BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matters of the Applications of Duke Energy Ohio, Inc., for Adjustments to Rider MGP Rates.	)	Case No. 14-375-GA-RDR
	)	Case No. 15-452-GA-RDR
	)	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 Energy Ohio, Inc., for Tariff Approval.	)	Case No. 14-376-GA-ATA
	)	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

POST-HEARING BRIEF OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

The above-captioned consolidated cases concern the extent to which Duke Energy Ohio, Inc. (Duke) may recover its ongoing investigation and remediation costs from customers for two former manufactured gas plants (MGP) that are no longer in service, no longer used and useful, and do not benefit customers. Specifically, the Public Utilities Commission of Ohio (Commission) is tasked with determining whether the costs incurred related to these two MGP sites in the years 2013, 2014, 2015, 2016, and 2017 were reasonable, prudently incurred by Duke, and lawful.

Duke is one of several utilities in Ohio that is successor in interest to an operator of MGP sites.[1] Duke has waited decades to clean up its two sites: the West End Site, whose operations ended in 1963, and its East End Site, whose operations ended in 1928. But now Duke seeks to recover costs from customers that the Commission has already determined they cannot recover.

[1] Testimony of Todd Bachand, Tr. Vol II at 285.

Duke is seeking authority to recover from Ohio customers costs associated with environmental investigation and remediation in Kentucky and the Ohio River, as well as costs associated with property purchased by Duke and other areas beyond the boundaries of the MGP sites delineated in the Commission's previous order. Even though it was ordered to do so, Duke also has refused to refund to customers the net insurance proceeds that it has received to date, which total more than $50 million. The Commission should reject Duke's attempts to ignore or re-litigate the prior Commission rulings and only authorize recovery for reasonable, prudently incurred costs associated with the MGP sites used to render public utility service to Ohio customers. The Commission should also order Duke to immediately refund to customers insurance proceeds that it has received.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 10, 2009, Duke requested authority to defer potential future recovery of the costs associated with the environmental investigation and remediation costs associated with two former manufactured gas plant (MGP) sites in Ohio.[2] The Commission authorized Duke to defer environmental investigation and remediation costs related to for potential recovery of reasonable and prudent costs in a future base rate proceeding the East End and West End MGP sites.[3]

The Commission authorized the recovery of environmental investigation and remediation costs in the amount of $55.5 million for prudently incurred costs that had been incurred by Duke between 2008 and 2012 associated with the East End site for the period of January 1, 2008 through December 12, 2012 and for the West End site for the period of January 1, 2009 through December

[2] *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, Application (August 10, 2009).

[3] *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 (November 12, 2009) (2009 Deferral Order).

31, 2012.[4] 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."[5] And, explicitly required Duke to credit any insurance proceeds received from insurers or their parties to ratepayers to reimburse the ratepayers.[6]

The Commission also authorized Duke to defer environmental investigation and remediation costs beyond December 31, 2012.[7] But limited the deferral authority to the East and West End sites and to a period of 10 years.[8] Importantly, the Commission did not grant deferral authority or the recovery of any costs associated with the purchased parcel and Ohio River. On February 21, 2014, Duke filed the Rider MGP tariff for recovery of the initial $55.5 million in MGP remediation costs authorized by the Rate Case Order.[9] From 2014 through 2018, Duke filed annual applications seeking approval to adjust Rider MGP to recover costs incurred during each preceding year for environmental investigation and remediation of the MGP sites.

This proceeding consists of the applications that Duke filed from 2014 through 2019 to adjust its MGP Rider to recover from customers costs incurred for its cleanup efforts for the MGP plants. Duke asks the Commission to approve cost recovery for remediation efforts undertaken between 2013 and 2018 amounting to $45,846,043, even though the remediation provides no

[4] *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, et al., Opinion and Order at 72-73 (November 13, 2013) (Rate Case Order), aff'd, Slip Opinion No. 2017-Ohio-5536 (June 29, 2017).

[5] Id. at 73.

[6] Id. at 67.

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

[8] Id. at 72, 74.

[9] Id. at 73.

benefit to Duke's utility customers.[10] Staff filed its review of the numerous MGP Rider applications on July 12, 2019, recommending a disallowance of $23,234,142 and a total recovery between the East End and West End sites of $22,611,901.[11] Staff also recommended that recovery be tied to a finite period of time and that insurance proceeds be netted against the costs.[12]

On August 13, 2019, the attorney examiner issued an Entry consolidating the cases, establishing a procedural schedule, and denying Duke's request to continue the MGP Rider at its current level during the pendency of the proceeding.[13] At that time, the Attorney Examiner clarified that:

> simply because Duke's activities and management decisions regarding its remediation efforts were determined to be reasonable and prudent for costs incurred before December 31, 2012, does not, in itself, mean that that will continue to be the case, especially noting the Commission's diligent review of thousands of pages of testimony and transcripts that took place prior to that determination of prudency. Consistent with the decision in the Duke Rate Case, the Commission will continue to evaluate the evidence as provided to ensure the expenses to be collected under Rider MGP are not imprudent.[14]

A hearing commenced on November 18, 2019, and following the conclusion of the hearing, the Attorney Examiner established a briefing period. Pursuant to the directive of the Attorney Examiner, OMAEG hereby files its initial Brief in this matter.

[10] Staff Ex. 2 at 8-9 (Staff Report) (July 12, 2019) (2019 Staff Report); also see Staff Ex. 1 (September 28, 2018) (2018 Staff Report) (Staff filed this initial Staff Report in Case No. 14-375-GA-RDR, et al).; also see Entry at ¶¶10, 11 (August 13, 2019).

[11] 2019 Staff Report at 9.

[12] Id.

[13] Entry at ¶19 (August 13, 2019).

[14] Id.

II. ARGUMENT

A. Recovery of Costs for Remediation of Property Outside the East End and West End Sites is Prohibited.

The Rate Case Order made it clear that the Commission was limiting Duke's recovery and only authorizing Duke to recover from customers any investigation or remediation costs incurred within the two original MGP sites.[15] The Rate Case Order was dispositive as to the issue of the geographical scope of investigation and remediation and cannot be revisited in this case.[16] Here, Duke is trying to recover for cleanup in a manner that exceeds the Commission's jurisdiction. The PUCO allowed Duke to defer expenses incurred remediating the MGP sites between 2013 to 2019 on the East End and West End sites. Duke can only charge customers for amounts that were properly deferred. The Rate Case Order unambiguously limits the deferral of costs to the geographic bounds of the East End and West End sites themselves—not the areas surrounding them:

> Duke requests authority to continue to defer costs related to the MGP remediation after December 31, 2012. . . . [T]he environmental investigation and remediation costs associated with the East and West End MGP sites are business costs incurred by Duke in compliance with Ohio regulations and federal statutes. Therefore, we find Duke's request for authority to continue to modify its accounting procedures and to defer costs related to the environmental investigation and remediation cost beyond December 31, 2012, is reasonable and should be approved. Such deferral authority should be limited to the East and West End sites and for a period as set forth below.

Rate Case Order at 71.

[15] Rate Case Order at 73-74.

[16] In the 2019 Staff Report, Staff further clarified that recovery outside of the bounds of the parcels at issue was improper, stating that "[i]t is Staff's understanding that when the Commission approved recovery of MGP remediation costs associated with the East and West End sites, *that the sites were defined by current property boundaries*." 2019 Staff Report at 5 (emphasis added).

The Rate Case Order states that the deferral is limited to costs for remediating the East End and West End sites. It does not state that the deferred costs just have to be related to the East End and West End sites. It does not state that Duke may defer costs associated with the land, air, and water near the East End and West End sites. It does not state that Duke may defer all contamination caused by manufactured gas plants. It does not state that Duke may defer costs associated with the East End and West End sites, plus any contaminated portions of other areas surround the East End and West End sites, such as a purchased parcel of land. The Rate Case Order does not state that that Duke may defer costs associated with the East End and West End sites plus the Ohio River. The Rate Case Order is devoid of these statements and Duke cannot credibly claim that the deferral of costs, which may later be collected from customers, includes contamination outside the geographic bounds of the MGP sites as defined in the Rate Case Order. As written, the Rate Case Order plainly limits the deferral of costs to the remediation at the East End and West End sites only.[17]

Furthermore, the Commission's discussion of the Purchased Parcel in the Rate Case Order also confirms that remediation outside the geographic bounds of the East End and West End sites should not be customers' responsibility. The Commission specifically found that Duke could not charge customers under Rider MGP for remediation costs associated with a piece of property purchased (Purchased Parcel) because there was no evidence that it was ever used for the provision of manufactured gas or utility service for the customers of Duke or its predecessors:

> 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

[17] Rate Case Order at 73-74.

> 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.[18]

The Purchased Parcel and other property (including the Ohio River, 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. The Commission must enforce its Rate Case Order. The Rate Case Order states that the deferral of costs from 2013 and beyond is limited to the West End and East End sites themselves, not the surrounding areas. The 2013 to 2018 remediation costs may only be passed on to customers, if at all, if they are costs for remediation within the geographic bounds of the East End and West End sites. If Duke believes that there should be remediation activities conducted outside the East and West End boundaries, then those costs should be the responsibility of Duke's shareholders, not Duke's customers.

Likewise, the West of West parcel (WOW parcel)[19] is beyond the scope of the Commission's authorization. Staff agreed that the Rate Case Order limited deferral of costs to the geographical area specified in the Rate Case Order. See Staff Ex. 8 at 9-10 (Crocker Testimony). The Purchased Parcel, as Staff notes, was a residential neighborhood that was never part of the former East End MGP site.[20] Staff describes the property as a large vacant field with no visible

[18] Rate Case Order at 60.

[19] The West of the West Parcel (WOW or WOW Parcel) is the property immediately adjacent to the West Parcel of the East End Site. Part of it was owned by Duke prior to 2006 when it was sold to DCI. Duke purchased the entire WOW parcel, along with the Riverside Drive Property directly to the west of the WOW Parcel--those properties together are referred to as the "Purchased Parcel."

[20] "While it may be that a portion of this purchased parcel was formerly part of the MGP, 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. 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 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." Rate Case Order at 60.

structures or underground facilities that are used and useful in providing natural gas distribution service.[21]

Likewise, Staff concurred that customers should not pay for remediation of property outside the bounds of the East End and West End sites, based upon the location of the remediation.[22]

Additionally, cost recovery should not extend to 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 work in the Ohio River outside the Ohio boundaries.[23] Some of the sediment sampling taken through boring by Duke's consultant ARCADIS was taken from the soil in Kentucky.[24] It is clear that the borings were completed outside the bounds of Ohio as approval from the Kentucky Department of Fish and Wildlife Resources and Kentucky Transportation Department to investigate the sites and take samples was required.[25]

All such activity was improper and unreasonable, and cost recovery there should not be authorized by the Commission. The Commission potentially does not have the authority to permit costs associated with investigation and remediation outside the state of Ohio, or in the Ohio River, to be recovered from customers.[26] The Public Utilities Commission of Ohio is a creature of the

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[21] Rate Case Staff Report at 41.

[22] See, 2019 Staff Report at 5 ("It is Staff's understanding that…the Commission approved recovery …with the East and West End Sites…defined by current property boundaries.").

[23] Tr. Vol. I at 76-78. "Q. And so there was, in fact, sediment sampling done on the Kentucky side of the Ohio River? A. Based upon my recollection that some of the sampling was in Kentucky"; Tr. Vol. I at 135-36: "we did some preliminary sediment sampling at the West End site, and I believe there may have been one or two borings, I don't remember the exact number, but a few borings that may have been across the Kentucky line but that's all I recall."

[24] Tr. Vol. I at 76-78.

[25] Id.

[26] Generally, an expense has to be related to work performed in Ohio. See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc's Distribution Storm Rider.*, Case No. 18-282-EL-RDR, 2019 WL 919755 at *2 (February 20, 2019). ("Staff states that the reason for the disallowance for out of state expenses was based on the fact that Staff was unable to determine if the lodging expenses were for storm restoration work performed in Ohio, not the location of the hotels."); *In the Matter of the Petition of the Blanchester Comm. for Extended Area Serv., Complainants*, No. 80-

general assembly and may exercise no jurisdiction beyond that conferred by statute. *Penn Central Transp. Co. v. Public Utilities Commission* (Ohio 1973) 35 Ohio St.2d 97, 298 N.E.2d 587, 64 O.O.2d 60. The Commission cannot, *sua sponte,* enlarge its statutory authority,[27] and Ohio statutory law limits jurisdiction of the Commission to remediation in Ohio. 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**; and to the records and accounts of any companies which are part of an electric utility holding company system exempt under section 3(a)(1) or (2) of the "Public Utility Holding Company Act of 1935," 49 Stat. 803, 15 U.S.C. 79c, and the rules and regulations promulgated thereunder, insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system.

R.C. 4905.05 (emphasis added).

R.C. 4905.05 limits the Commission's jurisdiction over "property of which lies wholly within this state" and of "that part of such plant or property which lies within this state." Thus, the Commission cannot authorize the recovery of remediation costs incurred outside the State of Ohio. Given that the Commission's Rate Case Order has been deemed lawful, the Order should be read so that it does not exceed the Commission's statutory authority, and any prior authorization of cleanup should not be interpreted to allow for remediation outside of Ohio. Prior precedent indicates that exceptions to this general principle may be allowed if if the out of state property is

423-TP-PEX, 1980 WL 624934 at *1 (May 7, 1980) ("This Commission has no jurisdiction over the operations of a telephone company outside of Ohio, specifically, the provision of telephone service to the Covington, Kentucky area. That portion of the complaint … shall be dismissed for lack of jurisdiction.").

[27] *Time Warner AxS v. Pub. Util. Comm.,* 75 Ohio St.3d 229, 661 N.E.2d 1097, 1996-Ohio-224, reconsideration denied, 75 Ohio St.3d 1453, 663 N.E.2d 333.

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). Here, the record does not demonstrate that the area outside of Ohio in the Ohio River and Kentucky was in fact used and useful in rendering utility service to current Ohio customers or that the remediation was directly related to the Ohio MGP sites and related impacts. The Commission should not allow recovery for investigation and remediation on properties that are in Kentucky and are the jurisdiction of Kentucky. Therefore, any costs associated therewith should be disallowed.

Moreover, the Ohio River is unique among Ohio's rivers in that it is one of the main navigable rivers in the United States. The US Constitution states that navigable rivers are the subject of Federal oversight.[28] While that does not preclude all state activity in such rivers, if state activity is, in its effect, an encroachment upon interstate commerce, though expressed to be a regulation under the state police power, the courts will hold that activity unconstitutional. *Arnold v. Yanders*, 56 Ohio St. 417, 421, 47 N.E. 50, 51 (1897). Additionally, the Clean Water Act explicitly regulates these waterways, and state regulation should not interfere with Congress' intent to regulate those waters as a Federal matter. Because of the nature of the Ohio River as an interstate, navigable, waterway, at a minimum, cost recovery for remediation efforts in the Ohio River should be based on reasoned judgment that the cleanup is prudent based upon expert testimony and evidence that the remediation is necessary as a result of MGP impacts from the Ohio sites. Here, the evidence shows that Duke pursued investigation and analysis without any such determination or preapproval by the Commission and without producing any such evidence of the link to the East End and West End sites.

[28] See, US Constitution, Art. I, Section 8.

Remediation costs in the Ohio River should also be disallowed because Duke has not demonstrated that the costs are used and useful in rendering current customers utility service. Such authorization was not provided in the Rate Case Order and there was conclusive evidence to the contrary in the record in this case: Duke's main remediation witness, Todd Bachand, admitted that 1) evidence of tar in the Ohio River is not conclusive evidence of MGP impacts[29] 2) the source of tar, be it MGP-related or not, is very hard to determine,[30] and 3) that invoices for investigation and analysis in the Ohio river have not been segregated for cost-accounting purposes.[31]

Duke has the burden of proof to demonstrate that it acted prudently. Here, even Duke's own witnesses could not claim that Duke's efforts in the Ohio River were a direct result of MGP-related impacts associated with the East End and West End sites. Thus, recovery for remediation costs associated with the Ohio River and Kentucky should not be allowed.

B. Cost Recovery Outside the East End and West End Sites Is Barred by Collateral Estoppel.

The Doctrine of collateral estoppel also bars cleanup in the areas beyond the East End and West End sites. 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 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

[29] Tr. Vol. II at 295 (Bachand).

[30] "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." Tr. Vol. II at 296 (Bachand).

[31] Tr. Vol. II at 297-98 (Bachand).

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.

In the 2012 Rate Case Order, the Commission held that the cost recovery under the MGP Rider would be limited to the East and West End sites and explicitly exclude costs associated with the Purchased property, (which includes the West of the West).[32] 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. For example, the Ohio River clearly is off-site, is not utility owned property, has not been used to provide services to Ohio ratepayers, and as such, Duke is prohibited from seeking a second bite at the apple regarding off-site remediation.

In the Opinion and Order in the Duke Rate Case, the Commission expressly denied the recovery of any "costs *associated* with the purchased parcel."[33] On that same page, the Commission held 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." The Commission went on to conclude that "the requested $2,331,580 associated with the purchase parcel on the East End site should not be included in the amount of costs to be recovered through Rider MGP."[34]

Now in this case, to try to get a second bite at the apple, Duke is trying to narrow the 2012 Order, claiming that it is limited to just the premium price for the Purchased Parcel. But, that is

[32] Rate Case Order at 60, 71; Tr. Vol. I at 71 (Bednarcik) (WOW part of purchased Parcel).

[33] See Rate Case Order at 60.

[34] Id.

not the case. The Commission talked about costs "associated" with the Purchased Parcel. It did not limit it to the purchase price premium for the parcel. And, the Commission 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.[35] "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." The Commission in the 2012 Order disallowed costs associated with the Purchased Parcel. In in the 2012 case, the only costs incurred for the Purchased Parcel at that time was the purchase premium. Duke did not start its investigation on the Purchased Parcel until 2013.

Finally, the Commission held that the cost recovery under the MGP Rider would be limited to the East and West End sites.[36] In so ruling, the Commission rejected Duke's contention that it should be allowed to recovery from ratepayers for costs related to cleanup required off-site. As such, the Commission already in its 2012 Order, affirmed by the Supreme Court of Ohio, rejected Duke's request to recover costs associated with the Purchased Parcel.

C. Duke Is Not Authorized to Recover Costs Incurred Which Are Deemed Imprudent.

Duke's entry into a Voluntary Action Program (VAP) was voluntary and its attempts to exceed prudent standards for remediation under the VAP should be rejected. OCC witnesses Campbell and Adkins demonstrated that Duke's VAP program was unjust, unreasonable, and imprudent:

[35] Rate Case Order at 43.

[36] Id. at 60, 71.

1. Duke's Remediation Costs on the Purchased Parcel, Including the WOW Parcel, Should be Deemed Unreasonable and Imprudent and Not Collected from Customers.

Costs associated with the Purchased Parcel, including the WOW Parcel or the West of the West Parcel, should be deemed imprudent. Duke reacquired the Purchased Property in 2011 at a premium purchase price. Duke witness Wathen explained that the Purchased Property was recorded on the Company's books as "non-utility plant."[37] Therefore, if it is sold, any proceeds would go to the shareholders, since customers had no investment in the property."[38] Because the Purchased Parcel is non-utility property, costs associated with remediation of the Purchased Parcel cannot be recovered from customers.

As discussed in more detail, *supra*, the doctrine of collateral estoppel further limits cost recovery for remediation of the Purchased Parcel, including the property called the WOW Parcel. In the Rate Case Order, the Commission expressly denied the recovery of any "costs associated with the purchased parcel."[39] On that same page, the Commission held 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."[40] The Commission then concluded that "the requested $2,331,580 associated with the purchase parcel on the East End site should not be included in the amount of costs to be recovered through Rider MGP."[41]

[37] Rate Case Order at 42.

[38] Id. ("The purchased parcel was a residential neighborhood that was never part of the former East End MGP site.").

[39] Rate Case Order at 60.

[40] Id.

[41] Id at 64.

Staff audited the remediation costs and concluded that approximately $23 million of the $46 million sought by Duke was unjust, unreasonable, imprudent, and/or not recoverable from ratepayers,[42] and recommended recovery of approximately $23 million.[43] Staff found that its recommended allowable recovery amount is consistent with the holdings and directives of the Rate Case Order because much of Duke's investigation and remediation costs were incurred outside of the established boundaries of the East End and West End sites.[44]

2. Duke Failed to Sustain Its Burden to Demonstrate that the Remediation Costs Were Prudently Incurred.

Duke did not put on one witness to demonstrate the reasonableness and prudency of the costs it seeks to recover from customers. On the other hand, OCC Witness Campbell attested to the unnecessary expenses incurred in Duke's remediation efforts. Dr. Campbell showed, among other things, why solid covers, engineering controls, and institutional controls would have fulfilled Duke's remediation obligations, and that such remediation would have led to costs of only $2.2 million.[45] Dr. Campbell testified that "Duke consistently failed to use more cost-effective approaches available under the VAP Rules."[46] The record demonstrates that the proposed remediation costs are excessive and were imprudently incurred.

Additionally, Duke's witnesses admit that Duke has not obtained a covenant not to sue under the VAP program. A covenant not to sue would help to ensure that the Ohio Environmental Protection Agency would not bring action against Duke, limiting the risks to customers. However, even then, a VAP would not preclude additional CERCLA liability for the site. Nonetheless,

[42] See 2018 Staff Report and 2019 Staff Report.

[43] 2019 Staff Report at 9.

[44] Id. at 5.

[45] OCC Exhibit 21 at 5; 12-14 (Campbell Testimony).

[46] Id. at 15.

without such covenant, entry into a VAP and performance under that VAP fails to demonstrate that: 1) Duke *has not* exceeded its obligations under Federal and State law; or 2) Duke has met its obligations under Federal law.[47] Duke has also not received a No Further Action letter from its VAP certified professional (VAP CP). As such, Duke has not met its burden to demonstrate that the remediation costs incurred under VAP were justified, let alone just, reasonable, and prudent.

D. The Commission Should Order Duke to Immediately Refund to Consumers the Net Proceeds Received from Insurance Claims.

To minimize the impact of the remediation costs on customers, who are not served by the now-defunct MGP plants at issue in this case and receive little, if any, direct benefit from Duke's cleanup efforts, the Commission clearly directed Duke to continue pursuing cost recovery from insurance companies and other potentially responsible parties and to reimburse customers the net proceeds collected.[48] Although Duke has collected approximately $56.2 million in insurance proceeds relating to the remediation of the MGP sites, net the cost to obtain the proceeds,[49] to date, Duke has ignored the Commission's directive and failed to reimburse any insurance proceeds to customers.

To the extent that Duke has already recovered from insurers or other potentially responsible parties, it should have begun to immediately offset any costs to be recovered from customers with those proceeds. Duke, however, takes a different view. In testimony filed in the 2017 adjustment case, Duke stated its belief that it should be allowed to deny customers this offset (even though the Commission has already determined that customers are entitled to the offset) until all efforts to recover from other parties have ceased. Duke contended that because it is able to net the amount

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47 Tr. Vol. IV at 978 (Crocker) (even VAP NFA not conclusive of Federal liability).

48 Rate Case Order at 67.

49 See Tr. Vol. III at 617; OCC Ex. 19 at 22, n.24 (Adkins Testimony).

it recovers from insurance companies or other third parties against the costs it incurred in obtaining those third-party proceeds, Duke should be permitted to wait until it has exhausted all of its efforts to collect third-party proceeds before passing the third-party proceeds it has collected on to customers (i.e., Duke wants to net what third-party proceeds it ultimately collects against the cost of collection before it passes any of what it has collected onto customers).[50]

Interestingly, since the filing of that testimony, Duke asserts that it has exhausted its insurance collection efforts,[51] yet Duke still has not passed the net benefit of the proceeds back to customers even though customers have fulfilled their obligation under the prior Rate Case Order and paid the full $55.5 million to Duke in remediating costs for 2008-2012. While Duke wants to continue to hold onto customers' money and make customers wait to benefit from any third-party proceeds, Duke is seeking authority to collect money from customers now for its remediation costs. Duke cannot have it both ways. If customers are going to be paying for Duke's remediation costs, Duke should be required to offset those costs with any third-party proceeds that it has received, as Duke receives them, or Duke should be required to provide an immediate refund to customers. Alternatively, if Duke is authorized to delay the offsetting of third-party proceeds, OMAEG recommends that carrying costs be included on any proceeds recovered from third parties to which customers are entitled.

E. MGP Cost Recovery Should Terminate on December 31, 2019.

The Commission recognized the importance of a prompt completion of the remediation efforts in its Rate Case Order authorizing the cost recovery at issue in these proceedings. Specifically, the Commission held that recovery of incurred costs should be limited to a timeframe

[50] Case No. 17-596-GA-RDR, Direct Testimony of Keith Bone on Behalf of Duke Energy Ohio, Inc. at 5 (March 31, 2017).

[51] Rate Case Order at 59.

within which Duke's remediation should have reasonably been concluded.[52] The Commission has determined that such a reasonable timeframe would end on December 31, 2019 for both plants at issue in these proceedings.[53] The Commission should affirm these timelines and end customer responsibility for Duke's remediation costs 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 project and customers should no longer be responsible for costs beyond that date. In fact, Duke has known about the need to clean up the MGP sites since at least 1988.[54] If Duke is 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.

In its Rate Case Order, the Commission required Duke to demonstrate that exigent circumstances exist to go beyond the 10-year timeframe. On rehearing, the Commission defined exigent circumstance as an "event beyond the control of the Company."[55] Duke has failed to demonstrate that any exigent circumstances do in fact exist. Accordingly, the PUCO should protect consumers and not allow Duke to continue deferring MGP remediation expenses beyond the current December 31, 2019 expiration date.

[52] Rate Case Order at 59.

[53] 2013 MGP Order at 72; *In re Application of Duke Energy Ohio, Inc. for Authority to Defer Envtl. Investig. & Remediation Costs,* Case No. 16-1106-GA-AAM, Finding & Order (December 21, 2016).

[54] Rate Case Order at 25.

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

III. CONCLUSION

For the above-stated reasons, the Commission should reject Duke's attempts to ignore or re-litigate the prior Commission rulings and only authorize recovery for reasonable, prudently incurred costs associated with the MGP sites used to render public utility service to Ohio customers. The Commission should also order Duke to immediately refund to customers insurance proceeds that it has received.

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CERTIFICATE OF SERVICE

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

/s/ Kimberly W. Bojko
Kimberly W. Bojko

Summary: Brief Post-Hearing Brief of The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group