**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. 14-0375-GA-RDR |
| In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval | ) ) ) | Case No. 14-0376-GA-ATA |
| In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates | ) ) ) | Case No. 15-0452-GA-RDR |
| In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval | ) ) ) | Case No. 15-0453-GA-ATA |
| In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates | ) ) ) | Case No. 16-0542-GA-RDR |
| In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval | ) ) ) | Case No. 16-0543-GA-ATA |
| In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates | ) ) ) | Case No. 17-0596-GA-RDR |
| In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval | ) ) ) | Case No. 17-0597-GA-ATA |
| In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates | ) ) ) | Case No. 18-0283-GA-RDR |
| In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval | ) ) ) | Case No. 18-0284-GA-ATA |
| In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates. | ) ) ) | Case No. 19-174-GA-RDR |
| In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval. | ) ) | Case No. 19-175-GA-ATA |

## POST-HEARING BRIEF OF THE KROGER CO.

## I. INTRODUCTION.

In this consolidated proceeding, Duke Energy Ohio, Inc. ("Duke") is seeking to recover various environmental investigation and remediation costs that the Public Utilities Commission of Ohio ("Commission") already held Duke cannot recover from Ohio ratepayers,[1] which ruling was affirmed by the Supreme Court of Ohio.[2] Despite this precedential and controlling ruling, Duke nonetheless asks this Commission to turn a blind eye to the Rate Case Order and allow it to recover from Ohio customers expenses that already were expressly disallowed. In doing so, Duke seeks to charge customers an additional $46 million for environmental investigation and remediation costs incurred by Duke between 2013 and 2018.[3] And, this is after the more than $55 million in environmental investigation and remediation costs already collected from customers for Duke's decommissioned manufactured gas plants ("MGP") that have not been used to provide utility service to customers in more than 60 years.[4]

Indeed, as part of its $46 million, Duke is asking this Commission to require Ohio customers to pay for environmental investigation and remediation in the Commonwealth of Kentucky and in the Ohio River – areas that are not owned by Duke and are not used to provide utility service to Ohio customers. Likewise, the Commission already disallowed all costs

[1] *In re Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, et al. ("Rate Case"), Opinion & Order (Nov. 13, 2013) ("Rate Case Order").

[2] *In re Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates,* Slip Opinion No. 2017-Ohio-5536 (June 29, 2017).

[3] *See In re Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, et al., Entry at ¶¶ 10-11 (Aug. 27, 2019) (Duke is seeking approximately $26 million for 2013 through 2017 and an additional $19.8 million for 2018).

[4] Rate Case Order at 12.

associated with a piece of property purchased by Duke ("Purchased Parcel") and other areas beyond the footprint of the MGP sites:

> 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 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.[5]

The Commission should remain steadfast and not allow Duke to charge customers for costs that the Commission already rejected.

Finally, in continuing its efforts to ignore the rulings in the Rate Case Order, affirmed by the Supreme Court of Ohio, Duke also has refused to credit back to customers the insurance proceeds – totaling over $50 million –as it was ordered to do. The Commission expressly provided that Duke must credit back all insurance proceeds collected, net only of the costs incurred to recover those insurance proceeds. Yet, not a single dollar has been credited back to customers. Instead, Duke wants to rewrite the Rate Case Order and hold onto those insurance proceeds to apply them to environmental investigation and remediation costs disallowed in this proceeding or to be incurred in the future even though the time period for Duke to recover for the remediation of the MGP sites expired as of December 31, 2019. The Commission should enforce the Rate Case Order and require Duke to comply by refunding amounts back to its customers immediately.

In short, contrary to Duke's efforts in this proceeding, there is no regulatory provision or Ohio law granting Duke the unfettered right to collect from customers every dollar it has incurred in environmental investigation and remediation costs. It is time, and indeed, passed

[5] Id. at 60; *see also* id. at 71 ("Such deferral authority should be limited to the East and West End sites and for a period finite[.]").

time, that Duke's shareholders bear the burden of these costs instead of ratepayers. In fact, in the Rate Case Order, the Commission held that Duke and its shareholders also should bear the burden of these environmental investigation and remediation costs of MGP plants that have not been used in over six decades:

> [W]e find the intervenors' argument that the shareholders should bear some of the responsibility for the remediation costs persuasive . . . we also find that it 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.
>
> * * * *
>
> We believe that, absent exigent circumstances, this 10-year timeframe from the inception of the federal mandate to the closure of cost recovery is reasonable and necessary in order to protect the public interest and ensure the Company and its shareholders are held accountable.[6]

It is time for Duke to bear the burden of any remaining MGP remediation costs that were not specifically authorized by the Commission.

Accordingly, The Kroger Co. ("Kroger") respectfully requests that the Commission affirm its Rate Case Order, and, under the doctrines of *res judicata* and collateral estoppel, (i) reject Duke's efforts to collect from customers the cost to remediate outside of the established footprints of the MGP sites; (ii) deny Duke's efforts to continue deferring costs beyond the current December 31, 2019 end date; and (iii) order Duke to immediately refund to customers the net insurance proceeds received by Duke instead of allowing Duke to continue to hold those funds hostage as a bargaining tool or financial boost to Duke's balance sheet.

[6] Rate Case Order at 59, 72.

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

The two MGP sites at issue in this consolidated proceeding, as was at issue in the Rate Case, are located in Cincinnati and are referred to as the West End site, which began operations in 1843, and the East End site, which began operations in 1884.[7] Those MGP sites ceased operations in 1928 and 1963, respectively.[8] Duke has known about MGP-related obligations at these two sites since at least 1988, but Duke did not begin any environmental investigation and remediation efforts at that time because Duke considered those sites as "lower priorities."[9] As a result, Duke's investigation efforts did not begin until 2007 for the East End site and 2010 for the West End site.[10]

In conjunction therewith, on August 10, 2009, Duke submitted an application to the Commission in Case No. 09-712-GA-AAM for authority to defer potential future recovery of the costs associated with the environmental remediation of the East End and West End MGP sites. Thereafter, on November 12, 2009, the Commission authorized Duke to defer environmental investigation and remediation costs related to these two former MGP sites in Ohio for potential recovery of reasonable and prudent costs incurred through a future base rate proceeding, but did not determine the amount, if any, that would be recoverable by Duke.[11]

In light of the 2009 Deferral Case, in 2012, Duke filed its Rate Case in which it sought, in part, to collect from customers the costs it had incurred in investigating and remediating the

---

[7] Rate Case Order at 25.

[8] Id.

[9] Id.

[10] Id. at 26.

[11] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM, Finding and Order at 4 (Nov. 12, 2009) ("2009 Deferral Case")).

MGP sites through December 31, 2012, which amounted to approximately $55 million.[12] Kroger and other parties, as well as the Staff of the Commission, opposed Duke's requested charges. Yet, on November 13, 2013, the Commission authorized the recovery of such environmental investigation and remediation costs as had been incurred by Duke between 2008 and 2012. The Commission, however, explicitly disallowed "costs related to the purchased parcel located west of the East End site, the costs incurred in 2008 for the West End site, and all carrying charges."[13] The Commission also authorized Duke to continue deferring environmental investigation and remediation costs, for a total 10-year period. That meant that for the East End site, Duke was allowed to defer costs from January 1, 2013 through December 31, 2016, and for the West End site, Duke was allowed to defer costs from January 1, 2013 through December 31, 2019.[14] While the Commission noted that the 10-year period for recovery of investigation and remediation costs could be extended if "exigent circumstances existed," Duke now wants an open-ended and indefinite extension of the deferral period for both the East End and West End sites without demonstrating that any such "exigent circumstances" exist.[15]

In addition to wanting an open-ended deferral period, in this proceeding, Duke wants to collect from customers over $46 million for investigation and remediation costs for 2013 through 2018. However, in reviewing Duke's proposed charges, Staff issued its Staff Reports, finding that approximately $23 million of the $49 million sought by Duke was improper, imprudent,

---

[12] Rate Case Order at 12.

[13] Id. at 73.

[14] Rate Case Order at 72. The deferral period for the East End site was extended to December 31, 2019. *See In re Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation & Remediation Costs*, Case No. 16-1106-GA-AAm, Finding & Order at 14 (Dec. 21, 2016) ("2016 Extension Order").

[15] Rate Case Order at 72.

unreasonable and not recoverable from ratepayers.[16] In so recommending, Staff found that the allowable recovery amount is consistent with the holdings and directives of the Rate Case Order, which was affirmed by the Supreme Court of Ohio, because much of Duke's investigation and remediation costs were incurred outside of the established boundaries of the East End and West End sites.[17]

Finally, at the evidentiary hearing of this matter that began on November 18, 2019, it was established that Duke has recovered in excess of $56.2 million dollars in insurance proceeds relating to the environmental clean-up of the MGP sites at issue here and incurred $5.7 million in costs to recover those proceeds.[18] Duke has exhausted its collection efforts, thereby leaving net insurance proceeds of $50.5 million, which are required by the Rate Case Order to be credited or refunded to customers.[19] Yet, to date, no such credits or refunds have occurred.[20]

At the conclusion of the evidentiary hearing, the Attorney Examiner established a briefing period.[21] In accordance therewith, Kroger submits its Post-Hearing Brief in this proceeding.

## III. LAW AND ARGUMENT.

### A. The Commission Should Enforce the Mandates and Directives of the Rate Case Order Under the Doctrines of Collateral Estoppel and *Res Judicata*.

As a matter of well-established law, the doctrine of collateral estoppel provides that a "fact or point that was actually and directly at issue in a previous action, and was passed upon

---

[16] *See* Staff Ex. 1, Case No. 14-375-GA-RDR, et al., Staff Report I (Sept. 28, 2018); Staff Ex. 2, Case No. 14-375-GA-RDR, et al., Staff Report II (July 12, 2019); *see also* August 27, 2019 Entry at ¶¶ 10-11 (reciting that Staff recommended a reduction of $11.9 million for 2013-2017 and an additional $11.4 million for 2018).

[17] *See* Staff Ex. 1, Staff Report I, at 4, 6; Staff Ex. 2, Staff Report II, at 5.

[18] *See* Tr. Vol. III at 617; see also OCC Ex. 19, Kerry J. Adkins Direct Testimony, at 22.

[19] Tr. Vol. III at 630.

[20] Duke Ex. 23, Kevin Butler Suppl. Testimony, at 8.

[21] Tr. Vol. IV at 984.

and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998). "Essentially, collateral estoppel prevents parties from relitigating facts and issues that were fully litigated in a previous case." *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112, Ohio St.3d 470, 2006-Ohio-6553, ¶ 46. The doctrine also eliminates "the possibility of inconsistent decisions." *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶ 25.

Similarly, the Supreme Court of Ohio has described the doctrine of res judicata as precluding "'re-litigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.'" *State ex rel. Tantarelli v. Decapua Enterprises, Inc.,* 156 Ohio St.3d 258, 2019-Ohio-517, at ¶ 14 (2019) (citation omitted). In essence, when issues were litigated in a prior proceeding, such as the Rate Case, Duke cannot have a second bite at the apple.

Here, the doctrines of collateral estoppel and *res judicata* prohibit Duke from attempting to re-litigate issues regarding the recovery of costs associated with the parcel of property known as the Purchased Parcel. Specifically, in the Rate Case Order, the Commission expressly denied the recovery of any "costs *associated* with the purchased parcel."[22] The Commission went on to hold that it was unwilling to consider the request for recovery of costs related to that property because Duke failed to establish that the Purchased Parcel had provided, "either in the past or in the present, utility services that caused the statutorily mandated environmental remediation."[23] The Commission concluded that "the requested $2,331,580 associated with the purchase parcel

[22] *See* Rate Case Order at 60.

[23] Id.

on the East End site should not be included in the amount of costs to be recovered through Rider MGP."[24]

Notwithstanding that the language in the Rate Case Order was clear and unambiguous, Duke tries to narrow the Rate Case Order disallowance and expand the footprints for the MGP sites to include recovery for remediation outside of the authorized recovery area. In doing so, Duke argues that the Commission's rulings as to the Purchased Parcel disallowance were limited solely to the premium price paid for the Purchased Parcel.[25] But, that is not the case. In addition to the Commission referencing costs "associated with" and "related to" the Purchased Parcel, the Commission also made it clear that Duke was seeking in that case exactly what it is seeking here: to be allowed to recover investigation and remediation costs for the Purchased Parcel. "Duke disagrees that the costs to remediate the purchased parcel not be recoverable, stating that Duke is responsible not only for the impacts of the MGP directly under the historic site, but also for the cleanup of any impacts off-site that can be linked to the operations conducted at the site while under Duke's ownership."[26] Simply put, the Commission in the Rate Case Order disallowed costs associated with the Purchased Parcel. Duke cannot attempt to rewrite the Rate Case Order to try to revisit recovery of costs associated with the Purchased Parcel.

Consistent therewith, in the Rate Case Order, the Commission also held that the cost recovery under the MGP Rider would be limited to the East and West End sites, those footprints.[27] Id. at 60, 71. In so ruling, the Commission rejected Duke's contention that it should be allowed to recover from ratepayers costs related to cleanup required off-site or beyond the

[24] Id.

[25] See Case No. 14-375-GA-RDR, et al., Comments of Duke Energy Ohio, Inc., at 6 (Aug. 12, 2019).

[26] Rate Case Order at 43.

[27] Id at 60, 71.

footprints established for the East and West End sites. As such, the Commission already in its 2012 Order rejected Duke's request to recover costs associated with the Purchased Parcel. The Commission should affirm its ruling and reject Duke's request to recover costs associated with the Purchased Parcel.

Finally, the doctrines of collateral estoppel and *res judicata* also prohibit Duke's argument that if any MGP costs are disallowed, Duke and its shareholders should get to keep some of the MGP insurance proceeds recovered by Duke. This is the exact same argument made by Duke in the Rate Case.[28] Specifically, in rejecting this argument, the Commission held:

> We find that any proceeds paid by insurers or third parties for MGP investigation and remediation should be used to reimburse the ratepayers. . . To the extent the proceeds collected from insurers and/or third parties exceed the amount recoverable from ratepayers, Duke should be permitted to retain such amount.[29]

There is nothing ambiguous about this ruling. The Commission already determined that if there is insurance money, it goes to the customers. If the insurance is more than the amount the customers pay, Duke gets to keep whatever is left over. However, as established at the hearing, there will likely be no money left over in this case. Therefore, Duke's attempt to re-litigate this issue and claim that some of the insurance money should instead go to shareholders or Duke as a result of any potential disallowance is not allowed. The Attorney Examiner erred in allowing Duke to present evidence and testimony related to the Purchased Parcel and other areas outside of the boundaries of the MGP sites. *See* Ohio Adm. Code 4901-1-15(F). Accordingly, the Commission should strike the testimony associated with cost recovery for the Purchased Parcel and other areas outside of the boundaries of the MGP sites and deny recovery to Duke for all costs associated therewith.

---

[28] Rate Case Order at 66.

[29] Id. at 67.

### B. The Commission Should Deny Duke's Request to Recover Environmental Investigation and Remediation Costs Incurred Outside Of the East End and West End MGP Sites.

The Rate Case Order also was clear and unambiguous as to the geographic scope of environmental investigation and remediation for which Duke could seek recovery. Specifically, as explained above, the Commission already ruled that Duke's recovery from customers shall be limited to the clean-up costs incurred within the two original MGP site footprints.[30] Indeed, as Staff recognized in its Staff Report II, "when the Commission approved recovery of MGP remediation costs associated with the East and West End sites, . . . the sites were defined by current property boundaries."[31]

Duke cannot ignore the plain language of the Commission's Rate Case Order. Yet, that is precisely what Duke requests that the Commission do here. Duke wants the Commission to reverse itself and allow Duke to collect from customers for areas surrounding the East End and West End sites themselves, including the Purchased Parcel, the Ohio River and the banks in the Commonwealth of Kentucky. Significantly, however, expenses in those expanded areas are not allowed under the Rate Case Order. As such, based upon the Rate Case Order, Duke's customers should not have to pay clean-up expenses incurred beyond the East and West End MGP sites.

Indeed, with respect to the Purchased Parcel, the Commission already ruled that that investigation and remediation efforts outside of the East and West End MGP sites, including the Purchased Parcel, are not costs to be borne by Duke's customers. As explained above, in so ruling, the Commission noted that the Purchased Parcel was not used to provide utility service to Duke's customers:

---

[30] Rate Case Order at 60, 71.

[31] Staff Ex. 2, Staff Report II at 5.

> With regard to the purchased parcel located to the west of the western parcel of the East End site, ... Duke failed to prove, on the record, 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. Rather, the record indicates that, while the nine-acre purchased parcel may have been impacted by the former MGP operations, only a small portion of the parcel may have been associated with the actual MGP property originally owned by Duke and its predecessors. ... [W]e 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.[32]

This continues to be true today in this proceeding. The Purchased Parcel and other property (including the Ohio River and the banks of the river in the Commonwealth of Kentucky) were not part of the original MGP sites that caused the contamination. Thus, any costs to remediate property outside the geographic bounds of the East End and West End sites should not be passed on to customers.

Additionally, the geographic bounds of the East End and West End sites should not include the Ohio River because, among other things, cost recovery for remediation there would be unlawful. At hearing, Duke confirmed that it has performed investigative and remedial work in the Ohio River outside the Ohio boundaries.[33] Some of the soil sampling done by Duke's consultant was taken from Kentucky's soil.[34] It is clear that the work performed was completed outside the bounds of Ohio as approval to investigate the soil was provided by the Kentucky Department of Fish and Wildlife Resources and Kentucky Transportation Department.[35] It is

[32] Rate Case Order at 60.

[33] Tr. Vol. I at 77-78.

[34] Tr. Vol. I at 78.

[35] Id.

beyond the Commission's jurisdiction to order Ohio customers to pay for costs incurred in other states. R.C. 4905.05 provides:

> The jurisdiction, supervision, powers, and duties of the public utilities commission extend to every public utility and railroad, the plant or *property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state;* to the persons or companies owning, leasing, or operating such public utilities and railroads; to the records and accounts of the *business thereof done within this state*; . . .

R.C. 4905.05 (emphasis added). A reasonable reading of R.C. 4905.05's limitation of Commission jurisdiction over "property of which lies wholly within this state" and of "that part of such plant or property which lies within this state," leads to the conclusion that it is beyond the Commission's jurisdiction to order cost recovery for remediation efforts occurring outside the State of Ohio.

That being said, recovery can only occur for out of state property if the property is being "used and useful in rendering service" to Ohio customers. *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm'n of Ohio*, 42 Ohio St. 2d 403, 422, 330 N.E.2d 1, 14 (1975). However, Duke did not present any evidence at the hearing establishing that the Ohio River and the Commonwealth of Kentucky were used and useful in rendering utility service to current Ohio customers. Likewise, Duke's own witnesses could not establish that Duke's efforts in the Ohio River were a direct result of MGP-related impacts. Specifically, Duke witness Todd Bachand admitted that: (i) evidence of tar in the Ohio River is not conclusive evidence of MGP impacts,[36]

[36] Tr. Vol. II at 295.

(ii) the source of tar, be it MGP-related or not, is very hard to determine,[37] and (iii) invoices for investigation and analysis in the Ohio River have not been segregated for cost-accounting purposes.[38] Thus, the Commission should not allow recovery for investigation and remediation in the Ohio River or on the banks of the Commonwealth of Kentucky. Consistent with the Rate Case Order, those costs should be disallowed.

### C. Because Duke Failed to Establish Exigent Circumstances, The Commission Should Deny Duke's Request for an Open-Ended and Indefinite Deferral Period Beyond December 31, 2019.

In its Rate Case Order, the Commission required Duke to demonstrate that exigent circumstances exist in order to request an extension beyond the 10-year period, until December 31, 2019, to continue deferral authority for the MGP sites. On rehearing, the Commission defined exigent circumstance as an "event beyond the control of the Company."[39] Duke has failed to demonstrate that any exigent circumstances do in fact exist. Simply stated, Duke failed to satisfy its burden of proof at the hearing. It is undisputed that Duke has had more than enough time to complete its remediation efforts since it knew about the clean-up needs at the MGP sites since at least 1988.[40]

The Commission recognized the importance of a prompt completion of Duke's investigation and remediation efforts of the MGP sites in its Rate Case Order authorizing the cost recovery at issue in these proceedings:

> The Commission believes that the imposition of such a timeframe

---

[37] Tr. Vol. II at 296 ("Q. And you wouldn't be able to know whether there were impacts that flowed down the river from other sites, would you? A. I wouldn't -- I wouldn't be able to verify or deny that at this time because typically in the investigation world you would do background sampling as well as downstream sampling, and we are still in the process of investigating both sites, so I don't have all the information so I really can't respond to what's upgrading and what's downgrading of the site.").

[38] Id. at 297-98.

[39] Rate Case Entry on Rehearing at 4 (January 8, 2014).

[40] Rate Case Order at 25.

> [10 years] is, in accordance with R.C. Title 49, reasonable and in the public interest and will ensure that the remediation will be carried out in a responsible and expeditious manner, so that recovery through Rider MGP will be finite. . . We believe that, absent exigent circumstances, this 10-year timeframe . . . is reasonable and necessary in order to protect the public interest and ensure that the Company and its shareholders are held accountable.[41]

The Commission should not abandon these timelines; customer responsibility for Duke's remediation costs should cease at the end of 2019, regardless of how much remediation work still needs to be completed. By that point, Duke will have had a reasonable amount of time to complete the clean-up and customers should no longer be responsible for costs beyond that date. If Duke was unable to complete its work in the Commission-established timeframe, it should accept financial responsibility for any work that it is required to complete in 2020 and beyond.

### D. Pursuant to the Directives of the Rate Case Order, the Commission Should Order Duke to Credit or Refund the Collected Insurance Proceeds Net Only of The Costs Incurred To Recover Those Proceeds.

In its Rate Case Order, the Commission found that Duke should make every effort to collect all remediation costs from insurance policies and/or other third parties and ordered that any such proceeds should be used to reimburse ratepayers, net only of the costs incurred to collect those proceeds:

> The Commission agrees that Duke should continue to use every effort to collect all remediation costs available under its insurance policies, and Duke should continue to pursue recovery of costs from any third parties who may also be statutorily responsible for the remediation of the MGP sites. *We find that any proceeds paid by insurers or third parties 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. In crediting any proceeds back to the ratepayers, the Commission finds that no interest rate should be added to the credit. Finally,*

[41] Rate Case Order at 72; *see also* 2016 Extension Order at 14.

> *we agree that, to the extent the proceeds collected from insurers and/or third parties exceed the amount recoverable from ratepayers, Duke should be permitted to retain such amount*.[42]

Thus, the Rate Case Order was clear and unambiguous: Duke should take all efforts to recover insurance proceeds and reimburse ratepayers for any such insurance proceeds recovered net only of the costs incurred to obtain them.

At the hearing, it was established that Duke has collected approximately $56.2 million in insurance proceeds relating the remediation of the MGP sites.[43] Specifically, Duke witness Keith Butler testified that Duke attempted to pursue recovery under approximately 100 insurance policies and had to institute litigation in the Hamilton County Court of Common Pleas against some of the insurers.[44] In the end, Duke reached settlements with all solvent insurers and third-parties, collectively approximately $56.2 million in insurance proceeds for the environmental investigation and remediation of the MGP sites. The majority of those amounts were collected well over a year before the evidentiary hearing commenced on November 18, 2019.[45] Duke witness Michael Lynch testified that Duke has now exhausted all efforts to collect from third parties for the MGP site remediation efforts.[46]

According to the Rate Case Order, therefore, Duke was required to net the costs incurred to recover those proceeds from the collected proceeds and then reimburse ratepayers. At the hearing, it was established that Duke spent approximately $5.7 million in costs (litigation costs,

---

[42] Rate Case Order at 67 (emphasis added).

[43] *See* Tr. Vol. III at 617; *see also* OCC Ex. 19, Kerry J. Adkins Direct Testimony at 22 fn. 24 ("Duke provided information and the insurance proceeds to OCC in a confidential discovery response but subsequently agreed that OCC could publicly state the aggregate amount of insurance proceeds collected ($56,231,987)").

[44] Tr. Vol. III at 597; Duke Ex. 24, Michael Lynch Testimony at 3, 5-6; Duke Ex. 20, Case No. 17-596-GA-RDR, et al., Keith Bone Testimony at 4-5; Duke Ex. 22, Case No. 19-174-GA-RDR, et al., Kevin Butler Testimony at 7.

[45] Duke Ex. 23, Kevin Butler Suppl. Testimony at 8.

[46] Tr. Vol. III at 630; *see also* OCC Ex. 19, Kerry J. Adkins Direct Testimony at 22.

etc.) in pursuing and recovering the insurance proceeds.[47] That leaves a net balance of insurance proceeds of approximately $50.5 million that Duke continues to hold today. Indeed, Duke has made no effort whatsoever to reimburse or credit that $50.5 million to customers.

Significantly, Duke is not claiming that the insurance proceeds exceed the amount collected from customers and that is why Duke is retaining those funds. It cannot. It is undisputed that under the Rate Case Order, Duke has collected more than $50 million from customers for remediation costs incurred through 2012 and has sought to recover an additional $46 million for 2013 through 2018.[48] Simply, the net insurance proceeds do not exceed the amounts recovered from customers.

Instead, Duke is ignoring the clear and unambiguous language of the Rate Case Order and asserting that it can hold onto the insurance proceeds to apply them to environmental investigation and remediation costs disallowed in this consolidated proceeding or to be incurred in the future even though the time period for Duke to recover for the remediation of the MGP sites expired as of December 31, 2019. Such an assertion requires a rewrite of the Rate Case Order inasmuch as it is directly contrary to the mandate therein. The Rate Case Order does not say that insurance proceeds can be netted against future remediation costs. It does not say that insurance proceeds can be netted against disallowed costs. And, it does not say that the insurance proceeds will be divided among Duke's shareholders and customers. What it does say is clear: all insurance proceeds, net of costs incurred to recover them, must be reimbursed to customers until the customers are reimbursed in full. Once the customers are reimbursed in full, if anything is left, Duke can retain that overage. It is undisputed that customers have not been reimbursed in full. In fact, they have not been reimbursed at all. Thus, Duke cannot retain any

[47] Id.

[48] Rate Case Order at 12; August 27, 2019 Entry at ¶¶ 10-11.

of the insurance proceeds beyond the $5.7 million in costs incurred to recover those insurance proceeds.

As such, the Commission should enforce the Rate Case Order and require Duke to comply by crediting or refunding the insurance proceeds of $50,529,236 to its customers.

## IV. CONCLUSION.

For the foregoing reasons, Kroger respectfully requests that the Commission affirm its Rate Case Order and find that Duke is prohibited from requesting recovery of certain costs under the doctrines of *res judicata* and collateral estoppel. The Commission should: (i) reject Duke's efforts to collect from customers the cost to remediate outside of the footprints of the East and West End MGP sites; (ii) deny Duke's efforts to continue deferring costs beyond the current December 31, 2019 cut-off date; and (iii) order Duke to begin immediately crediting or refunding to customers the net insurance proceeds ($50,529,236) collected for these costs. At a minimum, the Commission should reduce Duke's requested recovery of $45,846,043 for years 2013 through 2018 to the Staff recommended amount of $22,611,900.[49]

Respectfully submitted,

*/s/ Angela Paul Whitfield*
Angela Paul Whitfield (0068774)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-4100
paul@carpenterlipps.com
(willing to accept service by email)

*Counsel for The Kroger Co.*

[49] *See* August 27, 2019 Entry at ¶¶ 10-12.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served via electronic mail on all parties of record on January 17, 2020.

*/s/Angela Paul Whitfield*
Attorney for The Kroger Co.

Summary: Brief Post-Hearing Brief of The Kroger Co. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.