

**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. 20-0053-GA-RDR

In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval. ) ) Case No. 20-0054-GA-ATA

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**COMMENTS OF DUKE ENERGY OHIO, INC.**

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**I. INTRODUCTION**

The Public Utilities Commission of Ohio (Commission) has already held that prudently incurred expenses for environmental remediation of impacts of Duke Energy Ohio, Inc.’s (Duke Energy Ohio or the Company) former manufactured gas plant (MGP) operations are recoverable under R.C. 4909.15(A)(4), as costs “incurred . . . for rendering utility service.”<sup>1</sup> The Commission reached this conclusion because such remediation costs are “a necessary cost of doing business as a public utility in response to a federal law, CERCLA [the Comprehensive Environmental Response, Compensation, and Liability Act], that imposes liability . . . for the remediation of the MGP sites.”<sup>2</sup> And, on appeal, the Ohio Supreme Court affirmed the Commission’s decision.<sup>3</sup>

In accordance with the Commission’s Opinion and Order in the 2012 Natural Gas Base Rate Case, as affirmed, Duke Energy Ohio has, each year from 2014 through 2020, submitted applications for recovery of its prudently incurred costs of investigating and remediating the

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<sup>1</sup> See *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No.12-1865-GA-AIR, *et al.*, Opinion and Order (November 13, 2013), p. 58 (2012 Natural Gas Base Rate Case).

<sup>2</sup> *Id.*, pp. 58-59.

<sup>3</sup> *In re Application of Duke Energy Ohio, Inc., for an Increase in Its Natural Gas Distribution Rates*, 150 Ohio St. 3d 437, 2017-Ohio-5536, 82 N.E.3d 1148, ¶ 2.

impacts of its former MGP operations for calendar years 2013 through 2019. In this proceeding, the Company seeks recovery of its MGP investigation and remediation costs for calendar year 2019, in the total amount of \$39,435,627.<sup>4</sup> In its report and recommendation, issued on July 23, 2020 (2020 Staff Report), Staff of the Commission (Staff) has recommended that \$3,897,930 of these costs be disallowed.<sup>5</sup>

Staff has not identified any imprudent expenditures, but only recommended disallowances based on the attribution of certain expenses to (1) a parcel known as the Area West of the West Parcel; and (2) to areas outside what Staff considers to be the “original footprint” of the operations, including the Ohio River.<sup>6</sup> If it was appropriate to limit cost recovery per the geographic boundaries cited by Staff, then Staff’s allocation methodology in the 2020 Staff Report appears to be reasonable, assuming the correction of a minor clerical error. However, Staff’s recommendation to limit the Company’s recovery based on perceived geography is incorrect as a matter of law; it is fundamentally incompatible with the Commission’s decision and the Ohio Supreme Court’s affirmance in the 2012 Natural Gas Base Rate Case and must be rejected. The Company should be permitted to recover *all* prudently incurred MGP investigation and remediation costs arising from former MGP operations at the East End and West End sites.

Staff does not speak directly to the allocation of insurance proceeds that the Company has obtained under various environmental policies to cover its costs of investigating and remediating MGP contamination from its former operations, but recommends that the Company *not* hold the proceeds until investigation and remediation are entirely complete. The Commission must reject this recommendation, as it would preclude a fair allocation of the insurance proceeds between the

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<sup>4</sup> See Amended Direct Testimony of Sarah E. Lawler, Attachment SEL-3.

<sup>5</sup> 2020 Staff Report, p. 7.

<sup>6</sup> For detailed background and history on the sites at issue, see *In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, *et al.*, Post Hearing Brief of Duke Energy Ohio, Inc., pp. 4-15 (January 17, 2020).

Company and customers in the event of any disallowances. Because the insurance policies are generic and the proceeds resolve the Company's claims related to *all* MGP contamination regardless of location, any exclusion of certain geographic areas from cost recovery will require a proportional adjustment to any refund of insurance proceeds. It will only be when the MGP investigation and remediation work is complete, and the Commission has finally determined all costs and recoveries, that the Company will be able to calculate the proper amount to reimburse to customers.

## **II. BACKGROUND**

### **A. The Commission Has Authorized Deferral of MGP Investigation and Remediation Costs, As Well As Approved Cost Recovery For 2008-2012.**

Duke Energy Ohio initially requested authorization in 2009 to defer “all environmental investigation and remediation costs incurred . . . after January 1, 2008, in compliance with state and federal regulations.”<sup>7</sup> The Company expected at that time that such costs would be costs incurred to investigate and remediate the environmental impacts of former operations at MGP sites<sup>8</sup> because the Company was legally responsible for “removing the environmental and/or public health hazard, in accordance with Chapter 3745-300, O.A.C., and/or CERCLA.”<sup>9</sup>

The Commission approved the Company's deferral of “costs related to the environmental investigation and remediation costs described above,” holding that the request was “reasonable.”<sup>10</sup> The Commission made its decision only after “review[ing] . . . the applicable federal and state rules and statutes,” and finding “that these environmental investigation and remediation costs are business costs incurred by Duke in compliance with Ohio regulations and federal statutes.”<sup>11</sup>

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<sup>7</sup> *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, p. 2 (November 12, 2009) (Commission paraphrasing Company's request).

<sup>8</sup> *Id.*, p. 1 (“According to Duke, the majority of these environmental remediation costs are related to former manufactured gas plant (MGP) sites.”).

<sup>9</sup> *Id.*, p. 2.

<sup>10</sup> *Id.*, p. 3.

<sup>11</sup> *Id.*

In 2012, the Company filed a natural gas base rate case to seek recovery of, among other things, (1) approximately \$57.9 million for MGP remediation costs,<sup>12</sup> and (2) approximately \$5 million in carrying costs.<sup>13</sup> In that case, Staff and certain intervenors had sought to limit the Company's cost recovery, arguing that the Company should be permitted to only recover remediation costs associated with discrete areas surrounding utility equipment and infrastructure that was currently "used and useful" under R.C. 4909.15(A)(1).<sup>14</sup> The Commission, however, explained—and the Supreme Court of Ohio ultimately affirmed—that the "used and useful" standard was simply "not applicable,"<sup>15</sup> because the correct standard was R.C. 4909.15(A)(4).<sup>16</sup>

After vigorous litigation of the Company's MGP cost recovery, the Commission concluded that the Company was entitled to recover MGP investigation and remediation costs incurred pursuant to its "legal[] obligat[ion] to remediate these sites."<sup>17</sup> Under R.C. 4909.15(A)(4), the Company had only "to prove that the costs that have been incurred and deferred, are costs that were incurred for rendering utility service and were prudent."<sup>18</sup> Thus, the Company was entitled to recover nearly all of its claimed costs because it had "substantiated, on the record, that the remediation costs were *a necessary cost of doing business as a public utility in response to a federal law, CERCLA*, that imposes liability on Duke and its predecessors for the remediation of the MGP sites."<sup>19</sup> Also, the Commission specifically cited the Company's "societal obligation to clean up these sites" as a reason that "these costs are a current cost of doing business."<sup>20</sup> The Commission's Opinion and Order made no geographical limitations regarding where remediation

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<sup>12</sup> 2012 Natural Gas Base Rate Case, Opinion and Order, p. 26 ("Duke now requests authorization to recover \$62.8 million in actual MGP costs . . . Mr. Wathen explains that the proposed \$62.8 million represents the actual costs, including carrying costs, that were incurred by Duke as of December 31, 2012.").

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, pp. 28-29.

<sup>15</sup> *Id.*, p. 54.

<sup>16</sup> *Id.*, p. 58.

<sup>17</sup> *See Id.*, pp. 58-59.

<sup>18</sup> *Id.*, p. 58.

<sup>19</sup> *Id.*, pp. 58-59 (emphasis added).

<sup>20</sup> *Id.*, p. 59 (emphasis added).

had to be performed in order for the costs to be deferred or recovered, as recoverability was based on addressing the Company's liability under environmental laws.<sup>21</sup>

Based on the above reasoning, the Commission also authorized recovery of the MGP investigation and remediation costs through Rider MGP, continued deferral of MGP costs, without any carrying charges, after December 31, 2012, and ordered Duke Energy Ohio to file separate annual Rider MGP applications to recover costs incurred during the previous year.<sup>22</sup> In the same case, the Commission ordered the Company to "use every effort" to recover remediation costs under available insurance policies.<sup>23</sup>

**B. Consolidated Cost Recovery Proceedings for MGP Investigation and Remediation Costs Incurred In 2013 to 2018 Remain Pending.**

In 2014, 2015, 2016, 2017, 2018, and 2019, Duke Energy Ohio submitted annual applications to recover costs incurred in calendar years 2013 to 2018, seeking a cumulative total of approximately \$45.8 million for investigation and remediation of the contamination associated with the former MGP sites.<sup>24</sup> Throughout the same period, the Company worked hard to maximize its recovery of insurance proceeds under various historical insurance policies, actively litigating its claims, which ultimately netted over \$50 million.<sup>25</sup>

Neither Staff nor the Commission took any action on the Company's cost recovery applications until 2018. First, these proceedings were consolidated,<sup>26</sup> and then Staff filed its first

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<sup>21</sup> The Commission limited only the time within which the Company could defer and recover its ongoing remediation costs, absent exigent circumstances and denied carrying costs. East End site recovery was limited to December 31, 2016, and West End site recovery was limited to December 31, 2019. *Id.*, p. 72. The former deadline has since been extended, and a request to extend the deadlines for certain areas remains pending. *See In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 19-1085-GA-AAM, Application (May 10, 2019).

<sup>22</sup> 2012 Natural Gas Base Rate Case, Opinion and Order, pp. 71-72.

<sup>23</sup> *Id.*, p. 67.

<sup>24</sup> *See In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, 15-452-GA-RDR, 16-542-GA-RDR, 17-596-GA-RDR, 18-283-GA-RDR, 19-174-GA-RDR, *et al.*; *see also* 2020 Staff Report, p. 6 (giving amounts of recovery sought for years 2013 to 2018).

<sup>25</sup> *See* Direct Testimony of Keith G. Butler, pp. 3-4.

<sup>26</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-0375-GA-RDR, *et al.*, Case Nos. 15-0452-GA-RDR, *et al.*, Case Nos. 16-0542-GA-RDR, *et al.*, Case Nos. 17-596-GA-RDR, *et al.*, Case Nos. 18-283-GA-RDR, *et al.*, Entry, p. 3 (June 28, 2018).

report and recommendation, the 2018 Staff Report, in September 2018.<sup>27</sup> The 2018 Staff Report recommended that the Commission disallow \$11,867,900 of the Company's \$26,042,012 of MGP investigation and remediation costs for 2013 to 2017, primarily on the basis of Staff's belief that such costs were incurred in geographical areas that were ineligible for recovery.<sup>28</sup> Staff disqualified all costs that it perceived as attributable to the Purchased Parcel (which they mistakenly believe to be synonymous with Area West of the West Parcel) and all of what it believed to be "offsite costs,"<sup>29</sup> including costs incurred related to the Ohio River. Where Staff could not attribute costs to the Area West of the West Parcel "directly," it arbitrarily attributed 50 percent of non-parcel-specific costs to the Area West of the West Parcel for 2013 through 2016, and 70 percent for 2017.<sup>30</sup> Finally, Staff recommended disallowing certain costs that it believed to be capital costs of substation relocation and installation, rather than MGP remediation costs.<sup>31</sup>

In July 2019, Staff filed the 2019 Staff Report,<sup>32</sup> in which its recommendations were quite similar to the 2018 Staff Report. Of the \$19,804,031 claimed by the Company for MGP investigation and remediation costs incurred in 2018, Staff recommended a disallowance of \$11,366,243, primarily because "Duke's recovery from customers was limited to any investigation or remediation costs incurred within the two original MGP site footprints."<sup>33</sup> The Staff also recommended that a small additional amount be excluded from recovery via Rider MGP due to Staff categorizing the costs of relocation and construction of certain facilities as capital costs rather than MGP remediation costs.<sup>34</sup> The 2019 Staff Report further recommended that any "discussion

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<sup>27</sup> *Id.*, A report by the Staff of the Public Utilities Commission of Ohio (September 28, 2018).

<sup>28</sup> 2018 Staff Report, p. 7.

<sup>29</sup> *Id.*, pp. 3-4, 5.

<sup>30</sup> *Id.*, p. 4.

<sup>31</sup> *Id.*, p. 5.

<sup>32</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-0375-GA-RDR, *et al.*, Case Nos. 15-0452-GA-RDR, *et al.*, Case Nos. 16-0542-GA-RDR, *et al.*, Case Nos. 17-596-GA-RDR, *et al.*, Case Nos. 18-283-GA-RDR, *et al.*, Case Nos. 19-174-GA-RDR, *et al.*, Staff Report (July 12, 2019).

<sup>33</sup> 2019 Staff Report, pp. 5, 9.

<sup>34</sup> *Id.*, p. 6.

pertaining to” recovery of ongoing MGP costs “should be directly tied to or netted against insurance proceeds.”<sup>35</sup> Neither the 2018 Staff Report nor the 2019 Staff Report recommended any disallowances on the basis that costs were imprudently incurred.

After the 2019 Staff Report was filed, the Company submitted supplemental testimony and the Office of the Ohio Consumers’ Counsel (OCC) submitted testimony challenging the prudence of the Company’s expenditures.<sup>36</sup> During this round of submissions, Company witness Todd Bachand performed a review of the Company’s invoices and performed an alternate allocation of MGP investigation and remediation costs, finding that the costs that could be properly attributed to the Area West of the West Parcel and the Ohio River were substantially less than what was recommended in the 2018 and 2019 Staff Reports.<sup>37</sup> As a matter of law, the Company continued to disagree—as it does today—with Staff’s position that MGP investigation and remediation costs must be disallowed on the basis of “where” they were incurred, but Mr. Bachand’s testimony provided a more accurate estimate of how much was spent in each geographic territory.

The Company, as well as a number of intervenors, conducted a hearing on the 2014 to 2019 MGP cost recovery applications (for costs in each preceding calendar year) in November 2019. The Company’s position on the central points in these consolidated proceedings was as follows:

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<sup>35</sup> *Id.* The Staff Report further recommended that the Commission deny both the Company’s request for continued deferral authority and its motion to continue the Rider MGP to recover costs incurred from 2013-2017. The motion for Rider Continuance was denied, the month after the 2019 Staff Report issued. See *In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval*, Case No. 19-175-GA-ATA, Entry, p. 8 (August 13, 2019). The Deferral Extension is the subject of a separate proceeding before the Commission, Case No. 19-1085-GA-AAM, was not consolidated into these proceedings, and was subject to a separate procedural schedule.

<sup>36</sup> See *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-0375-GA-RDR, *et al.*, Case Nos. 15-0452-GA-RDR, *et al.*, Case Nos. 16-0542-GA-RDR, *et al.*, Case Nos. 17-596-GA-RDR, *et al.*, Case Nos. 18-283-GA-RDR, *et al.*, Case Nos. 19-174-GA-RDR, *et al.*, Supplemental Testimony of Jessica L. Bednarcik (October 4, 2019); Supplemental Testimony of Todd L. Bachand (October 4, 2019); Supplemental Testimony of Keith G. Butler (October 4, 2019); Supplemental Testimony of Sarah E. Lawler (October 4, 2019); Direct Testimony of Kerry J. Adkins (October 8, 2019) (OCC witness); Direct Testimony of James R. Campbell (October 8, 2019) (OCC witness).

<sup>37</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-0375-GA-RDR, *et al.*, Case Nos. 15-0452-GA-RDR, *et al.*, Case Nos. 16-0542-GA-RDR, *et al.*, Case Nos. 17-596-GA-RDR, *et al.*, Case Nos. 18-283-GA-RDR, *et al.*, Case Nos. 19-174-GA-RDR, *et al.*, Supplemental Testimony of Todd L. Bachand, pp. 22-23 and Attachment TLB-6 (October 4, 2019).

- The Opinion and Order in the 2012 Gas Base Rate Case, which had been affirmed by the Ohio Supreme Court, did not authorize any geographic distinctions, but rather permitted recovery of all investigation and remediation costs incurred to meet the Company’s legal and regulatory environmental obligations arising from the former MGP operations;<sup>38</sup>
- If the Commission ordered the Company to exclude costs associated with the Area West of the West Parcel and/or Ohio River—which it should not—the amounts calculated by Mr. Bachand should be used, rather than the amounts recommended by Staff, because Mr. Bachand’s allocations were far more accurate;<sup>39</sup>
- The relatively small amounts categorized by Staff as capital costs and therefore recommended to be excluded from Rider MGP recovery were, in fact, MGP investigation and remediation costs and should be recoverable;<sup>40</sup> and
- The insurance proceeds were awarded to the Company for all MGP investigation and remediation costs, not just costs ultimately deemed recoverable by the Commission, and therefore the insurance costs would need to be allocated in proportion with any disallowances, which could only occur after all remediation was complete.<sup>41</sup>

The parties concluded briefing in February 2020, and the consolidated proceedings currently remain pending before the Commission.

**C. The Company’s Application in the Present Case Seeks Recovery of Calendar Year 2019 MGP Investigation and Remediation Costs.**

On March 31, 2020, Duke Energy Ohio submitted its annual application for recovery of the previous year’s MGP investigation and remediation costs in Case Nos. 20-53-GA-RDR, *et al.* (2019 Rider MGP Application). On July 7, 2020, the Company submitted an Amended Application with two amended testimonies. For calendar year 2019, Duke Energy Ohio has incurred \$39,435,627 in investigation and remediation costs incurred to address the environmental impacts of its former MGP operations.<sup>42</sup> In addition to submitting testimony supporting the prudence and eligibility of these costs for recovery, the Company also included, in Mr. Bachand’s

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<sup>38</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, *et al.*, Post Hearing Brief of Duke Energy Ohio, Inc., pp. 24-30 (January 17, 2020).

<sup>39</sup> *Id.*, pp. 47-53.

<sup>40</sup> *Id.*, pp. 53-55.

<sup>41</sup> *Id.*, pp. 55-62.

<sup>42</sup> Amended Direct Testimony of Sarah E. Lawler, p. 6 and Attachment SEL-3.



testimony in this proceeding, an itemization of costs attributable to the Area West of the West Parcel and Ohio River for calendar year 2019.<sup>43</sup> Although the Company believes that such costs are just as recoverable as any other costs associated with fulfilling the Company's legal and societal investigation and remediation obligations arising from the operation of the former MGP facilities, Mr. Bachand provided this itemization in order to ensure that, if Staff continued to disagree on this point, at least Staff would have all of the information necessary to reasonably identify such costs.

On July 23, 2020, Staff submitted its 2020 Staff Report, recommending a disallowance of \$3,897,930 of the costs claimed by the Company for calendar year 2019.<sup>44</sup> The Company submits the following comments on the 2020 Staff Report.

### **III. AS IN PRIOR PROCEEDINGS, STAFF'S DISALLOWANCE RECOMMENDATION RESTS ON A MISUNDERSTANDING OF BOTH PRECEDENT AND GEOGRAPHY.**

#### **A. The Staff Erred in Recommending Disallowance of Costs Associated With Investigation and Remediation of the Area West of the West Parcel.**

In the 2020 Staff Report, Staff recommended that the Company not recover costs associated with investigation and/or remediation of the Area West of the West Parcel, on the grounds that "the Commission denied [such costs] for recovery,"<sup>45</sup> presumably referring to Staff's misinterpretation of the Opinion and Order in the 2012 Natural Gas Base Rate Case. As the Company has previously explained, Staff misunderstands the Commission's analysis in that case.

In the 2012 Natural Gas Base Rate Case, the Commission rejected the notion that investigation and remediation costs had to be associated with property that was used and useful,<sup>46</sup>

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<sup>43</sup> Amended Direct Testimony of Todd L. Bachand, pp. 25-30 and Amended Attachment TLB-3.

<sup>44</sup> 2020 Staff Report, p. 7. In listing the costs submitted by the Company in prior years, Staff slightly misstates the total costs for 2017 as \$14,652,068. The correct number is \$14,651,798. *See In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case Nos. 18-283-GA-RDR, *et al.*, Direct Testimony of Todd Bachand, p. 13 (March 28, 2018).

<sup>45</sup> 2020 Staff Report, p. 5.

<sup>46</sup> 2012 Natural Gas Base Rate Case, Opinion & Order, p. 54.

and thereby undermined Staff's arguments for imposing geographical limitations on the Company's recovery of remediation expenses. Instead, the Commission found the MGP costs were a cost of doing business and were recoverable as such under the controlling statute, R.C. 4909.15(A)(4).<sup>47</sup> The Commission explained that R.C. 4909.15(A)(1) did not apply because state and federal statutes required Duke Energy Ohio to remediate the environmental impacts of the former MGP operations:

There is no disagreement on the record that the *sites for which Duke seeks cost recovery must be cleaned up and remediated in accordance with the directives of CERCLA*. There is also no dispute that Duke had MGP operations, and still has utility operations on the East and West End sites, . . . . Therefore, in light of the circumstances surrounding the two MGP sites in question and the fact *that Duke is under a statutory mandate to remediate the former MGP residuals from the sites*, the Commission finds that R.C. 4909.15(A)(1) and the used and useful standard . . . . is not applicable to our review and consideration of whether Duke may recover the costs *associated with its investigation and remediation* of the MGP sites. Therefore, it is not necessary for the Commission to determine if the MGP sites would be considered used and useful under R.C. 4909.15.<sup>48</sup>

The Commission explained that Duke Energy Ohio's legal obligation to clean up the MGP contamination and address its liability under CERCLA determined the scope of recoverable costs:

Not only is Duke legally obligated to remediate these sites as the owner and operator of these sites, but it is undisputed on the record that Duke has the societal obligation to clean up these sites for the safety and prosperity of the communities in those areas and in order to maintain the usefulness of the properties; *therefore, these costs are a current cost of doing business*.<sup>49</sup>

On rehearing, the Commission returned to this point: "It is undisputed that CERCLA obligates Duke to investigate and remediate the MGP sites and that such obligations are clearly not voluntary on Duke's part."<sup>50</sup> Staff does not dispute that the Company's environmental legal obligations extend to environmental impacts of its former operation of MGP facilities regardless of any given parcel boundaries.

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<sup>47</sup> *Id.*, pp. 58-59.

<sup>48</sup> *Id.*, p. 54 (emphasis added)

<sup>49</sup> *Id.*, p. 59 (emphasis added)

<sup>50</sup> 2012 Natural Gas Base Rate Case, Entry on Rehearing, p. 13.

Staff's perception that the Commission previously denied the Company recovery of costs associated with the Area West of the West Parcel specifically, is likely based on the Commission's disallowance of costs associated with the Company's reacquisition of the Purchased Parcel, a nine-acre area that includes the Area West of the West Parcel.<sup>51</sup> However, as the Company has previously explained, this exclusion was made because the costs in question were related to property acquisition and *not* incurred in the course of performing investigation and/or remediation of environmental impacts of the former MGP operations.<sup>52</sup> Thus, it offers no basis for disallowing recovery of actual investigation and remediation costs.

Finally, although Staff does not offer any additional reasoning in the 2020 Staff Report, the Company believes that Staff's exclusion of costs associated with the Area West of the West Parcels is likely premised at least in part on additional misunderstandings about the origins and historical use of the parcel itself. The Company's discussion of these points can be found in the consolidated proceedings for costs incurred in calendar years 2013 to 2018.<sup>53</sup>

Thus, Staff's recommendation to exclude costs associated with the Area West of the West Parcel should be rejected.

**B. The Staff Erred in Recommending Disallowance of Costs Associated With Investigation or Remediation Work “Outside the Original Footprint” of the MGP Sites.**

Staff recommended that the Company be denied recovery of “costs associated with investigation or remediation of soil, water or any other tracts of land located outside the original footprint of the East End and West End sites (such as in the Ohio River).”<sup>54</sup> As the Company has

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<sup>51</sup> See 2012 Natural Gas Base Rate Case, Opinion and Order, p. 60.

<sup>52</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, *et al.*, Post Hearing Reply Brief of Duke Energy Ohio, Inc., pp. 5-6 (February 14, 2020).

<sup>53</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, *et al.*, Post Hearing Brief of Duke Energy Ohio, Inc., pp. 48-49 (January 17, 2020).

<sup>54</sup> 2020 Staff Report, p. 5.

previously reiterated, Staff is mistaken both in principle as to the relevance of any so-called “original footprint,” and in fact, as to the physical dimensions of the original footprint in question.

First, as already described in the previous section, the Commission has previously authorized the Company to recover all costs incurred in fulfilling its legal and societal obligations to investigate and remediate the environmental impacts of its prior MGP operations. This applies equally to portions of the Ohio River which could have been contaminated as a result of the former MGP operations. Under federal and state environmental laws, the Company *must* investigate whether MGP contaminants have migrated, and could continue to migrate into the banks and sediments of the Ohio River, and if necessary, remediate such impacts.<sup>55</sup> All costs associated with such efforts are recoverable under Rider MGP.

Second, the Staff is mistaken about the “original footprint” of the former MGP operations. Historically, and during the time of MGP operations, the Ohio River’s low-water mark was at the Ohio-Kentucky border. The current riverbank is as much as 200 feet north of that former waterline due to the construction of the Markland locks and dam in 1959 and 1964, which significantly raised the Ohio River water level, placing portions of the former MGP operations under the water of the current Ohio River.<sup>56</sup> Thus, even if there was some basis to geographically circumscribe recoverable costs to some “original footprint,”—which there is not—Ohio River costs would be eligible.

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<sup>55</sup> Amended Direct Testimony of Todd Bachand, pp. 9, 11-13; *see also generally* 2012 Natural Gas Base Rate Case, Opinion and Order, pp. 58-59 (referring to the Company’s CERCLA obligations as the reason for the costs’ recoverability).

<sup>56</sup> *See* Amended Direct Testimony of Todd Bachand, pp. 14-15.

**IV. IF IT WAS APPROPRIATE TO DISALLOW COSTS ASSOCIATED WITH THE AREA WEST OF THE WEST PARCEL AND OHIO RIVER—WHICH IT IS NOT—THE AMOUNTS RECOMMENDED TO BE ATTRIBUTED BY STAFF APPEAR TO BE REASONABLE, WITH CORRECTION OF A MINOR CLERICAL ERROR.**

As the Company has described above and reiterated in prior proceedings, the disallowance of *any* costs incurred to perform MGP investigation and remediation in compliance with the Company’s legal and societal obligations is contrary to both Commission precedent in the 2012 Natural Gas Base Rate Case and the Ohio Supreme Court decision affirming the Commission. But, if it was proper to disallow costs associated with the Area West of the West Parcel and Ohio River—which it is not—the Company believes that Staff’s methodology in identifying such costs appears generally reasonable, but that Staff made a minor clerical error.

Staff reviewed “vendor contracts, and all invoices for investigation and remediation activities at the East End and West End sites for 2019.”<sup>57</sup> After “review[ing] the costs and compar[ing] these to all invoices provided in response to data requests,” Staff recommended the removal of “all costs associated with the [Area West of the West Parcel] and river remediation outlined by the Company in Amended Attachment TLB-3.”<sup>58</sup> In addition to the costs identified in Amended Attachment TLB-3, Staff recommended the disallowance of \$85,210.38 and \$12,254.09 for indirect East End and West End costs, respectively, associated with the river and/or Area West of the West Parcel.<sup>59</sup>

Staff mistakenly described the costs identified by Mr. Bachand in Amended Attachment TLB-3 as \$2,632,006.15 on the East End site and \$1,253,669.38 for the West End site.<sup>60</sup> However, the second of these numbers appears to come from Mr. Bachand’s original filed testimony in

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<sup>57</sup> 2020 Staff Report, p. 5.

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Id.

March 2020,<sup>61</sup> and the first number does not match the Amended Attachment TLB-3. The correct numbers, which Staff no doubt meant to reference, are \$2,546,795.76 and \$1,315,091.20, respectively.<sup>62</sup> Staff’s calculation of indirect costs, which was calculated using these numbers, would need to be adjusted correspondingly, but the impact on total recovery would be very minor.

In total, Staff recommended a disallowance of \$3,897,929.62 on the basis that this amount could be somehow attributed to investigation or remediation work associated with the river and/or Area West of the West Parcel.<sup>63</sup> Although the Company disagrees with disallowing any amounts on this basis, the Company believes that Staff’s methodology in determining the total amount attributable to these areas would be reasonable, if such disallowance was warranted (which it is not), assuming the clerical error described above was corrected.

Given that Staff has adopted Mr. Bachand’s cost allocation as credible—with only a minimal adjustment for indirect costs—in this most recent proceeding, the Company believes that any allocations performed for earlier years should be performed consistently. Thus, if Staff’s recommendation to exclude river and/or Area West of the West Parcel costs is adopted, which *it should not be*, any allocations for prior years should also be performed in accordance with Mr. Bachand’s analysis for each respective year, as provided in the consolidated proceedings for costs incurred in calendar years 2013 to 2018.<sup>64</sup>

## **V. STAFF IS MISTAKEN IN RECOMMENDING PREMATURE RELEASE OF THE INSURANCE PROCEEDS.**

Regarding the insurance proceeds, Staff recommends in the 2020 Staff Report that the proceeds, net of litigation costs and attorney fees, “should be reimbursed to ratepayers” and that

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<sup>61</sup> Direct Testimony of Todd L. Bachand, Attachment TLB-3, p. 3.

<sup>62</sup> Amended Direct Testimony of Todd L. Bachand, Amended Attachment TLB-3, pp. 1-2 (the two totals on these two pages sum to \$2,546,795.76) and p. 3 (see total at bottom of \$1,315,091.20).

<sup>63</sup> 2020 Staff Report, p. 5.

<sup>64</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Consolidated Case Nos. 14-0375-GA-RDR, *et al.*, Case Nos. 15-0452-GA-RDR, *et al.*, Case Nos. 16-0542-GA-RDR, *et al.*, Case Nos. 17-596-GA-RDR, *et al.*, Case Nos. 18-283-GA-RDR, *et al.*, Case Nos. 19-174-GA-RDR, *et al.*, Supplemental Testimony of Todd L. Bachand, pp. 22-23 and Attachment TLB-6 (October 4, 2019).

they “should also not be held by Duke until all investigation and remediation is complete.”<sup>65</sup> While the Company believes that ratepayers should be reimbursed their fair share of the insurance proceeds, the Company submits that this amount cannot be calculated until investigation and remediation is complete and the Company knows what proportion of its investigation and remediation costs will be recoverable.

**A. Customers Are Entitled To Reimbursement Only For the Proportion Of MGP Investigation and Remediation Costs Which They Pay.**

If the Company’s cost recovery for investigating and remediating the environmental impacts of former MGP operations is limited to specific areas or portions of the sites, the insurance proceeds must be allocated accordingly. Staff does not question the Company’s diligence in pursuing insurance proceeds or the scope of the Company’s insurance coverage, but recommends that “any proceeds paid by insurers for MGP investigation, net of litigation costs and attorney fees, should be reimbursed to ratepayers.”<sup>66</sup> Staff does not address the question of allocation explicitly in the 2020 Staff Report, but states that its position is “[c]onsistent with Staff testimony filed in Case No. 19-0174-GA-RDR.”<sup>67</sup> In that case, Staff opposed allocation on the basis of what it believed to be a quotation from the Opinion and Order in the 2012 Natural Gas Base Rate Case, in which the Commission supposedly stated that “[t]he insurance proceeds should not be allocated based on any disallowances.”<sup>68</sup> However, as the Company pointed out, such language does not appear anywhere in the Opinion and Order.<sup>69</sup> Still, because Staff appears to maintain the position

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<sup>65</sup> 2020 Staff Report, p. 6.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> See *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, *et al*, Staff Exhibit 8, Prefiled Testimony of Nicci Crocker, pp. 11-12 (October 16, 2019); id., Initial Brief Submitted on Behalf of the Public Utilities Commission of Ohio, p. 9 (January 17, 2020) (containing same misquotation).

<sup>69</sup> Id., Post Hearing Reply Brief of Duke Energy Ohio, Inc., p. 36 (February 14, 2020) (identifying the error).

in this case, the Company explains here why allocation of the insurance proceeds is the only fair and reasonable way to proceed.

As Company witness Keith Butler testifies, the insurance settlement proceeds were for *all* impacted areas, not just those Staff (and others) claim are eligible for recovery:

[T]he settlement and underlying insurance policies were not directed at any particular parcel or limited to the presence of contamination only where the original MGP operations took place. The scope of settlements achieved, relates to coverage for all MGP contamination related to and/or stemming from the former MGP operations, no matter where that impact is located.<sup>70</sup>

Mr. Butler also elaborates:

[T]he insurance proceeds at issue were to resolve all remediation liabilities relating to the East End MGP Site and the West End MGP Site under the policies that were the subject of the insurance coverage lawsuit that Duke Energy Ohio filed. The insurance policies were not tied to a specific year, a specific boundary of real property, the location of contamination or the type of contamination. The settlements were to resolve all claims related to the presence of contaminants at the East End MGP Site and the West End MGP Site, wherever these might be located, including within and along the Ohio River.<sup>71</sup>

And indeed, Staff makes no attempt to contest this.

Given that a portion of the insurance proceeds was effectively awarded for the completion of the work associated with the Area West of the West Parcel and Ohio River, that portion of the proceeds should flow to whomever winds up paying for *that* work, whether its customers (if the Commission makes no geography-based disallowances) or Company shareholders (if the Commission chooses to disallow costs based on Staff's understanding of the geography). In other words, customers should only be reimbursed for insurance proceeds associated with those areas for which the Company recovers costs through Rider MGP. Indeed, Staff itself, in the 2012

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<sup>70</sup> Direct Testimony of Keith G. Butler, p. 4.

<sup>71</sup> *Id.*, p. 8.



Natural Gas Base Rate Case, argued that the distribution of insurance proceeds should be equitable recommending that “any proceeds paid by insurers for MGP investigation and remediation should be *split between shareholders and ratepayers, commensurate with the proportion of MGP costs paid by ratepayers*, until customers are fully reimbursed.”<sup>72</sup>

Requiring the Company to refund *all* insurance proceeds to customers, while permitting it to recover only *a portion* of the legally obligatory investigation and remediation costs for which the insurance proceeds were meant to compensate, would unfairly punish the Company for its efforts to comply with environmental law. Per Mr. Butler’s testimony quoted above, the Company’s insurance providers did not assign dollars to one specific geographic area or another. Instead, the proceeds from the insurance carriers were for all of the costs incurred to investigate and remediate environmental impacts of the former MGP operations.<sup>73</sup> Thus, Customers’ share of the insurance proceeds must be commensurate with their share of the MGP investigation and remediation costs at issue. After all, Staff does not dispute that all environmental contamination at issue stems from the historic operation of the manufactured gas plant to provide utility service to customers. And Staff does not dispute that, as the Commission determined, Duke Energy Ohio has a statutory and societal obligation to address contamination associated with the former MGPs. If the Commission, contrary to its own and the Ohio Supreme Court’s prior findings that MGP investigation and remediation costs are costs of providing utility service under R.C. 4909.15(A)(4), apportions any amount of the investigation and remediation expense as unrelated to utility service, then a proportional amount of the insurance proceeds must also be awarded to the Company as associated with that investigation and remediation work.

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<sup>72</sup> 2012 Natural Gas Base Rate Case, Opinion and Order, p. 66 (emphasis added) (Commission paraphrase of Staff position).

<sup>73</sup> See *supra* p. 16.

Refusing to proportionally allocate the insurance proceeds would also upset the balance of responsibilities that the Commission envisioned in the 2012 Natural Gas Base Rate Case, between shareholders and customers. Although some parties in that proceeding attempted to argue that the MGP investigation and remediation costs “are the responsibility of the shareholders,”<sup>74</sup> the Commission rejected this. Instead, the Commission concluded that the appropriate item to assign to shareholders was the carrying costs: “we find the intervenors’ argument that the shareholders should bear some of the responsibility for the remediation costs persuasive, in that the carrying costs should not be borne by the ratepayers.”<sup>75</sup> The Commission’s analysis in the 2012 Natural Gas Base Rate Case Opinion and Order indicates strongly that the Commission did not intend to burden shareholders with a large portion of the actual investigation or remediation costs.

For these reasons, insurance proceeds must be allocated in the event of any non-prudence-based disallowance.

**B. Insurance Proceeds Cannot Be Fairly Allocated—and Therefore Cannot Be Refunded—Until Investigation and Remediation Are Complete.**

Staff recommends that the insurance proceeds “should ... not be held by Duke until all investigation and remediation is complete.”<sup>76</sup> But no allocation can be performed until all the relevant variables have been finalized. In other words, the Company must know (1) how much expense it has incurred to truly complete all of the necessary investigation and remediation work to fulfill its environmental legal and societal obligations; and (2) how much it will be able to recover through Rider MGP. These amounts will not be known—and therefore allocation will be impossible—until all investigation and remediation work is complete. Thus, the Commission should reject Staff’s recommendation on this point.

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<sup>74</sup> See 2012 Natural Gas Base Rate Case, Opinion and Order, p. 55-56 (describing various intervenors’ arguments on this point).

<sup>75</sup> *Id.*, p. 59.

<sup>76</sup> 2020 Staff Report, p. 6.

## VI. CONCLUSION

For the reasons set forth above, the Company disagrees with the recommended disallowances contained within the 2020 Staff Report and with Staff's recommendation regarding the insurance proceeds.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served on the following parties this 21<sup>st</sup> day of August 2020, by regular U.S. Mail, overnight delivery, or electronic delivery.

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**Case No(s). 20-0053-GA-RDR**

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