

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matters of the Applications of Duke)
Energy Ohio, Inc., for Adjustments to Rider) Case No. 20-53-GA-RDR
MGP Rates.)

In the Matters of the Applications of Duke) Case No. 20-54-GA-ATA
Energy Ohio, Inc. for Tariff Approval.)

**REPLY TO DUKE’S COMMENTS ON THE PUCO STAFF REPORT REGARDING
CHARGES TO CLEAN UP DEFUNCT MANUFACTURED GAS PLANTS
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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I. INTRODUCTION AND BACKGROUND

Duke wants to collect nearly \$39 million from its customers for 2019 cleanup costs of two long defunct manufactured gas plant (“MGP”) sites. In support of its position, Duke repeats the same arguments in its application in this case (“Application”) and comments that it made last year in Case No. 19-174-GA-RDR. That case was fully litigated and is awaiting a ruling by the Public Utilities Commission of Ohio (“PUCO”). The PUCO Staff, OCC, and other intervenors, thoroughly refuted Duke’s arguments in the 19-174 case and Duke’s recycled arguments should be rejected here to protect consumers.

For example, in this case, Duke once again argues that it is entitled to cleanup costs in the area of the East End former MGP site known as the West of the West (or “WOW”) parcel and the Ohio River. But PUCO Staff, OCC, and others have clearly shown that Duke is not entitled to collect cleanup costs for these areas from customers. Duke also wants to keep some of the insurance money that it has collected related to the MGP cleanup, even though the PUCO has

already ruled that all of this money—approximately \$50.6 million—belongs to Duke’s customers.

Duke again wants to charge customers for costs to clean up the MGP sites to a standard that *exceeds* the applicable environmental requirements, thus leading to much higher charges to Duke’s customers. In Case No. 19-174-GA-RDR, OCC offered the testimony of James R. Campbell, a Ph.D., on this matter. He is an environmental engineer with 30-plus years of experience at more than 50 MGP sites who is certified by the State of Ohio to evaluate MGP cleanup projects like Duke’s. He testified that Duke is cleaning up these properties far beyond what is required by law and far beyond what is necessary to protect human health and the environment. Duke’s continued remediation efforts at issue here were again excessive and unnecessary. Duke could have remediated the MGP sites in 2019 at substantially lower costs than it is seeking reimbursement from customers now. While Duke should not be allowed to charge consumers, the PUCO should find that Duke’s charges for clean-up beyond legal requirements should be denied.

Accordingly, the PUCO should adopt the recommendations made by OCC. The PUCO should adopt the PUCO Staff’s recommended full \$3,897,930 adjustment to Rider MGP to remove costs incurred in the WOW parcel and the Ohio River. The PUCO should order Duke to identify and remove all remediation costs that go beyond the standards identified by OCC witness Dr. James Campbell in testimony filed in the 19-174-GA-RDR case. And the PUCO should direct Duke to immediately pay customers all approximately \$50.6 million in insurance proceeds that it collected from insurers and is currently holding in a non-interest-bearing account.

II. COMMENTS

A. **The PUCO previously ruled that Duke cannot charge customers for Manufactured Gas Plant cleanup costs incurred outside the bounds of the Manufactured Gas Plant Sites.**

Duke's primary argument in this case (as it was in previous MGP cases) is that the location of contamination doesn't matter.¹ According to Duke, customers should pay for all cleanup related to the MGP sites, no matter where the contamination is located. But as explained below, the PUCO has already ruled that Duke cannot charge customers for MGP cleanup costs outside the bounds of the MGP Sites. The PUCO should disallow these charges as recommended by its own Staff and supported by OCC.

1. **The PUCO should not allow Duke to charge customers for investigation and remediation of the Area West of the West Parcel and the areas outside the "original footprint" of the MGP plants operations, including the Ohio River.**

Consistent with its position in previous cases, in the August 2020 Staff Report, the PUCO Staff recommended that Duke should not be permitted to collect costs associated with investigation and/or remediation of the WOW Parcel. Staff also recommended that Duke not be permitted to collect costs associated with the areas outside what PUCO Staff considers to be the "original footprint" of the MGP sites, including the Ohio River.² Staff correctly reasoned that "the Commission [already] denied [such costs] for recovery."³

¹ Duke Comments at 9-12.

² Staff Report at 5 (July 23, 2020).

³ *Id.*

Duke disagrees with Staff's recommendation.⁴ Duke asserts that the PUCO Staff misunderstands the PUCO's Opinion and Order in the 2012 Natural Gas Base Rate case.⁵ Duke is incorrect.

In that case the PUCO ruled that a utility can charge customers for expenses related to property, even if that property is not "used and useful" under R.C. 4909.15(A)(1).⁶ But there is a condition: the utility must also satisfy R.C. 4909.15(A)(4), by showing that the charge is for the "cost to the utility of rendering the public utility service."

Here, the PUCO should conclude that the Rate Case Order already prohibits Duke from charging consumers for remediation costs for the WOW parcel and Ohio River (together, the "Offsite Areas"). They are not costs of rendering public utility service.

The Rate Case Order addresses how Duke must comply with R.C. 4909.15(A)(4) on pages 54 to 60. This section of the Order includes some language that Duke considers favorable to its position:

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.*⁷

Duke refers to this quote, where the PUCO focused on Duke's legal obligation to remediate the sites, and the PUCO's statement that remediation costs are "a current cost of doing business."⁸ Duke argues that this is all you need to know about the Rate Case Order — that this

⁴ *Id.* at 11-12.

⁵ *Id.*

⁶ Case No. 12-1685-GA-AIR, Opinion & Order at 53-54 (Nov. 13, 2013) (the "Rate Case Order").

⁷ Duke Comments at 9-10.

⁸ *Id.*

one sentence is unambiguous proof that the PUCO has allowed Duke to charge customers for any and all cleanup costs, no matter where the contamination is found. But drawing this conclusion from this single sentence ignores both the plain language of other parts of the Rate Case Order and the context in which the PUCO made this statement.

First, the Rate Case Order also says:

Upon our review of the record in these cases, we find that Duke has supported its claim that the *remediation costs incurred on the East and West End sites* were a cost of providing utility service. Duke has 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.⁹

This language — which immediately precedes Duke’s favored quote — says that Duke has supported its claim regarding remediation costs “incurred *on the East and West End sites*.”¹⁰ It does not say that Duke has supported a claim for remediation of *offsite* areas like the WOW parcel and Ohio River.

Second, also in the same paragraph, the PUCO highlights the importance of cleaning up the properties “to maintain the usefulness of the properties.”¹¹ This, too, demonstrates that the PUCO was referring to the MGP Sites themselves and not the Offsite Areas. At the time, the MGP Sites themselves were used for utility operations, including underground gas mains and pipelines; a gas operations center; storage, staging, and employee facilities; sensitive utility infrastructure; and propane facilities.¹² The PUCO reasoned that it was important to remediate those areas to “maintain the usefulness of the properties” for providing utility service. The same

⁹ Rate Case Order at 58-59.

¹⁰ *Id.* at 58 (emphasis added).

¹¹ *Id.* at 59.

¹² *Id.* at 54.

cannot be said of the offsite areas. The WOW parcel is an empty field with no utility distribution operations whatsoever. The Ohio River is neither owned by Duke nor used for utility service.¹³

Third, the PUCO's discussion of R.C. 4909.15(A)(4) in the Rate Case Order does not end with Duke's quoted language. To the contrary, the Rate Case Order devotes an entire paragraph specifically to the Purchased Parcel (which includes the WOW parcel) and how R.C.

4909.15(A)(4) applies to it. In rejecting charges to Duke's customers for a \$2.3 million premium for the Purchased Parcel, the PUCO stressed that the Purchased Parcel was not used to render public utility service:

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. ... While it may be that a portion of the 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 [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. Moreover,* the record reflects that the requested \$2,331,580 amount submitted by Duke for recovery relates to the price Duke paid to purchase the property from a third-party and not to the statutorily mandated remediation efforts. Therefore, we conclude that the requested \$2,331,580 associated with the purchased parcel on the East End site should not be included in the amount of costs to be recovered through Rider MGP approved by the Commission in this Order.¹⁴

This paragraph is the only paragraph from the Rate Case Order regarding the applicability of R.C. 4909.15(A)(4) to the Purchased Parcel, yet Duke ignores most of it in its Comments. The impact of this paragraph, however, cannot and should not be ignored.

¹³ See Case No. 19-174-GA-RDR, Tr. Vol. I at 193 (Bachand) (Duke not using the WOW parcel for distribution operations); see *id.* Tr. Vol. I at 166 (Bednarcik) (Ohio River not used to render public utility service to customers).

¹⁴ Rate Case Order at 60 (emphasis added).

Duke says in its Comments that the PUCO Staff recommended denial of Duke's collection of the approximately \$3.9 million in this case because of the PUCO's previous disallowance of costs associated with Duke's reacquisition of the Purchased Parcel, which includes the WOW Parcel.¹⁵ Duke reads that decision as not binding here because the \$3.9 million is not related to acquisition costs but instead is for investigation and/or remediation of former MGP operations.¹⁶ Therefore, Duke concludes, PUCO Staff offered no basis for not allowing Duke to charge customers approximately \$3.9 million for the costs of actual investigation and remediations.¹⁷ Duke's interpretation of the Rate Case Order is flawed.

The PUCO identified two independent grounds for denying charges to customers for the Purchased Parcel, separated by the word "moreover." First, the PUCO ruled that under R.C. 4909.15(A)(4), Duke could not charge customers for the Purchased Parcel because the Purchased Parcel had 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." Second, the PUCO ruled that Duke could not charge customers for the premium it paid for the Purchased Parcel because it "relates to the price Duke paid to purchase the property from a third-party and not to the statutorily mandated remediation efforts."¹⁸

If the PUCO intended to allow Duke to collect MGP remediation costs from customers regardless of a causal connection between the utility service provided and the remediation (as Duke argues), there would be no reason for the PUCO's language quoted above. And this language applies in this case as well. The WOW parcel is part of the Purchased Parcel. So, the

¹⁵ Duke Comments at 11.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Rate Case Order at 60.

PUCO's ruling regarding the Purchased Parcel in the Rate Case Order applies to the WOW parcel.

Duke cannot show that the WOW parcel or Ohio River were ever used to “provide, either in the past or the present, utility services that caused the statutorily mandated environmental remediation.” Consistent with the Rate Case Order, therefore, it is insufficient under R.C. 4909.15(A)(4) for Duke to merely show that its investigation and remediation costs are a “cost of doing business.” The Rate Case Order is unambiguous: Duke cannot charge customers to investigate and remediate the WOW Parcel nor the Offsite Areas because there is no causal connection between Duke providing utility service and the remediation. The PUCO should adopt its Staff's recommendation to disallow these charges to consumers.

2. To consumers' detriment, Duke relies on language from the Rate Case Order and Ohio Supreme Court ruling unrelated to the PUCO's ruling on R.C. 4909.15(A)(4).

Duke argues in its comments that the Rate Case Order “recognized *all* MGP investigation and remediation expenses stemming from Duke Energy Ohio's statutory mandate as recoverable costs of utility service under R.C. 4909.15(A)(4).”¹⁹ Duke arrives at this conclusion through a series of citations to the Rate Case Order, some taken out of context, and many taken from sections of the Rate Case Order that were not about R.C. 4909.15(A)(4).

Duke begins its argument by quoting the Rate Case Order, where the PUCO said that “the 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

¹⁹ Duke Comments at 10.

statutes.”²⁰ The PUCO did say this. But it said it in the section of the Rate Case Order approving deferral authority (which is not ratemaking). This quote was not about R.C. 4909.15(A)(4).

Duke then provides a lengthy block quote from the Rate Case Order where the PUCO discusses Duke’s statutory obligation to clean the MGP Sites.²¹ This time, the quote is from the section of the Rate Case Order addressing the used and usefulness criteria for rate base under R.C. 4909.15(A)(1), which the Supreme Court explicitly ruled has no bearing on whether consumers can be charged for expenses under R.C. 4909.15(A)(4).²²

Duke also quotes the Supreme Court of Ohio’s decision in the appeal of the Rate Case, where the Supreme Court referred to Duke’s “statutory mandate to remediate the contamination.”²³ Yet again, this quote is taken out of context. Here, the Supreme Court was addressing parties’ arguments regarding the used and useful standard and OCC’s argument that the PUCO failed to follow its own precedent on that issue.²⁴ This language from the Supreme Court opinion was not about charging customers for expenses of remediation under R.C. 4909.15(A)(4).

3. The PUCO’s 2016 ruling extending the time period for Duke’s deferral was not ratemaking and thus has no bearing on whether Duke can charge customers for costs incurred in the “Offsite” Areas.

In the Rate Case Order, the PUCO ruled that Duke could not charge customers for cleanup costs at the East End Site after December 31, 2016.²⁵ The PUCO, however, left open the possibility of deferring (for later collection from customers) additional cleanup costs Duke

²⁰ *Id.*

²¹ *Id.* (quoting the Rate Case Order at 54).

²² Supreme Court Opinion ¶ 19.

²³ Duke Comments at 10.

²⁴ Supreme Court Opinion ¶¶ 22-25.

²⁵ Rate Case Order at 72.

incurred under “exigent circumstances.”²⁶ In 2016, Duke filed an application to extend deferral authority beyond December 31, 2016, claiming exigent circumstances.²⁷ The PUCO ruled in favor of Duke, finding that exigent circumstances existed at the time and allowing Duke to continue deferring costs on the East End through December 31, 2019.²⁸ In its Comments, Duke suggests that this deferral ruling (the “Deferral Order”) supports its claim that it can charge customers to investigate and remediate the West of the West parcel. Duke is mistaken, for several reasons.

First, as the PUCO and Ohio Supreme Court have emphasized, a deferral is an accounting mechanism and nothing more — it is not ratemaking.²⁹ Indeed, the Deferral Order itself addressed this issue, reiterating that “deferrals do not constitute ratemaking” and that “the Commission is not determining what, if any, of these costs may be appropriate for recovery in a subsequent proceeding.”³⁰

Second, the PUCO did not make any factual findings or legal rulings regarding the WOW parcel in the Deferral Order. Duke notes in its Comments that the Deferral Order discusses the WOW parcel.³¹ The Deferral Order does mention the WOW parcel, except in sentences where the PUCO is summarizing Duke’s position.³² At no point in the Deferral Order does the PUCO say that Duke can defer or charge customers for cleanup costs in the WOW parcel or Ohio River.

²⁶ *Id.*

²⁷ Case No. 16-1106-GA-AAM.

²⁸ *Id.*, Finding & Order (Dec. 21, 2016).

²⁹ *See, e.g., Elyria Foundry Co. v. PUCO*, 114 Ohio St.3d 305, 311 (2007).

³⁰ Case No. 16-1106-GA-AAM, Finding & Order ¶ 38 (Dec. 21, 2016).

³¹ Duke Comments at 5.

³² Deferral Order ¶ 36.

Third, the issue of whether customers could be charged for costs incurred in the WOW parcel and Ohio River simply was not raised in the deferral case. The PUCO's ruling in that case came in December 2016. It was not until nearly two years later that the PUCO Staff issued its first report in these rider cases and parties began filing their respective comments on the issue of charges in the WOW parcel and Ohio River. The Deferral Order, therefore, provides no support for Duke's theory that it can defer or charge customers for remediation costs in the WOW parcel and Ohio River.

B. The PUCO Staff's recommended approximately \$3.9 million disallowance for Duke's 2019 spending on the East End and West End remediation protects consumers and is reasonable and reliable and consistent with its positions on prior cases.

The PUCO Staff provided a comprehensive calculation of the total amount that Duke spent investigating and remediating the Offsite Areas. The PUCO Staff recommended the following disallowances:³³

³³ Staff Report and Recommendation at 7.

Year	East End Disallowance	West End Disallowance
2013	\$274,321	\$22,456
2014	\$135,380	\$328,299
2015	\$222,780	\$97,728
2016	\$561,999	\$0
2017	\$10,033,787	\$191,149
2018	\$9,366,276	\$1,999,967
2019	\$2,632,006	\$1,265,923
TOTAL	\$23,226,546	\$3,905,522

Duke asserts that although it does not believe it was appropriate for Staff to disallow costs associated with the WOW Parcel and Ohio River (at East End) and the Ohio River (West End), the amounts recommended by Staff appear to be reasonable.³⁴ The PUCO Staff's analysis is appropriate and reasonable and consistent with its recommendations in prior cases.³⁵ Therefore, it should be adopted by the PUCO.

- C. To protect consumers, the PUCO should disallow Duke Manufactured Gas Plant cleanup costs that are excessive and far more than necessary to protect people and the environment.**
- 1. Duke's proposed charges to consumers for 2019 Manufactured Gas Plant cleanup costs are imprudent because Duke could have cleaned up the Manufactured Gas Plant Sites at substantially lower cost while still complying with the Ohio Voluntary Action Program.**

In 2019 Duke continued its practice of cleaning up the MGP Sites to a standard well beyond what is necessary to protect the public and the environment. In testimony filed in this case, Duke witness Todd L. Bachand describes remedial actions at the MGP Sites similar to those described in the prior cases, including deep excavation and in-situ solidification (where reagents such as Portland cement are mixed with the MGP contaminants to bind the contaminants and keep them from moving).

³⁴ Duke Comments at 13.

³⁵ See, e.g., PUCO Staff Report in Case No. 19-174-GA-RDR (July 12, 2019).

In Case No. 19-174-GA-RDR, MGP expert Dr. James R. Campbell, who has a Ph.D. in Civil and Environmental Engineering from Carnegie Mellon, testified for OCC.³⁶ Dr. Campbell has been working with manufactured gas plant sites for more than 30 years, including the investigation, design, and remediation of more than 50 such sites.³⁷ He has worked on the analysis or environmental assessment and cleanup of more than 100 sites in total, providing expert analysis for 12 MGP sites designated as superfund sites under the Comprehensive Environmental Response, Compensation, and Liability Act (more commonly known as “CERCLA”). He is a certified professional (“CP”) under the Ohio Voluntary Action Program (“VAP”).³⁸ This means that the State of Ohio considers him well-qualified based on his education and experience to act as an agent of the State for purposes of interpreting the VAP and determining when a site meets all applicable VAP standards.³⁹ The PUCO itself has previously described Dr. Campbell as “a learned environmental consultant and professional.”

In short, Dr. Campbell testified in last year’s case that “Duke consistently failed to use more cost-effective approaches available under the VAP Rules. That failure to pursue more cost-effective approaches should be borne by Duke’s shareholders and not its customers.”⁴⁰ Duke’s customers should similarly not be on the hook to pay for Duke’s excessive and imprudent MGP cleanup costs incurred in 2019.

³⁶ Case No. 19-174-GA-RDR, OCC Ex. 21 (Campbell Testimony) at 1.

³⁷ *Id.* at 2

³⁸ Case No. 19-174-GA-RDR, OCC Ex. 21 (Campbell Testimony), Attachment JRC-2.

³⁹ *See* Case No. 19-174-GA-RDR, Duke Ex. 15 (Fiore Testimony) at 7 (describing what it means to be a VAP CP).

⁴⁰ *Id.* at 15.

D. In consumers’ interest, the PUCO should adopt the PUCO Staff’s recommendation to release the insurance proceeds and immediately provide an approximately \$50.5 million credit to consumers, which is the amount of net proceeds from the insurance claims.

1. Duke’s proposal to keep some of the \$50.5 million in insurance proceeds for itself (which would harm customers), and its assertion that consumers’ fair share of the insurance proceeds cannot be calculated until investigation and remediation is complete, contradicts the Rate Case Order and is barred by the doctrine of collateral estoppel.

Consistent with the Rate Case Order,⁴¹ the PUCO Staff recommended that any proceeds paid by insurers for MGP investigation, net of litigation costs and attorney fees, should be reimbursed to consumers.⁴² PUCO Staff also recommended that the proceeds should not be held by Duke until all investigation and remediation is complete, which could be years from now.⁴³ Duke takes particular issue with this recommendation and asserts that this amount cannot be calculated until investigation and remediation is complete and Duke knows what proportion of its investigation and remediations costs will be recoverable.⁴⁴ The PUCO should adopt Staff’s recommendation to release the insurance proceeds and immediately refund the amount held by Duke to customers.

The doctrine of collateral estoppel, also known as issue preclusion, operates to “preclude the 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.”⁴⁵ It applies to PUCO

⁴¹ Rate Case Order at 67.

⁴² Staff Report and Recommendation at 6.

⁴³ *Id.*

⁴⁴ Duke Comments at 14-15 (Aug. 21, 2020).

⁴⁵ *In re Ohio Power Co.*, 144 Ohio St.3d 1, 6 (2015) (quoting *Office of Consumers’ Counsel v. PUCO*, 16 Ohio St.3d 9, 10 (1985)).

proceedings.⁴⁶ The PUCO has already held that Duke must pass the entire amount of the insurance proceeds to its customers to offset the costs that customers paid or will pay for Duke's MGP cleanup.⁴⁷

The PUCO then ruled on this issue: "We find that any proceeds paid by insurers ... for MGP investigation and remediation should be used to reimburse the ratepayers. The Commission also concludes that any proceeds returned to ratepayers should be net of the costs to achieve those proceeds, *e.g.*, litigation costs.... Finally, we agree that, to the extent the proceeds collected from insurers ... exceed the amount recoverable from ratepayers, Duke should be permitted to retain such amount."⁴⁸

In other words, in the Rate Case, Duke made precisely the same argument it is making here — that if any costs are disallowed, Duke should get to keep a corresponding portion of the insurance proceeds. And the PUCO explicitly rejected that argument, ruling that Duke gets to keep insurance proceeds only after customers are reimbursed in full.

The precise issue of insurance allocation was raised in the Rate Case. Parties took competing, well-defined positions on that issue. And the PUCO made an unambiguous ruling. That ruling is that customers get *all* the insurance proceeds (approximately \$50.5 million), and *only* after customers are reimbursed in full does Duke get any. Customers have already paid approximately \$55.5 million under Rider MGP, so with approximately \$50.5 million in net insurance proceeds, they will never be reimbursed in full. Thus, there will never be any leftover insurance proceeds for Duke, and there is no basis for Duke to continue holding the insurance

⁴⁶ *Id.* ("Res judicata, whether claim preclusion or issue preclusion, applies to administrative proceedings that are of a judicial nature."). *See also In re Application of the Dayton Power & Light Co.*, Case No. 08-1094-EL-SSE, Second Finding & Order ¶ 32 (Dec. 18, 2019) (applying the doctrines of res judicata and collateral estoppel).

⁴⁷ Rate Case, Opinion & Order at 59 (Nov. 13, 2013) (the "Rate Case Order").

⁴⁸ *Id.* at 67.

money. Duke is doing nothing more than trying to litigate the issue again, which is barred by collateral estoppel.

2. Using all insurance proceeds to offset charges to customers is consistent with the PUCO's ruling in the Rate Case Order that Duke's shareholders should be responsible, in part, for cleaning up the Manufactured Gas Plant Sites.

In its Report, Staff asserts that it continued to investigate Duke's efforts to pursue collection of insurance proceeds, as directed by the PUCO in the Rate Case Order.⁴⁹ According to PUCO Staff, as of December 31, 2019, Duke successfully collected \$50,562,476, net of legal fees, from multiple insurance companies.⁵⁰ PUCO Staff explained that it will continue to monitor Duke's efforts. PUCO Staff noted that these funds have not yet been reimbursed to consumers and, consistent with PUCO Staff testimony filed in Case No. 19-0174-GA-RDR, PUCO Staff recommends that any proceeds paid by insurers for MGP investigation, net of litigation costs and attorney fees, should be reimbursed to customers (as OCC has previously recommended).⁵¹ Also, PUCO Staff recommended that the proceeds should not be held by Duke until all investigation and remediation is complete.⁵²

Duke claims that requiring it to refund all insurance proceeds to customers, while permitting it to collect from customers only a portion of the legally obligatory investigation and remediation costs for which the insurance proceeds were meant to compensate, would unfairly punish Duke for its efforts to comply with environmental law.⁵³ Duke also argues that refusing to proportionally allocate the insurance proceeds would upset the balance of responsibilities that the

⁴⁹ Staff Report and Recommendation at 6.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Duke Comments at 17.

PUCO envisioned in the 2012 Natural Gas Base Rate Case, between shareholders and customers.⁵⁴ Finally, Duke claims the PUCO's analysis in the 2012 Natural Gas Base Rate Case Opinion and Order indicates strongly that the PUCO did not intend to burden shareholder's with a large portion of the actual investigation or remediation costs.⁵⁵ Rather, shareholders would only bear the carrying costs.⁵⁶

First, the Rate Case Order never says that this is the *only* way that shareholders should pay for Duke's MGP costs. Second, the Rate Case Order limited Duke's recovery of MGP costs to 10 years, thus contemplating that shareholders would be responsible for any costs beyond that period. Third, the Rate Case Order denied Duke the right to charge customers for any 2008 costs for the West End site, so shareholders paid those amounts. Fourth, the Rate Case Order did not allow Duke to charge customers more than \$2.3 million related to the Purchased Parcel, so shareholders paid that amount. Fifth, as explained above, the Rate Case Order unambiguously stated that all insurance proceeds would go to customers, thus benefiting customers and not shareholders. Sixth, as explained above, the Rate Case Order prohibits Duke from charging customers to investigate and remediate the Offsite Areas, so shareholders should pay those amounts.

Duke mischaracterized the Rate Case Order by claiming that the PUCO expected that the *only* costs to be borne by shareholders would be through the denial of carrying costs. The Rate Case Order contemplates multiple different ways that Duke's shareholders would be out of pocket for MGP costs. The PUCO should reject Duke's claim that the Rate Case Order intended limited shareholders responsibility for MGP cleanup to bearing carrying costs.

⁵⁴ *Id.* at 18.

⁵⁵ *Id.*

⁵⁶ *Id.*

III. CONCLUSION

Duke's proposed \$39 million in charges to consumers are inconsistent with the Rate Case Order because they include \$3.9 million in charges for the Offsite Areas that Duke never used for manufactured gas activity. Duke's proposed \$39 million in charges to consumers are excessive and imprudent because Duke employed remediation methods that were unnecessary to effectively and efficiently clean up the MGP Sites. And Duke's proposal that it be allowed to keep some of the \$50.5 million in insurance proceeds is barred by the Rate Case Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply To Duke's Comments On The PUCO Staff Report Regarding Charges To Clean Up Defunct Manufactured Gas Plants was served by electronic transmission upon the parties below this 9th day of November 2020.

/s/ William J. Michael

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Reply Reply to Duke's Comments on the PUCO Staff Report Regarding Charges to Clean Up Defunct Manufactured Gas Plants by the Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Michael, William J.