⁵⁷ The PUCO said it again later in the same order: “Such deferral authority is *limited to* the East and West End sites”⁵⁸

The PUCO’s use of the phrase “limited to” cannot be ignored. This is because it directly contradicts Duke’s position in the current cases that its ability to charge customers for MGP remediation is *unlimited* in geographic scope. Duke’s position is that any and all necessary remediation, no matter where located, can be charged to customers.⁵⁹ Had the PUCO intended such a result, there would be no reason to say that the deferral is “limited to” the MGP Sites. It would simply have said that Duke can defer any and all MGP remediation costs. Indeed, as OCC witness Adkins testified, “The PUCO’s determination was clear and unambiguous. Duke cannot

⁵⁵ Rate Case Order at 63-65; OCC Ex. 19 (Adkins Testimony) at 5 (\$55.5 million approved in Rate Case).

⁵⁶ Rate Case Order at 71-73.

⁵⁷ *Id.* at 71 (emphasis added).

⁵⁸ *Id.* at 74 (emphasis added).

⁵⁹ Duke Ex. 14 (Bachand Supp. Testimony) at 11.

recover from customers costs to remediate any part of the Purchased Parcel. ... The PUCO's determination and reasoning also applies to the Ohio River and any other offsite areas⁶⁰

The PUCO should uphold its prior order and rule that Duke cannot charge customers for investigating and remediating areas outside the MGP Sites.

2. There is no evidence that Duke or its predecessors ever used the Offsite Areas to manufacture gas, and thus, customers should not be charged to clean them up.

In the Rate Case, Duke sought to charge customers for the price it paid to purchase the Purchased Parcel.⁶¹ The WOW parcel is part of the Purchased Parcel.⁶² The PUCO rejected Duke's request because Duke failed to prove "what, if any, of this purchased parcel was, or ever had been, used for the provision of manufactured gas or utility service for the customers of Duke or its predecessors."⁶³ The PUCO continued, noting that "Duke has failed to provide sufficient evidence on the record to distinguish the portion of the parcel that had been MGP-related from the portion that had never been related to the MGPs."⁶⁴ The PUCO concluded that under R.C. 4909.15(A)(4), only those costs for property actually used as MGP sites are recoverable from customers as the "cost to the utility of rendering the public utility service":

Thus, when applying the requirement for recovery set forth in R.C. 4909.15(A)(4), we are not willing to entertain Duke's unsubstantiated request for recovery of costs related to property [that] has not been shown on the record in these cases to provide, either in the past or in the present, utility services that caused the statutorily mandated environmental remediation.⁶⁵

⁶⁰ OCC Ex. 19 (Adkins Testimony) at 10.

⁶¹ Rate Case Order at 60.

⁶² Tr. Vol. I at 227 (Bachand).

⁶³ Rate Case Order at 60.

⁶⁴ *Id.*

⁶⁵ *Id.*

This language refutes Duke's theory in the current case that remediation costs can be charged to customers no matter where they were located. If the location of the remediation were irrelevant in the PUCO's eyes, there would have been no reason to distinguish in the Rate Case Order between property used for the production of manufactured gas and property not so used. The Rate Case Order, therefore, must be interpreted to mean that Duke can only charge customers for investigating and remediating property that was used in the past to produce manufactured gas.

Duke cannot make such a showing in this case. With respect to the WOW parcel, the only evidence of MGP operations on that land is the alleged existence of a small portion of an iron tar tank.⁶⁶ But that evidence is ambiguous, at best. Some maps appear to show part of the tar tank in the WOW parcel, but another map—one provided by Duke itself in the Rate Case—shows the entire tar tank located in the West Parcel of the East End Site, *i.e.*, not at all in the WOW parcel.⁶⁷

More importantly, however, Duke's own evidence shows that the iron tar tank was removed before Duke's predecessors ever owned the property. Duke's predecessors first purchased the WOW parcel in 1928.⁶⁸ But as Duke witness Bednarcik testified, the iron tar tank in question was removed between 1904 and 1917.⁶⁹ Thus, even if the iron tar tank was in fact

⁶⁶ See Duke Ex. 8 (Bednarcik Supp. Testimony), JLB-1 Attachment. *See also* Tr. Vol. I at 201 (Bachand) (Duke not aware of any MGP equipment on the WOW parcel other than the iron tar tank).

⁶⁷ OCC Ex. 19 (Adkins Testimony), Attachment KJA-03.

⁶⁸ Duke Ex. 8 (Bednarcik Supp. Testimony) at 4; Tr. Vol. I at 88 (Bednarcik) ("Q. And to the best of your knowledge, the predecessors didn't own any of the West of the West before 1928, correct? A. Correct.").

⁶⁹ Tr. Vol. I at 90 (Bednarcik).

located partially in the WOW parcel at some point, it was removed before Duke's predecessors ever owned the WOW parcel—so they never could have used the tar tank for MGP operations.⁷⁰

Regarding the Ohio River, Duke witness Bednarcik testified that she did not consider it part of the MGP Sites,⁷¹ and no Duke witness testified that Duke ever used the river itself to manufacture gas.

Consistent with the Rate Case Order, therefore, the PUCO should not allow Duke to charge customers for any costs associated with the Offsite Areas.

C. Duke spent \$23.0 million investigating and remediating the Offsite Areas from 2013 to 2018, so this amount should be removed from Duke's proposed charges to customers under Rider MGP.

As explained above, the Rate Case Order and the law prohibit Duke from charging customers for costs to remediate the Offsite Areas. The next step is determining how much of Duke's proposed 2013 to 2018 charges to customers are attributable to the Offsite Areas. Duke proposes total charges of \$45.8 million for 2013 to 2018. But in its applications, Duke did not separate out the costs for the Offsite Areas. Thus, the PUCO Staff performed its own analysis and found that \$23.0 million of Duke's costs was for the Offsite Areas.⁷² The PUCO should adopt the PUCO Staff's analysis as the only reasonable and reliable calculation of the cost to investigate and remediate the Offsite Areas.

⁷⁰ See also Tr. Vol. I at 111 (Duke witness Bednarcik testifying that did know whether the WOW parcel was ever part of the East End MGP site).

⁷¹ Tr. Vol. I at 79 (Bednarcik) ("Q. And you would consider the Ohio River to be off-site, correct? A. I would.").

⁷² Staff Ex. 8 (Crocker Testimony), Table 3.

1. Staff performed a thorough investigation and based on its expertise and experience provided a reasonable and reliable calculation of the costs that Duke incurred to remediate the Offsite Areas.

PUCO Staff witness Nicci Crocker was responsible for investigating and reviewing Duke's proposed charges to customers in these cases.⁷³ For the first few years, Kerry Adkins, who previously worked for Staff but now is a witness for OCC in these cases, supervised her work.⁷⁴ Staff performed a comprehensive review of Duke's testimony, vendor contracts, and all invoices to, among other things, "ensure that ratepayers were not charged for costs associated with investigation and remediation of areas outside the boundaries of the East End and West End sites based on the ... Rate Case Order."⁷⁵

Through its investigation, Staff learned that Duke properly excluded some, but not all costs associated with the WOW parcel for 2013 and 2014.⁷⁶ Staff also learned that Duke failed to exclude any WOW costs for 2015 through 2018.⁷⁷

Staff asked Duke to segregate out the costs it incurred for the WOW parcel and the Ohio River, but Duke repeatedly refused, telling Staff that it would be "impractical" to do so.⁷⁸ Staff then performed its own analysis, reviewing vendor contracts, engineering maps, construction timelines, and every invoice for 2013 to 2018 costs.⁷⁹ Staff was able to identify some costs that

⁷³ Staff Ex. 8 (Crocker Testimony) at 1.

⁷⁴ OCC Ex. 19 (Adkins Testimony) at 4.

⁷⁵ Staff Ex. 8 (Crocker Testimony) at 2.

⁷⁶ Staff Ex. 8 (Crocker Testimony) at 4; Tr. Vol. IV at 917-18 (Staff witness Crocker confirming that her references to "annual filings in 2014 and 2015" referred to costs incurred in 2013 and 2014).

⁷⁷ Staff Ex. 8 (Crocker Testimony) at 4; Tr. Vol. IV at 917-18 (Staff witness Crocker confirming that her references to "annual filings in years 2016 through 2019" referred to costs incurred from 2015 through 2018).

⁷⁸ Staff Ex. 8 (Crocker Testimony) at 4-5; Staff Ex. 1 (2018 Staff Report) at 3 (citing Duke's discovery responses in Case No. 15-452-GA_RDR, 16-542-GA-RDR, and 18-283-GA-RDR); Staff Ex. 2 (2019 Staff Report) at 5 (citing Duke's discovery responses in Case No. 19-174-GA-RDR).

⁷⁹ Staff Ex. 8 (Crocker Testimony) at 5.

were clearly attributable to the Offsite Areas, which Staff refers to as the “direct costs.”⁸⁰ For the remaining costs, Staff created an allocation methodology based on its knowledge and expertise and its review of the underlying documents provided to it by Duke. For the years 2013-2016 and 2018, Staff removed all direct costs and 50% of remaining costs.⁸¹ For 2017, Staff found that a greater portion of the work was attributable to the Offsite Areas, so it removed all direct costs and 70% of the remaining costs.⁸² OCC witness (and former PUCO Staff member) Adkins agreed that Ms. Crocker’s methodology was reasonable and reliable.⁸³

In sum, Staff analyzed all information available to it through its investigation and provided its expert opinion on the amount of costs that were attributable to the Offsite Areas. The PUCO should adopt Staff’s calculation and reduce Duke’s proposed charges to customers by \$22,972,871, as recommended by Staff witness Crocker and supported by OCC witness Adkins.

2. Duke provided a self-serving alternative analysis that substantially understated the amount that should be disallowed, thereby overstating the amount that should be charged to customers.

As explained, the PUCO Staff used its expert experience and knowledge to calculate the amount that Duke spent investigating a remediating the Offsite Areas. The PUCO should adopt Staff’s recommendation to disallow nearly \$23 million of Duke’s proposed charges to customers.

Duke, however, claims that Staff’s recommended disallowance is overstated because, according to Duke, it did not spend that much on the Offsite Areas. In support of this claim, Duke introduced the testimony of Duke employee Todd Bachand. Mr. Bachand came up with a different number than Staff, one that is self-serving and much lower (and would thus result in

⁸⁰ Staff Ex. 8 (Crocker Testimony) at 5.

⁸¹ Staff Ex. 8 (Crocker Testimony) at 6; Staff Ex. 1 (2018 Staff Report); Staff Ex. 2 (2019 Staff Report).

⁸² Staff Ex. 8 (Crocker Testimony) at 6; Staff Ex. 1 (2018 Staff Report); Staff Ex. 2 (2019 Staff Report).

⁸³ OCC Ex. 19 (Adkins Testimony) at 14.

millions of dollars of additional charges to customers). The PUCO should give it no weight because (i) Mr. Bachand admitted that his analysis was designed to be incomplete, (ii) Mr. Bachand's analysis had so many errors that it is useless, and (iii) Duke should be estopped from even proposing a number different from Staff's because Duke hindered Staff's investigation in these cases by failing to provide information that Staff requested.

a. Duke's alternative calculation of the costs to clean up the Offsite Areas is incomplete by design and thus serves no purpose.

Staff provided a comprehensive calculation of the total amount that Duke incurred investigating and remediating the Offsite Areas. This amount (\$23.0 million) should not be charged to customers because, as explained above, Duke can only charge customers for the MGP Sites themselves and not land or water that is located offsite.

Duke provided an alternative, lower number of \$7,459,649.⁸⁴ But Duke's lower number is meaningless because Duke admitted that its number represents only *part* of the costs it incurred for the Offsite Areas. Duke witness Bachand was asked, "And so it's fair to say that [your analysis] is not a comprehensive summary of all the costs of investigating and remediating the West of the West from 2013 to 2018, correct?"⁸⁵ He replied, "That's correct."⁸⁶ He made a similar admission regarding the Ohio River.⁸⁷ At another point during his cross examination, he similarly testified, "I'm not here to tell you that my analysis is ... 100 percent all inclusive."⁸⁸

⁸⁴ Duke Ex. 14 (Bachand Supp. Testimony), TLB-6 Attachment.

⁸⁵ Tr. Vol. I at 241.

⁸⁶ Tr. Vol. I at 241 (Bachand).

⁸⁷ Tr. Vol. I at 241 (Bachand) ("Q. [F]or the Ohio River, [your analysis] would not be a comprehensive summary of all investigation and remediation costs from 2013 to 2018 for the Ohio River, correct? A. Correct.").

⁸⁸ Tr. Vol. I at 235 (Bachand).

And yet again he testified, “As I already testified to, I indicated this is not all inclusive. I think I made that very clear.”⁸⁹

Given Duke witness Bachand’s frank admission that his analysis is incomplete, there would be no basis for the PUCO to favor his analysis over the comprehensive analysis that PUCO Staff witness Crocker provided.

b. Duke’s alternative analysis had so many errors that it is hard to keep track of them all. The analysis should be rejected in its entirety and afforded no weight.

On cross examination, it quickly became apparent that Duke witness Bachand’s analysis was filled to the brim with errors and omissions. And while Mr. Bachand lamented that he is human and therefore not perfect⁹⁰ (and certainly none of us are), his human imperfection does not turn his haphazard, ill-conceived analysis into a reasonable and reliable one.

The errors in Mr. Bachand’s analysis include:

- Mr. Bachand’s analysis ignored groundwater monitoring and soil boring costs in the WOW parcel.⁹¹
- Mr. Bachand’s analysis included only costs for a subsection of the WOW parcel known as the “Phase 2 Area,” even though Duke incurred costs in other parts of the WOW parcel.⁹²
- Mr. Bachand’s analysis included only \$86,000 in costs for the WOW parcel from 2013 to 2014, but Duke witness Bednarcik testified that the cost likely would have been much higher, around \$250,000.⁹³

⁸⁹ Tr. Vol. I at 265 (Bachand).

⁹⁰ Tr. Vol. II at 346 (Bachand) (Mr. Bachand attempting to downplay his many errors and omissions by testifying, “I’m human. I’m not perfect.”).

⁹¹ Tr. Vol. I at 195 (Bachand).

⁹² Tr. Vol. I at 195 (Bachand).

⁹³ Duke Ex. 14 (Bachand Supp. Testimony), TLB-6 Attachment (\$66,826.15 for 2013 and \$19,526.43 for 2014); Tr. Vol. I at 79 (Bednarcik) (\$250,000 for 2013 and 2014).

- Mr. Bachand ignored the differences in well depths when calculating the cost of groundwater monitoring in the WOW parcel, thus resulting in an inaccurate calculation.⁹⁴
- Duke incurred internal costs to investigate and remediate the WOW parcel, but Mr. Bachand ignored all of these costs in his analysis.⁹⁵
- Mr. Bachand overlooked invoices for costs related to the WOW parcel and Ohio River, which should have been included in his analysis.⁹⁶
- Duke incurred surveying costs for the WOW parcel, but Mr. Bachand did not allocate any such costs to the WOW parcel for purposes of his analysis.⁹⁷
- Duke incurred costs for the Ohio River in 2013 and 2014, but Mr. Bachand ignored these costs, deciding to include only Ohio River costs from 2017 and 2018.⁹⁸
- Duke incurred costs for soil removal, but Mr. Bachand accidentally missed at least one soil removal invoice in the tens of thousands of dollars and admitted that he may have missed others.⁹⁹
- In his pre-filed testimony, Mr. Bachand stated that soil disposal costs for 2016 were \$83,957, but in response to a discovery request from OCC, he stated that the same costs were \$156,845.¹⁰⁰ Mr. Bachand was unable to reconcile this discrepancy.
- In his pre-filed testimony, Mr. Bachand stated that in 2013, Duke spent \$66,826 on the Purchased Parcel (which includes the WOW parcel), but Duke witness Bednarcik testified that the number was actually \$89,223.¹⁰¹ Mr. Bachand was unable to resolve this discrepancy and made no effort to work with Ms. Bednarcik to get an accurate number.¹⁰²

⁹⁴ Tr. Vol. I at 216-21 (Bachand) (admitting that the cost of deep wells is greater than the cost of shallow wells but admitting that he treated wells of different depths the same when calculating the cost of groundwater monitoring).

⁹⁵ Tr. Vol. I at 223, 241-42, 245 (Bachand).

⁹⁶ Tr. Vol. I at 240-41 (Bachand).

⁹⁷ Tr. Vol. I at 243-44, 248 (Bachand).

⁹⁸ Tr. Vol. I at 75-76 (Bednarcik); Tr. Vol. I at 246, 249-50 (Bachand).

⁹⁹ Tr. Vol. I at 257 (Bachand).

¹⁰⁰ Tr. Vol. I at 262-64 (Bachand).

¹⁰¹ Tr. Vol. I at 264-65 (Bachand).

¹⁰² Tr. Vol. I at 265 (Bachand).

Mr. Bachand was refreshingly honest about the flaws of his analysis, testifying, “I’m not here to tell you that my analysis is 100 percent accurate....”¹⁰³ During his cross examination, Mr. Bachand admitted that he made errors and acknowledged that in light of those errors, there’s no way to know just how many more errors he might have made:

Q. And so, the amount for this invoice, the 61,749, that should have been included on your TLB-6, correct?

A. Yes.

Q. And given that you missed this one, it’s possible you may have missed others, correct?

A. It’s possible.

Q. And there is no way for us to know just how many you might have missed, correct?

A. Not – no, there is no way we would know that.¹⁰⁴

When confronted with the laundry list of mistakes in his analysis, Mr. Bachand had no choice but to admit that his calculation is unreliable, admitting that his proposed disallowance of \$7.5 million was too low.¹⁰⁵

The PUCO thus has two choices. It can adopt Staff’s recommendation, which is a reasonable and comprehensive calculation of all costs to investigate and remediate the Offsite Areas. Or it can adopt Duke’s recommendation, which is an error-laden calculation of only a subset of the costs to investigate and remediate the Offsite Areas. This is not a difficult choice.

¹⁰³ Tr. Vol. I at 235 (Bachand). *See also* Tr. Vol. II at 329 (Bachand) (“It was not my intent to create this table to be 100-percent accurate...”).

¹⁰⁴ Tr. Vol. I at 257-58 (Bachand).

¹⁰⁵ Tr. Vol. I at 267 (Bachand).

3. Duke stonewalled Staff's investigation by claiming that it was "impractical" to provide certain relevant information, but then Duke suddenly was able to include that very information when it came time to file its self-serving testimony.

As part of its investigation in these cases, Staff tried to identify which costs were attributable to the Offsite Areas. Staff asked Duke for this information explicitly, multiple times. Each year, as part of its investigation, Staff asked Duke to "list and describe in detail the projects and associated costs for any work completed" in the WOW parcel.¹⁰⁶ And each year, Duke provided a qualitative description of the work but provided no cost information, stating that it was "impractical" or "impracticable" to provide cost information for the WOW parcel.¹⁰⁷ Duke similarly refused to provide this information to OCC. In 2018, OCC asked Duke to "identify the amount of the total annual costs associated with remediating the 'WOW' parcel," and Duke responded that "it is impractical to determine whether any of the costs were associated solely with the Area West of the West Parcel."¹⁰⁸ Yet when pressed on cross examination, Mr. Bachand admitted that he could have provided this information earlier in 2016 or 2017, meaning it was in fact *not* impractical to do so as Duke claimed in its responses to Staff's data requests.¹⁰⁹

Then, when this case was scheduled for hearing, Duke filed the Supplemental Testimony of Todd Bachand (Duke Ex. 14), where Mr. Bachand purports to do precisely what Duke said was impractical and impracticable: segregate out the costs that Duke believed were attributable

¹⁰⁶ Staff Ex. 1 (2018 Staff Report) at 3 (citing Duke's discovery responses in Case No. 15-452-GA-RDR, 16-542-GA-RDR, and 18-283-GA-RDR); Staff Ex. 2 (2019 Staff Report) at 5 (citing Duke's discovery responses in Case No. 19-174-GA-RDR); Duke Ex. 14 (Bachand Supp. Testimony), TLB-5 Attachment (Case No. 19-174-GA-RDR, Duke's response to Staff-DR-04-001); OCC Ex. 12 (Case No. 17-596-GA-RDR, Duke's response to Staff-DR-03-001 Supplemental); OCC Ex. 13 (Case No. 18-283-GA-RDR, Duke's response to Staff-DR-04-001).

¹⁰⁷ Staff Ex. 1 (2018 Staff Report) at 3 (citing Duke's discovery responses in Case No. 15-452-GA-RDR, 16-542-GA-RDR, and 18-283-GA-RDR); Staff Ex. 2 (2019 Staff Report) at 5 (citing Duke's discovery responses in Case No. 19-174-GA-RDR).

¹⁰⁸ OCC. Ex. 9 (Duke's response to OCC-INT-01-006 CONSOLIDATED).

¹⁰⁹ Tr. Vol. I at 236 (Bachand).

to the WOW parcel. And lo and behold, Duke's number is much lower than Staff's, which would mean substantially higher charges to consumers.

Duke hindered Staff's investigation and now is trying to use the very information that it withheld from Staff to attempt to refute Staff's expert analysis. The PUCO should not condone Duke's tactics. As OCC witness Adkins testified, "Duke should not be permitted to benefit from its failure to track costs by parcel despite knowing the PUCO's determination in the Rate Case Order regarding recovery of costs incurred in the Purchased Parcel."¹¹⁰ Duke's competing analysis of the costs to investigate and remediate the Offsite Areas should be afforded no weight.

D. Duke's proposed charges to consumers are imprudent because Duke could have cleaned up the MGP Sites at substantially lower cost while still complying with the Ohio Voluntary Action Program.

As the PUCO ruled in the Rate Case Order, "Duke shall bear the burden of proof to show that the costs incurred for the previous year were prudent" in these rider cases.¹¹¹ Duke has failed to do so because Duke spent \$46 million investigating and remediating the MGP Sites and the Offsite Areas, when it could have done so for substantially lower cost while still complying with the Ohio Voluntary Action Program. As OCC witness Dr. James Campbell testified, instead of spending \$46 million, Duke could have cleaned the MGP Sites and Offsite Areas for just \$10.1 million, only \$3.9 million of which was for the MGP Sites themselves.¹¹²

1. The VAP is a flexible standard, and Duke abused that standard and harmed consumers by choosing remediation methods that are substantially more expensive than necessary.

The question that the PUCO must answer is not simply whether Duke's chosen remediation methods are consistent with the VAP, but whether Duke could have remediated the

¹¹⁰ OCC Ex. 19 (Adkins Testimony) at 15.

¹¹¹ Rate Case Order at 72.

¹¹² OCC Ex. 21 (Campbell Testimony) at 5 (exact numbers being \$10,059,313 and \$3,876,102).

MGP Sites under the VAP at a lower cost. In many instances, there will be more than one way to comply with the VAP.¹¹³ As OCC witness Campbell testified, “the VAP Rules do not mandate a specific approach or time frame for how and when remediation should be conducted.”¹¹⁴ But Duke cannot simply choose the most expensive one and then expect customers to pay for it.

As Duke witness Fiore admitted, “the VAP does not require consideration of cost.”¹¹⁵ It makes sense that the VAP would not necessarily consider cost. After all, it is an environmental statute and not a ratemaking statute. The goal of the VAP is ensure that contaminated land and water do not pose a risk to human health and the environment.¹¹⁶ In cases where unregulated companies are in fact spending their own money (and not their monopoly customers’ money), the companies have an incentive to comply with the VAP at the lowest possible cost. But Ohio EPA, which promulgated the VAP rules, doesn’t have an interest either way regarding how much that company chooses to spend. As long the site is sufficiently cleaned to protect human health and the environment, Ohio EPA would be satisfied.

This is where Duke’s status as a regulated utility injects cost into the equation. Because Duke expects its customers to pay for all remediation costs, it has less incentive than an unregulated company to keep costs down. Customers cannot rely on the competitive market to ensure that VAP remediation is done efficiently. Instead, they need the PUCO to apply ratemaking standards—like prudence and just and reasonableness—to protect them from paying for excessive and unnecessary remediation.

¹¹³ Duke Ex. 15 (Fiore Testimony) at 10.

¹¹⁴ OCC Ex. 21 (Campbell Testimony) at 9.

¹¹⁵ Duke Ex. 15 (Fiore Testimony) at 11.

¹¹⁶ Duke Ex. 16 (Brown Testimony) at 17.

The evidence in this case demonstrates that while Duke’s chosen remediation methods may comply with the VAP, Duke could have employed alternative, more efficient methods that also comply with the VAP, but at a fraction of the cost. Duke might be able to prove that its chosen remediation techniques were consistent with the VAP, but it did not make any serious attempt to minimize charges to consumers.

2. Duke could have complied with the VAP at the MGP Sites from 2013 to 2018 for less than \$4 million through a combination of soil covers, institutional controls, engineering controls, an urban setting designation, and variances.

Duke spent nearly \$46 million on the MGP Sites and Offsite Areas from 2013 to 2018. But as OCC witness Dr. James R. Campbell, PhD, testified, Duke’s soil remediation efforts were “excessive and imprudent and resulted in Duke spending considerably more than was necessary under the VAP Rules.”¹¹⁷ In fact, rather than \$46 million, Duke could have spent just over \$10 million, with only \$3.9 million on the MGP Sites themselves.¹¹⁸

OCC witness Campbell has a Ph.D. in Civil and Environmental Engineering from Carnegie Mellon.¹¹⁹ He has been working with manufactured gas plant sites for more than 30 years, including the investigation, design, and remediation of more than 50 such sites.¹²⁰ He has worked on the analysis or environmental assessment and cleanup of more than 100 sites in total, providing expert analysis for 12 MGP sites designated as superfund sites under the Comprehensive Environmental Response, Compensation, and Liability Act (more commonly known as “CERCLA”). He is a certified professional (“CP”) under the Ohio VAP.¹²¹ This means

¹¹⁷ OCC Ex. 21 (Campbell Testimony) at 15.

¹¹⁸ *Id.* at 5.

¹¹⁹ *Id.* at 1.

¹²⁰ *Id.* at 2.

¹²¹ OCC Ex. 21 (Campbell Testimony), Attachment JRC-2.

that the State of Ohio considers him well-qualified based on his education and experience to act as an agent of the State for purposes of interpreting the VAP and determining when a site meets all applicable VAP standards.¹²² And the PUCO itself has previously described Dr. Campbell as “a learned environmental consultant and professional.”¹²³ There should be no doubt that Dr. Campbell’s expert opinions regarding Duke’s MGP remediation deserve considerable weight.

Dr. Campbell evaluated Duke’s work at the MGP Sites and Offsite Areas from 2013 to 2018 and determined that Duke could have achieved the same result—protection of human health and the environment in compliance with the VAP rules—without spending so much money.

Duke’s chosen remediation methods were primarily extensive soil excavation and removal, and soil solidification (known as “in situ solidification”).¹²⁴ Duke generally chose to excavate soil to depths of 10 to 20 feet below ground surface and to solidify soil (by mixing it with re-agents like Portland cement) as deep as 45 feet below the bottom of the excavation.¹²⁵ This is anywhere from five to ten times greater excavation than was needed, and it leaves the oil/tar contamination in place, the same as the more prudent approach that Dr. Campbell recommended.¹²⁶

This level of excavation and solidification is not necessary to comply with the VAP rules.¹²⁷ Instead, as Dr. Campbell testified, the VAP rules allow for the use of risk mitigation

¹²² See Duke Ex. 15 (Fiore Testimony) at 7 (describing what it means to be a VAP CP).

¹²³ *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, Entry on Rehearing ¶ 29 (Jan. 8, 2014).

¹²⁴ OCC Ex. 21 (Campbell Testimony) at 5.

¹²⁵ OCC Ex. 21 (Campbell Testimony) at 7, 11.

¹²⁶ *Id.* at 11.

¹²⁷ *Id.* at 8 (“The VAP Rules do not require the extensive remediation efforts that Duke elected to implement.”).

measures in lieu of excavation.¹²⁸ These risk mitigation measures are designed to limit the potential for humans to come into contact with contaminated soils.¹²⁹ One example of such a risk mitigation measure is to cover the contaminated areas with clean soil or asphalt paving.¹³⁰

Instead of Duke's extensive soil excavation and solidification, Dr. Campbell recommended the following for Duke's remediation:

First, Duke could apply for an Urban Setting Designation ("USD") under the VAP rules.¹³¹ "An urban setting designation involves a formal recognition by the Ohio EPA that ground water in qualifying urban areas is not currently used as a source of drinking water and is not expected to be needed to meet the demands for public water supplies in the foreseeable future."¹³² This precisely describes the MGP Sites, because in Cincinnati, groundwater cannot be drawn for potable use.¹³³ A USD would shift the compliance point for VAP standards to the property boundary, or beyond, and this would result in significant cost savings, as it is part of and supports the engineering and institutional controls approach described below. Because Cincinnati prohibits using groundwater for potable use, Duke could have, and should have, requested a USD.¹³⁴

Second, Duke could have used dense non-aqueous phase liquid ("DNAPL") recovery wells to address any concerns with "free product" in groundwater.¹³⁵ Free product includes

¹²⁸ *Id.* at 12.

¹²⁹ *Id.*

¹³⁰ *Id.* at 12-13.

¹³¹ *Id.* at 19.

¹³² OCC Ex. 21 (Campbell Testimony) at 18 (quoting the Ohio VAP Technical Guidance Compendium).

¹³³ Tr. Vol. II at 410 (Fiore).

¹³⁴ OCC Ex. 21 (Campbell Testimony) at 18 ("A USD may be requested for properties when there is no current or future use of ground water by local residents for the purpose of drinking, showering, bathing, or cooking.").

¹³⁵ OCC Ex. 21 (Campbell) at 20.

things like liquid, mobile tar, as found in groundwater monitoring wells.¹³⁶ Free product was found in some of the monitoring wells at the MGP Sites.¹³⁷ Duke chose to address this issue through expensive soil excavation and solidification, but as Dr. Campbell testified, “remediation of free product could be accomplished much more cost effectively with DNAPL recovery wells.”¹³⁸

Third, even if free product affected groundwater, Duke could have applied for a variance under the VAP rules to limit the scope of remediation.¹³⁹ VAP rule 3745-300-12 allows remediating parties to request a variance from an established standard (such as the groundwater unrestricted potable use standard) if, among other things, the cost substantially exceeds the economic benefit.¹⁴⁰

Fourth, regarding soil remediation, Dr. Campbell recommended (i) engineering controls in the form of perimeter fencing (which is already in place) to limit and control access to the MGP Sites and a two-foot soil cover to protect workers from direct contact with contaminated soils, and (ii) institutional controls in the form of an environmental covenant restricting future use of the MGP Sites to commercial/industrial uses, prohibiting use of groundwater, and the use of a risk mitigation plan that provides protection to workers for any excavation that might be necessary in the future.¹⁴¹

¹³⁶ *Id.* at 19.

¹³⁷ *Id.* at 20.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ OCC Ex. 21 (Campbell) at 20 (citing Rule 3745-300-12).

¹⁴¹ OCC Ex. 21 (Campbell) at 25-28.

In short, as Dr. Campbell testified, “Duke consistently failed to use more cost-effective approaches available under the VAP Rules. That failure to pursue more cost-effective approaches should be borne by Duke’s shareholders and not its customers.”¹⁴²

Based on his expert analysis of more reasonable and cost-effective approaches available at the MGP Sites and Offsite Areas, Dr. Campbell calculated how much Duke should have reasonably spent from 2013 to 2018. According to his analysis, Duke could have safely and efficiently complied with the VAP rules while spending no more than \$10,059,313 for the MGP Sites and Offsite Areas combined, and just \$3,876,102 for the MGP Sites alone.¹⁴³ Thus, if the PUCO adopts Staff’s and OCC’s recommendation that customers not pay anything for the Offsite Areas, then customers should pay no more than \$3,876,102. If the PUCO rules that customers are required to pay for the Offsite Areas, then they still should not be charged more than \$10,059,313, which is the amount that Duke could have spent while still complying with the VAP. Anything above these amounts should be paid by Duke and its shareholders, not captive monopoly customers.

E. Duke cannot meet its burden of proof in this case because it did not put on a single witness to testify that its proposed charges to customers were prudent under Ohio’s ratemaking standards.

The Rate Case Order provides that in these rider cases, “Duke shall bear the burden of proof to show that the costs incurred for the previous year were prudent.”¹⁴⁴ The Supreme Court of Ohio has ruled that it is the utility that must “prove a positive point: that its expenses had been

¹⁴² *Id.* at 15.

¹⁴³ OCC Ex. 21 (Campbell) at 28-29; Attachments JRC-2, JRC-3, JRC-4, and JRC-5.

¹⁴⁴ Rate Case Order at 72.

prudently incurred.”¹⁴⁵ The Court further emphasized that “if the evidence was inconclusive or questionable, the commission could justifiably reduce or disallow cost recovery.”¹⁴⁶

Here, Duke failed to positively prove that its expenses had been prudently incurred. Indeed, *none* of Duke’s witnesses testified that Duke’s proposed charges were prudent under Ohio’s ratemaking standards:

- Duke witness Bednarcik confirmed that she took no position on who should pay for Duke’s investigation and remediation costs:

Q. But is it fair to say that in your testimony in general you are not testifying as to who should pay for the investigation and remediation?

A. That is correct.¹⁴⁷

- Duke witness Bachand testified that he did not even know how the PUCO defined prudence for purposes of cost recovery.¹⁴⁸ And like Ms. Bednarcik, he confirmed that he was not testifying about whether customers should pay for Duke’s MGP costs: “I don’t know if that’s my job to decide if a customer is – is required to pay.”¹⁴⁹
- Duke witness Fiore admitted that he was not testifying about the prudence of Duke’s remediation efforts for purposes of ratemaking:

Q. You are not talking about prudent and reasonable from a ratemaking perspective, correct?

A. Correct. What I am talking about here is prudent and reasonable in meeting all applicable standards under the VAP to mitigate the liabilities.

¹⁴⁵ *In re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 488 (2012).

¹⁴⁶ *Id.*

¹⁴⁷ Tr. Vol. I at 66 (Bednarcik).

¹⁴⁸ Tr. Vol. II at 291-92 (Bachand).

¹⁴⁹ Tr. Vol. II at 294 (Bachand).

- Duke witness Brown testified that when he used the word “prudent” in his pre-filed testimony, he was speaking generically as the word is commonly understood, and he admitted that he does not even know Ohio’s utility ratemaking formula.¹⁵⁰
- Duke witnesses Butler and Lynch testified only on insurance issues, rendering no opinion on the prudence of Duke’s remediation efforts or charges to consumers for those efforts.¹⁵¹
- Duke witness Lawler admitted that although she reviewed invoices for purposes of her testimony, she “did not conduct a prudence review” for 2016, 2017, or 2018 and did not even review all of Duke’s invoices for 2013 to 2015,¹⁵² so she could not have reviewed them for prudence.

Despite having the burden to affirmatively prove that its proposed charges to consumers are prudent under Ohio ratemaking laws, each of Duke’s witnesses admitted that he or she was not testifying on that very issue. Consistent with Ohio Supreme Court precedent, therefore, the evidence of ratemaking prudence is at best “inconclusive or questionable.”¹⁵³ Thus, the PUCO should deny Duke’s applications in their entirety and deny Duke’s request to charge customers anything for 2013-2018 MGP costs.

F. R.C. 4909.15(A)(4) prohibits Duke from charging customers to investigate and remediate the Offsite Areas because they are not used to render public utility service to customers.

In the Rate Case, the PUCO Staff and OCC argued that because the MGP Sites were not currently used and useful, Duke could not charge customers to remediate them.¹⁵⁴ The PUCO and Supreme Court of Ohio rejected this argument, ruling that the “used and useful” analysis applies only to plant under R.C. 4909.15(A)(1), and MGP remediation costs are expenses under

¹⁵⁰ Tr. Vol. II at 479, 503 (Brown).

¹⁵¹ Duke Exs. 17-21 (Bone Testimony adopted by Butler), 22-23 (Butler Testimony), 24 (Lynch Testimony).

¹⁵² Tr. Vol. III at 675-76 (Lawler).

¹⁵³ *In re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 488 (2012).

¹⁵⁴ Rate Case Order at 26-30, 47-53.

R.C. 4909.15(A)(4).¹⁵⁵ As the Court explained, “because Duke is seeking to recover costs—and not its capital investment in the MGP property and facilities—the commission correctly refused to apply the used-and-useful standard.”¹⁵⁶

But that is not the end of the analysis. R.C. 4909.15(A)(4) provides that customers can be charged only for the “cost to the utility of rendering the public utility service.” Even if Duke is not required to prove that its MGP cleanup costs are tied to used and useful property, it must still prove that the costs are a cost “of rendering the public utility service” under R.C.

4909.15(A)(4).¹⁵⁷

In the Rate Case, Duke was able to do this. The PUCO found that the West End and East End Sites were used for current utility operations, including underground gas mains and pipelines; a gas operations center; storage, staging, and employee facilities; sensitive utility infrastructure; and propane facilities.¹⁵⁸ The Ohio Supreme Court agreed, rejecting OCC’s 4909.15(A)(4) argument because Duke was “currently using the MGP sites for gas-distribution operations and that remediation was necessary for Duke to continue operations at the properties.”¹⁵⁹

In the current cases, however, Duke cannot prove that the Offsite Areas are being used to provide current utility service to customers. Duke witness Bachand testified that Duke does not currently use the WOW parcel for distribution service:

¹⁵⁵ Rate Case Order at 53-54; *In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 441-42 (2017).

¹⁵⁶ *In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d at 442.

¹⁵⁷ See Rate Case Order at 58 (“it is still Duke’s burden in these cases to prove that the costs that have been incurred and deferred, are costs that were incurred for rendering utility service and were prudent”).

¹⁵⁸ *Id.* at 54.

¹⁵⁹ *In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 445 (2017).

Q. And Duke does not currently have any distribution operations in the West of the West Parcel, correct?

A. Correct.¹⁶⁰

OCC witness Adkins similarly testified, based on his extensive experience with the MGP Sites through these cases and the Rate Case, that the Offsite Areas “are not currently used to provide utility service.”¹⁶¹

In the Rate Case, Duke witness Wathen testified that the Purchased Parcel (which includes the WOW parcel) was recorded on Duke’s books as nonutility plant.¹⁶² Further, Duke undoubtedly didn’t need the WOW parcel when it sold it to a real estate developer 2006 to 2011, and it has not added new distribution operations to it since.¹⁶³ Likewise, Duke is not currently using the Ohio River to provide distribution service to customers.¹⁶⁴

This make the current cases distinguishable from the Rate Case. While in the Rate Case, the properties in question (the West End and East End Sites themselves) were being used for various distribution operations, the Offsite Areas are not currently used for anything utility-related. Duke can continue to provide distribution service to customers without remediating the Offsite Areas, so under R.C. 4909.15(A)(4), the cost of remediating those areas is not a “cost to the utility of rendering the public utility service.”

¹⁶⁰ Tr. Vol. I at 193 (Bachand).

¹⁶¹ OCC Ex. 19 (Adkins Testimony) at 10-11.

¹⁶² Rate Case Order at 42.

¹⁶³ Tr. Vol. I at 193 (Bachand) (testifying that he did not know of any distribution operations that Duke installed on the WOW parcel since Duke repurchased it in 2011).

¹⁶⁴ Tr. Vol. I. at 166 (Bednarcik) (“Q. The Ohio River itself has not been used to render public utility service to customers, correct? A. I don’t believe so.”); OCC Ex. 19 (Adkins Testimony) at 10-11.

G. Ohioans should not pay to clean up environmental contamination that Duke or its predecessors caused in the State of Kentucky.

Some of the costs that Duke included in its proposed charges to consumers were actually for work done in Kentucky. Duke witness Bednarcik testified that Duke sought approval for some work from the Kentucky Transportation Cabinet and Kentucky Department of Fish and Wildlife Resources because some of Duke's sediment sampling work was "on the Kentucky side" of the Ohio River.¹⁶⁵ Surely, Duke's Ohio distribution customers should not be paying to clean up hazardous waste in the state of Kentucky.

H. Customers should not pay to remediate the same land twice.

Staff witness Crocker testified that as part of Staff's investigation, it discovered that Duke had remediated certain property by solidifying soil, and then Duke removed the already solidified soil, thus necessitating further remediation of that same land.¹⁶⁶ It is imprudent to remediate soil, remove the remediated soil, and then charge customers to remediate it again.¹⁶⁷

I. Duke cannot charge customers for capital costs through Rider MGP.

In the Rate Case appeal, the Ohio Supreme Court found that the "used and useful" standard did not apply to Rider MGP because Rider MGP is for expenses only, not capital costs.¹⁶⁸ Now, however, Duke is seeking to charge customers for capital costs, including installation of poles and footings for a substation and other unspecified substation costs,

¹⁶⁵ Duke Ex. 7 (Bednarcik 14-375 Testimony) at 10; Tr. Vol. I at 77-78 (Bednarcik); Tr. Vol. I at 136 (Bednarcik) (soil borings in Kentucky); Tr. Vol. II at 297 (Bachand).

¹⁶⁶ Tr. Vol. IV at 968-969 (Crocker). *See also* Staff Ex. 1 (2018 Staff Report) at 5 (noting that Duke's charges included costs for "disposal of previously solidified soil").

¹⁶⁷ Staff Ex. 8 (Crocker Testimony) at 7 (Staff recommends removal of "re-remediation" costs).

¹⁶⁸ *In re Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 442 (2017).

relocation of nitrogen tanks for a substation, and the cost of a metal staircase.¹⁶⁹ These costs, totaling at least \$226,091, should not be charged to customers as MGP remediation expenses.¹⁷⁰

J. Customers should not pay to remove soil that was added to the WOW parcel by DCI Properties from 2006 to 2011 when Duke did not even own that property.

Duke did not own the WOW parcel from 2006 to 2011.¹⁷¹ It was owned instead by a real estate developer known as DCI Properties. During that time, Duke believes that DCI brought new soil onto the WOW parcel.¹⁷² Further, Duke admitted that its proposed charges to consumers in these cases may include costs to remove the soil that DCI brought onto the WOW parcel.¹⁷³ Removing soil brought onto the WOW parcel by a real estate developer is not a prudently-incurred remediation cost. It was Duke that decided to sell the property to DCI in 2006, so Duke's shareholders should bear the cost of all soil removal for the WOW parcel, which totals at least \$384,900.¹⁷⁴

III. CONCLUSION

Customers have already paid more than \$55 million to clean up Duke's defunct manufactured gas plant sites. Now Duke wants customers to pay more to clean up properties that had nothing to do with those sites—properties that Duke doesn't even use for utility service. The law does not allow this, and the Rate Case Order does not allow this.

¹⁶⁹ Staff Ex. 1 (2018 Staff Report) at 5; Staff Ex. 2 (2019 Staff Report) at 6.

¹⁷⁰ Staff Ex. 2 (2019 Staff Report) at 6.

¹⁷¹ Tr. Vol. I at 71 (Bednarcik).

¹⁷² OCC Ex. 4 (Duke's response to OCC-INT-02-019 CONSOLIDATED) ("no construction activities were performed on the [WOW parcel] other than site preparation activities, which is believed to have included bringing soil fill onto the [WOW parcel]").

¹⁷³ Tr. Vol. I at 202 (Bachand).

¹⁷⁴ See Duke Ex. 14 (Bachand Supp. Testimony), TLB-6 Attachment (Rumpke soil removal costs for 2016 and 2017 for the WOW parcel).

Adding insult to injury, Duke is holding \$50 million in insurance money that belongs to customers and wants to continue holding it indefinitely, rather than giving customers relief. And Duke spent substantially more remediating the MGP sites than necessary by using excessive and unnecessary cleanup methods that go well beyond what is required.

Current customers have paid more than their fair share to clean up defunct, hundreds-of-years-old gas plants that were never used to provide any service whatsoever to those current customers. The PUCO should protect consumers by rejecting all or substantially all of Duke's proposed charges to consumers for 2013 to 2018 MGP cleanup costs and should order Duke to immediately provide all \$50 million of insurance proceeds owed to customers. Any other result would be unjust, unreasonable, and unlawful.

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Initial Post-Hearing Brief was served by electronic transmission upon the parties below this 17th day of January 2020.

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