ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Its Natural Gas Distribution Rates.	)	Case No. 2014-0328
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.	)	Public Utilities Commission of Ohio Case Nos. 12-1685-GA-AIR 12-1686-GA-ATA 12-1687-GA-ALT 12-1688-GA-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	

JOINT FOURTH NOTICE OF APPEAL
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
KROGER COMPANY,
OHIO MANUFACTURERS' ASSOCIATION,
OHIO PARTNERS FOR AFFORDABLE ENERGY

FILED
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SUPREME COURT OF OHIO

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JOINT FOURTH NOTICE OF APPEAL

The Office of the Ohio Consumers' Counsel ("OCC"), Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA") and Ohio Partners for Affordable Energy ("OPAE"),[1] respectively, and consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(A)(2), 3.11(C)(2), 3.15, and 10.02, hereby give notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("PUCO") of this appeal from PUCO decisions in Case Nos. 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, and 12-1688-GA-AAM. The decisions being appealed are the PUCO's Opinion and Order entered in its Journal on November 13, 2013, the PUCO's Entry on Rehearing entered in its Journal on January 8, 2014, the PUCO's Entry entered in its Journal on February 19, 2014.[2]

The OCC is the statutory representative, as established under R.C. Chapter 4911, of the residential customers of Duke Energy Ohio, Inc. ("Duke" or "Utility"). The OMA is a statewide association of approximately 1,500 manufacturing companies in Ohio.[3] Joint Appellants were parties of record in the above-referenced PUCO cases that are the subject of this appeal. Kroger is one of the largest grocers in the United States, with over 65 stores, manufacturing plants, and offices, taking gas distribution service from Duke on firm and interruptible transportation schedules. OPAE is an Ohio non-profit corporation with the stated purpose of advocating for affordable energy policies for low- and

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[1] Collectively "Joint Appellants."

[2] Pursuant to S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

[3] OMA's mission is to protect and grow Ohio manufacturing. OMA states that energy policy can enhance--or hinder--Ohio's ability to attract business investment, stimulate economic growth and spur job creation, especially in manufacturing.

moderate-income Ohioans. OPAE members include non-profit organizations located in the area served by Duke.

On December 13, 2013, OCC, Kroger, OMA and OPAE timely filed an Application for Rehearing (Joint Application for Rehearing) from the November 13, 2013 Opinion and Order in accordance with R.C. 4903.10. The PUCO denied that Joint Application for Rehearing (Joint Application for Rehearing) in regard to the issues raised in this appeal. *See* January 8, 2014 Entry on Rehearing. On March 21, 2014, OCC, Kroger, OMA and OPAE timely filed an Application for Rehearing (Second Joint Application for Rehearing) from the February 19, 2014 Entry in accordance with R.C. 4903.10. On April 21, 2014, the March 21, 2014 Joint Second Application for Rehearing was denied by operation of law.[4]

Joint Appellants file this Fourth Joint Notice of Appeal complaining and alleging that the PUCO's November 13, 2013 Opinion and Order, the January 8, 2014 Entry on Rehearing and the February 19, 2014 Entry are unlawful and unreasonable, and that the PUCO erred as a matter of law in the following respects, all of which were raised in the Joint Applications for Rehearing:

A. The PUCO Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants That Were Not Used And Useful, And That Were Not A Cost To The Utility Of Rendering Public Utility Service During The Test Year, In Violation Of Ohio Law, Including But Not Limited To, R.C. 4909.15.

1. The PUCO erred when it disregarded Ohio law, R.C. 4909.15(A)(1), that mandates only costs incurred from plant that is

[4] R.C. 4903.10(B) ("If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.")

"used and useful" in rendering utility service may be collected from customers.

2. The PUCO erred by authorizing Duke to charge customers for Manufactured Gas Plant investigation and remediation expenses that were not a cost to the Utility of rendering Public Utility service during the test year, in violation of R.C. 4909.15(A)(4) and (C)(1).

B. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not A Normal Recurring Expense, In Violation Of Ohio Law Including, But Not Limited To, R.C. 4909.15(A)(4).

C. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are Not Expenses For Duke's Utility Distribution Service In Violation Of Ohio Law Including, But Not Limited To, R.C. 4909.15.

D. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because The Order Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons Prompting The Decisions Arrived At Based Upon Said Findings Of Fact.

1. The PUCO's Order failed to set forth the reasons prompting the decision that the used and useful standard under R.C. 4909.15(A)(1) is not applicable.

2. The PUCO's Order failed to set forth the reasons prompting the decision that the MGP-related investigation and remediation costs were costs of rendering public utility service under R.C. 4909.15(A)(4).

3. The PUCO's Order failed to set forth the reasons prompting the decision that that strict liability for Duke under CERCLA means Duke's Customers should be responsible for paying the MGP-related investigation and remediation expenses.

E. PUCO Erred By Applying A Standard Which Discounted The Weight Placed Upon The Testimony Of Intervenor Experts (Who Presented Expert Opinions On The Record Consistent With the Ohio Rules of Evidence), Unlawfully Favored Duke Witnesses And Effectively Created A Presumption That Duke's Actions Were Prudent, Contravening PUCO And Ohio Supreme Court Precedent.

F. The PUCO Erred By Approving Duke's Tariffs That Unjustly, Unreasonably And Unlawfully Impose Manufactured Gas Plant-Related Environmental Investigation And Remediation Costs On Customers.

G. It Is Unlawful To Hold That Ohio Law (R.C. 4903.16) Requires The Posting Of A Bond To Effect A Stay Of A PUCO Order..

1. The Bond Requirement In R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine.

2. PUCO Orders May Be Stayed Pending An Appeal By The OCC[5] To The Supreme Court of Ohio Without The Posting Of A Bond Because The Public Office Exemption To The Bond Requirement (R.C. 2505.12) Applies To OCC.

The Joint Appellants respectfully note that, pursuant to R.C. 4903.20, "All actions and proceedings in the supreme court" under the Revised Code Chapters at issue in this appeal "shall be taken up and disposed of by the court out of their order on the docket."

Finally, Joint Appellants respectfully request that this Honorable Court designate OCC, Kroger, OMA and OPAE, respectively, as Appellants, for purposes of this proceeding. Such designation is appropriate and coincides with the intent of this Joint Fourth Notice of Appeal.

WHEREFORE, Joint Appellants respectfully submit that the PUCO's November 13, 2013 Opinion and Order, January 8, 2014 Entry on Rehearing and February 19, 2014 Entry are unreasonable and unlawful in regard to the errors discussed above, and should be reversed or modified with instructions to the PUCO to correct the errors complained of herein.

[5] Kroger, OMA and OPAE did not participate in this assignment of error included in the Second Joint Application for Rehearing.

Respectfully submitted,

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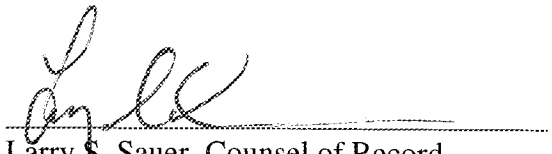
CERTIFICATE OF FILING

I certify that this Joint Fourth Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.



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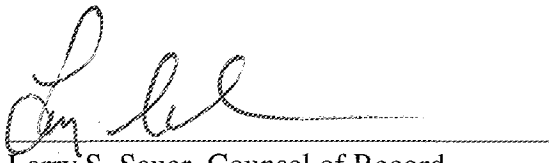
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Fourth Notice of Appeal of the Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association was served in accordance with R.C. 4903.13 by leaving a copy at the office of the Commission in Columbus and upon all parties of record via electronic transmission this 27th day of May 2014.



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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.	))))	Case No. 12-1687-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-1688-GA-AAM

OPINION AND ORDER

The Commission, considering the above-entitled applications, the Stipulation and Recommendation, and the record in these proceedings, hereby issues its Opinion and Order in these matters.

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OPINION:

I. HISTORY OF THE PROCEEDINGS

Duke Energy Ohio, Inc. (Duke, Applicant, or Company), is a natural gas company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission, pursuant to R.C. 4905.04, 4905.05, and 4905.06. Duke currently supplies natural gas service to approximately 426,000 customers in eight counties in southwestern Ohio (Staff Ex. 1 at 1).

On June 7, 2012, Duke filed a notice of intent to file an application for approval of an increase in its natural gas rates and related applications for tariff approval, an alternative rate plan, and to change accounting methods. In its notice of intent, Duke also requested a waiver of certain standard filing requirements relating to the Applicant's electric utility operations and certain payroll analysis. By Entry issued July 2, 2012, the Commission denied the request for waiver as it relates to the Applicant's electric utility operations and granted the remaining waiver request. By this same Entry, the Commission approved a date certain of March 31, 2012, and a test-year period of January 1, 2012 through December 31, 2012.

Duke filed its application to increase rates, along with the requisite standard filing requirements, on July 9, 2012. In its application, Duke sought a revenue increase of $44,607,929, or approximately 18.09 percent over current revenue. On July 20, 2012, Duke filed its supporting testimony. On November 28, 2012, Duke filed proof of publication of its notice of the application, in accordance with R.C. 4909.19 (Duke Ex. 3).

By Entry issued August 29, 2012, the Commission accepted the application for filing as of July 9, 2012, and ordered the Applicant to publish notice of the application, pursuant to R.C. 4909.19. By Entry issued January 18, 2013, motions to intervene filed by the following entities were granted: Ohio Consumers' Counsel (OCC); Stand Energy Corporation (Stand); Interstate Gas Supply, Inc. (IGS); The Kroger Company (Kroger); city of Cincinnati (Cincinnati); Ohio Partners for Affordable Energy (OPAE); Cincinnati Bell Telephone Company, LLC (CBT); The Greater Cincinnati Health Council (GCHC); People Working Cooperatively, Inc. (PWC); Ohio Manufacturers' Association (OMA); and Direct Energy Business, LLC, and Direct Energy Services, LLC (jointly, Direct Energy). Further, the motion for admission pro hac vice of Edmund J. Berger, on behalf of OCC, was granted by Entry issued December 21, 2012, and the motion for admission pro hac vice of Kay Pashos, on behalf of Duke, was granted at the hearing on April 29, 2013.

Pursuant to R.C. 4909.19, the Commission's Staff (Staff) conducted an investigation of the application and filed its report (Staff Report) on January 4, 2013 (Staff Ex. 1). Copies of the Staff Report were served upon the mayor of each affected municipal corporation and other persons the Commission deemed interested, in accordance with the requirements of R.C. 4909.19. In the Staff Report, Staff recommends a revenue decrease from current revenue of between $10,725,809 and $3,358,775, or a decrease from current revenue of between 2.80 percent and 0.88 percent (Staff Ex. 1 at Sch. A-1). Objections to the Staff Report were filed by Duke, IGS, CBT, PWC, GCHC, OCC, Kroger, Direct Energy, and OPAE on February 4, 2013. Motions to strike Duke's objections related to the recommendations in the Staff Report regarding Duke's cost recovery for the investigation and remediation of the Applicant's manufactured gas plants (MGPs) were filed by Staff

and OCC on February 7, 2013, and February 19, 2013, respectively. On February 26, 2013, Duke filed its memorandum contra the motions to strike filed by Staff and OCC.

By Entry issued January 18, 2013, the evidentiary hearing was scheduled to commence one business day after the conclusion of Duke's electric rate cases filed in *In re Duke Energy Ohio, Inc.*, Case No. 12-1682-EL-AIR, et al. (*Duke Electric Rate Case*), which was scheduled to commence on March 25, 2013. In addition, a separate Entry issued on January 18, 2013, scheduled the local public hearings for February 19, 2013, in Hamilton, Ohio; February 20, 2013, in Union Township, Cincinnati, Ohio; February 25, 2013, in Middletown, Ohio; and February 28, 2013, in Cincinnati, Ohio. Notice of the local public hearings was published in accordance with R.C. 4903.083 and proof of such publication was filed on February 19, 2013, and March 12, 2013 (Duke Exs. 4-5).

On April 2, 2013, as corrected on April 24, 2013, a Stipulation and Recommendation (Stipulation) was filed by some of the parties to these cases. As part of that Stipulation, the parties agreed to litigate the issues related to the Applicant's recovery of the MGP remediation costs at the evidentiary hearing in these cases. By Entry issued April 4, 2013, the evidentiary hearing was rescheduled to April 29, 2013. The evidentiary hearing commenced, as rescheduled, on April 29, 2013, and concluded on May 2, 2013. Initial briefs were filed on June 6, 2013, by Duke, Staff, Kroger, jointly by GCHC and CBT (GCHC/CBT), and jointly by OCC and OPAE (OCC/OPAE). Reply briefs were filed by Duke, OCC/OPAE, Kroger, GCHC/CBT, and OMA on June 20, 2013.

Columbia Gas of Ohio, Inc. (Columbia) filed an amicus curiae brief and an amicus curiae reply brief, on June 6, 2013, and June 20, 2013, respectively. On June 6, 2013, Columbia filed a motion for leave to file its amicus briefs in these matters. On June 21, 2013, OCC filed a memorandum contra Columbia's motion for leave to file amicus briefs.

On June 6, 2013, OCC filed a motion requesting the Commission take administrative notice of two documents from Duke's website regarding the MGP issue. On June 11, 2013, Duke filed a memorandum contra OCC's motion to take administrative notice, along with a motion to strike reference to the documents in the brief and reply brief filed by OCC/OPAE. OCC replied to Duke's memorandum contra the motion to take administrative notice and filed a memorandum contra Duke's motion to strike on June 18, 2013, and June 26, 2013, respectively. Duke replied to OCC's memorandum contra the motion to strike on June 28, 2103.

II. PENDING MOTIONS AND REQUESTS FOR REVIEW

A. Columbia's Motion For Leave to File Amicus Curiae Briefs

Columbia requests leave to file amicus briefs in order to support Duke's request to recover deferred environmental investigation and remediation costs associated with former MGP sites. In support of its motion, Columbia notes that, by Entry issued September 24, 2008, in *In re Columbia Gas of Ohio, Inc.*, Case No. 08-606-GA-AAM (*Columbia Deferral Case*), the Commission approved an application by Columbia to defer its environmental investigation and remediation costs incurred after January 1, 2008. Pursuant to the Commission's Entry in the *Columbia Deferral Case*, Columbia's recovery of the deferred costs would be addressed in Columbia's next base rate case. According to Columbia, its future ability to recover those deferred costs is now threatened by extraordinary and erroneous legal positions taken by Staff in the instant proceedings.

In support of its motion, Columbia points out that the Commission has granted interested parties leave to file briefs as amici curiae in several cases where full intervention is not necessary or warranted, citing various Commission cases, including *In re Columbia Gas of Ohio, Inc.*, Case No. 94-987-GA-AIR, Entry (Aug. 4, 1994) and *In re FirstEnergy Corp.*, Case No. 99-1212-EL-ETP, et al., Entry (Mar. 23, 2000). Columbia notes that Staff acknowledges in the instant cases that the question of whether Duke can recover the MGP costs, even if MGPs were not used and useful in rendering natural gas distribution service at a date certain, is "essentially a legal issue" (*citing* Staff Ex. 6 at 4). Therefore, Columbia asserts that its submission of amicus briefs on this limited legal issue, at the post-hearing stage of these proceedings, will not prejudice any party. Moreover, Columbia states that it will contribute to the full development and equitable resolution of the MGP issue in these proceedings.

In its memorandum contra Columbia's motion, OCC notes that Columbia's motion was filed 122 days after the deadline for the filing of motions to intervene in these cases. OCC argues that, through its amicus briefs, Columbia is attempting to influence the Commission's decision in these cases, which involves a different utility and different customers. According to OCC, Columbia is attempting to interject itself into the Duke cases because of what Columbia perceives as the potential precedent that the current Duke cases could have on a future Columbia rate case. OCC states that Columbia has offered nothing new or different in its briefs than the argument made by Duke. OCC cites to Commission precedent to support its position that the claimed interest of protecting against the setting of precedent was not sufficient grounds for granting intervention. *See In re Vectren Delivery of Ohio, Inc.*, Case No. 08-220-GA-GCR, Entry on Rehearing (Aug. 10, 2005) (*Vectren GCR Case*); *In re Ohio Edison, et al.*, Case No. 09-906-EL-SSO, Entry (Dec. 11, 2009). Furthermore, OCC argues that, if Columbia's motion is granted, other parties in these cases would be prejudiced, because Columbia would be allowed to participate in the

proceedings without being subject to the same scrutiny as other parties, *e.g.*, discovery. Finally, OCC asserts that, if amicus briefs were to be allowed, the amicus process should have been noticed to all stakeholders interested in this issue. Likewise, Kroger asserts that Columbia's motion to file amicus briefs, at this late stage of the proceedings, is in violation of the Commission's rules and would be prejudicial to the intervenors, because they have not had a chance to question or challenge the statements asserted by Columbia (Kroger Reply Br. at 3).

The Commission finds that the determination as to whether it is appropriate to permit the filing of amicus briefs in a proceeding must be made based on the individual case bar and the issues proposed to be addressed by the movant. OCC, in its opposition memorandum, mischaracterizes previous rulings by the Commission in its attempt to draw a comparison between the rulings in those cases and the instant cases. For example, the request for leave to file an amicus memorandum in support of an application for rehearing in the *Vectren GCR Case* obviously came at the rehearing stage of the case, well beyond the briefing stage of the proceeding, and the issues raised in the amicus filing in the *Vectren GCR Case* were primarily policy-oriented. Conversely, Columbia's motion for leave to file amicus briefs in the instant cases came at the briefing stage of these cases and Columbia's briefs are solely focused on the legal matters pertaining to the MGP cost recovery. In addition, the Commission believes that permitting Columbia to file its amicus briefs will not prejudice any party to these proceedings and will, in fact, assist with the consideration of the legal issues briefed in these matters. Accordingly, the Commission finds that Columbia's motion for leave to file amicus briefs is reasonable and should be granted.

B. OCC's Motion for Administrative Notice

On June 6, 2013, OCC filed a motion requesting the Commission take administrative notice of the two documents from Duke's website which contain frequently asked questions and answers about the West End and East End MGP sites that are at issue in these cases (website documents). OCC submits that the documents contain information relevant and important to the upcoming decision regarding Duke's recovery of the MGP costs associated with the remediation of these sites that OCC only recently became aware of. According to OCC, the documents include facts and admissions by Duke and, therefore, they should be administratively noticed. OCC notes that it has incorporated this information into its post-hearing brief.

In support of its motion, OCC states that these website documents equate to admissions by Duke that contradict some of the claims made by Duke at the hearing in these cases. OCC cites to Ohio Evid.R. 201(F) for the position that judicial notice of any adjudicative fact that is not subject to reasonable dispute may be taken at any stage of a proceeding, stating that this rule allows courts to fill gaps in the record. OCC

acknowledges that the Supreme Court of Ohio (Supreme Court) has held that, while there is no absolute right for the taking of administrative notice, there is no prohibition against the Commission taking such notice of facts outside of the record in a case. *See Canton Storage and Transfer Co., et al., v. Pub. Util. Comm.*, 72 Ohio St.3d 1, N.E.2d 136 (1995), *citing Allen d.b.a. J&M Trucking, et al., v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 532 N.E.2d 1307 (1988). OCC points out several cases where the Commission has taken administrative notice of facts, cases, entries, expert opinion testimony, briefs, and entire records from other proceedings. According to OCC, Duke would not be prejudiced by a taking of administrative notice because the website documents were posted by Duke on its website; therefore, it is Duke's own admission, not hearsay, that OCC seeks to notice and Duke can not claim that it did not have prior knowledge of the information. In addition, OCC states that, since Duke will have an opportunity to respond to the information contained in the website documents, through its reply brief, Duke will not be prejudiced.

Duke opposes OCC's motion for administrative notice, pointing out that the website documents in question have been available on Duke's website since the time the application was filed in these cases and, in fact, the information was referenced in Duke witness Bednarcik's testimony, as well as Staff data requests that were served on OCC (Duke Ex. 21 at 11, 16). In fact, the information, which Duke asserts is not contrary to any information presented on the record in these cases, has been on the Applicant's website since 2009 and 2010 for the East and West End sites, respectively. Moreover, Duke states that the attorney examiner closed the record in these cases, with no objection from any party, and OCC has failed to file a motion to reopen the record in these cases. Duke maintains that, had OCC offered this evidence at hearing, Duke may have offered rebuttal testimony; however, since it no longer has this option, Duke would be unfairly prejudiced by the admission of this evidence at this late date.

Duke notes that, while the Supreme Court has affirmed the Commission's ability to take administrative notice of matters outside the record, such notice has consisted of the Commission's own records. *See Schuster v. Pub. Util. Comm.*, 139 Ohio St. 458 at 461, 40 N.E.2d 930 (1942); *Canton v. Pub. Util. Comm.*, 63 Ohio St.2d 76 at footnote 1, 407 N.E.2d 930 (1980). However, Duke states that the Supreme Court has also held that the Commission may not take administrative notice of matters outside of the record, in particular, where the matter sought to be admitted in not the Commission's own record. *See Forest Hills v. Pub. Util. Comm.*, 39 Ohio St.2d 1, 313 N.E.2d 801 (1974). Duke offers that, in *Forest Hills*, the court found that the evidence must be introduced at hearing or brought to the attention of the parties prior to the decision, with an opportunity to explain and rebut. Duke points out that none of the cases cited by OCC in support of its motion involve matters not otherwise within the Commission's own record. Moreover, none of OCC's cited cases involve the admission of evidence one month after the hearing is closed and involve information that was publicly available during the pendency of the case.

Finally, Duke states that OCC seeks to misuse Ohio Evid.R. 201, which only allows judicial notice of an adjudicative fact that is not subject to reasonable dispute. Duke asserts that the evidence OCC seeks to have admitted goes to the heart of the MGP dispute in theses cases and, thus, the admission of such evidence would be contrary to Ohio Evid.R. 201 and should not be admitted.

Upon consideration of OCC's motion for administrative notice and the responsive pleadings, the Commission finds that it should be denied. As pointed out by Duke, the website documents are not new documents recently posted by Duke on its website; rather, they have been on Duke's website for at least three years and, in fact, the website has been referenced in discovery and testimony in these cases. For OCC to now attempt to utilize this information to discredit the sworn testimony of witnesses that OCC had ample opportunity to depose and cross-examine, at this late date, is inappropriate. OCC's argument that Duke's due process rights are protected by merely affording Duke the opportunity to respond to the late-filed website documents in its reply brief is weak, at best. As noted by Duke, the issue OCC is attempting to address through these documents affects a large part of the Commission's final decision in these cases. Thus, absent well-substantiated arguments to reopen these proceedings in order to provide Duke the opportunity to respond, which, as Duke notes, OCC did not request, the information can not be admitted into the record. Accordingly, OCC's motion for administrative notice should be denied.

Finally, Duke moves to have any references to the late-offered information stricken from the initial and reply briefs filed by OCC/OPAE. OCC opposes Duke's motion to strike stating that Duke has failed to conform to the Commission's rules, because Duke did not include, as part of its motion, a memorandum in support of its motion, in accordance with Ohio Adm.Code 4901-1-12. In reply, Duke argues that OCC's argument regarding Ohio Adm.Code 4901-1-12 elevates form over substance, in that, if the Commission denies OCC's motion for administrative notice, any references in the briefs to the website documents must be ignored. The Commission agrees that, even absent Duke's stated request to strike references to the website documents, since we denied OCC's motion for administrative notice in the proceeding paragraph, it is necessary to strike any references in the brief and reply brief filed by OCC/OPAE to the website documents. Therefore, we find that Duke's motion to strike should be granted, and any such references should be stricken from the brief and reply brief filed by OCC/OPAE and disregarded.

C. Motions for Protective Orders

At the hearing in these cases, Duke moved for the issuance of a protective order regarding certain information contained within the testimony and exhibits of OCC witnesses Campbell, OCC Ex. 15.1, and Gould, OCC Ex. 17.1, as well as OCC Ex. 6.1. In support of its motions, Duke asserts that certain information contained in these exhibits

refers to sensitive infrastructure that is considered confidential by the Department of Homeland Security; therefore, Duke requests the information not be made public. In addition, Duke requests that certain information concerning the bid prices be treated as confidential trade secret information. At the hearing, no one objected to Duke's motions for protective order and the attorney examiner found that the motions were reasonable and should be granted.

Ohio Adm.Code 4901-1-24, provides that, unless otherwise ordered, protective orders issued pursuant to this rule, automatically expire after 18 months. However, given that the exhibits contain sensitive utility infrastructure, consistent with previous rulings on such critical energy infrastructure information, the Commission finds that it would be appropriate to grant protective treatment indefinitely, until the Commission orders otherwise. Therefore, until the Commission orders otherwise, the docketing division should maintain, under seal, the information filed confidentially on February 25, 2013, and May 14 and 15, 2013.

If the Commission believes the information should no longer be provided protective treatment, prior to the release of the information, the parties will be notified and given an opportunity, in accordance with Ohio Adm.Code 4901-1-24(F), to file motions to extend a protective order.

D. Motion for Interlocutory Appeal filed by OCC/OPAE on Brief

By Entry issued April 4, 2013, the attorney examiner, inter alia, granted the motion to extend the hearing date in these cases filed by Duke, OCC, OPAE, GCHC, Kroger, Direct Energy, OMA, IGS, PWC, CBT, Cincinnati, and Staff. In that Entry, it was noted that, on April 2, 2013, the Stipulation was filed by some of the parties to these cases and, as part of the Stipulation, the parties agreed to litigate the MGP-related issues at the evidentiary hearing. Therefore, the attorney examiner established April 22, 2013, as the deadline for: each party that filed an objection to the Staff Report to file a statement identifying which objections pertain to the issues that are not part of the Stipulation and will be litigated at the evidentiary hearing; each party that previously prefiled testimony to file a statement as to whether their witnesses will appear at the evidentiary hearing and, if so, the party shall identify which portions of the witnesses' testimony address the issues that will be litigated at the hearing; and Staff and all parties shall file any additional expert testimony. On April 22, 2013, testimony was filed by Duke, Staff, OCC, and Kroger.

On April 24, 2013, OCC/OPAE filed a joint motion to strike the additional testimony filed by Duke on April 22, 2013. OCC/OPAE note that Duke's additional testimony filed on April 22, 2013, was filed nine months past the deadline for direct testimony and two months past the deadline for supplemental direct testimony. According to OCC/OPAE, the April 4, 2013 Entry was not an invitation to provide for the filing of this direct testimony on the MGP issue, but was intended only to allow parties to

address the impact, if any, of the Stipulation on the issues for hearing. Furthermore, OCC/OPAE state that the testimony filed by Duke on April 22, 2013, was, in fact, rebuttal testimony. In support of their motion, OCC/OPAE argue that Ohio Adm.Code 4901-7-01, App. A and 4901-1-29 require utilities to file their testimony in rate cases on a specific schedule to allow intervenors to prepare for the hearing and file their testimony with knowledge of the utility's direct testimony. The exceptions for allowing the filing of supplemental testimony set forth in the rule are not applicable here, according to OCC/OPAE. While OCC/OPAE acknowledge that the rules may be waived for good cause shown, they believe that, since the rules do not provide any other opportunity to file additional direct testimony in a rate proceeding, Duke's testimony should be stricken. Absent the opportunity to conduct discovery and prepare for cross-examination, OCC/OPAE assert that Duke's testimony, filed on April 22, 2013, is highly prejudicial to OCC, OPAE, and other parties.

On April 26, 2013, Duke filed its memorandum contra to the motion to strike filed by OCC/OPAE. Duke states that the April 4, 2013 Entry clearly invited additional testimony on MGP issues and the Commission's rules and procedures allow for such filing. While the Commission's rules generally prescribe the timing and type of testimony to be filed, Duke notes that Ohio Adm.Code 4901-1-38(B) provides that the Commission may waive such rules for good cause shown. Duke argues the testimony filed on April 22, 2013, is not improper rebuttal testimony and that other parties are not prejudiced by the filing of this testimony. Finally, Duke states that the Commission will be well served by allowing this additional testimony on these important policy issues.

At the hearing in these matters, on April 29, 2013, the attorney examiner denied the motion to strike filed by OCC/OPAE on April 24, 2013, stating that, "the attorney examiners' April 4, 2013, Entry clearly invited the filing of additional testimony by staff and the parties" (Tr. I at 15).

In their brief, OCC/OPAE filed an interlocutory appeal of the attorney examiner's April 29, 2013 ruling, in accordance with Ohio Adm.Code 4901-1-15(F) (*sic*). In support of their interlocutory appeal, OCC/OPAE reiterate the arguments set forth in their April 24, 2013 motion, namely that the Commission's rules do not provide for the late-filed testimony submitted by Duke on April 22, 2013, and the testimony was highly prejudicial to OCC, OPAE, and other parties. They restate that the extenuating circumstances provided for in the rules for the filing of supplemental testimony do not apply in these cases to Duke's testimony. Therefore, OCC/OPAE urge that Duke's April 22, 2013 testimony be stricken. (OCC/OPAE Br. at 101-107.)

In response, Duke states that OCC/OPAE were not prejudiced by the additional testimony filed on April 22, 2013, stating that OCC/OPAE had ample opportunity to file additional testimony and chose not to. Moreover, OCC/OPAE and other parties had the

opportunity to depose Duke's witnesses and to cross-examine such witnesses. (Duke Reply Br. at 38.)

Upon consideration of the April 24, 2013 interlocutory appeal filed, on brief, by OCC/OPAE and Duke's reply, and upon review of the record in these cases, the Commission finds that the appeal is without merit and should be denied. It is evident both by a review of the April 4, 2013 Entry and the statement by the attorney examiner at the April 29, 2013 hearing, that all parties, including Duke, were invited to file additional testimony. While OCC/OPAE claim that they have been prejudiced by the filing of Duke's testimony, we fail to see how such is the case when there were other avenues available to them which would allow them to fully respond and address any issues brought up in Duke's testimony. For example, OCC and/or OPAE, if they found the need to rebut any issues raised by Duke, could have requested to submit rebuttal testimony; however, no such request was made. Moreover, the record reflects that all parties, including OCC and OPAE, were given every opportunity in cross-examination to question Duke's witnesses, as attested to by the four days of hearing that concluded with over 1,000 pages of transcript. Therefore, the Commission concludes the motion for interlocutory appeal of the attorney examiner's April 29, 2013 ruling denying the April 24, 2013 motion to strike Duke's April 22, 2013 testimony, which was filed by OCC/OPAE, should be denied, and the attorney examiner's ruling should be affirmed.

E. OCC's Motion to Strike Two of Duke's Objections to the Staff Report

On February 19, 2013, OCC filed a motion to strike objections (6) and (15) filed by Duke on February 4, 2013, regarding the proposed MGP deferral and the facilities relocation tariff. In support of its motion to strike, OCC states that the objections lack specificity in violation to Ohio Adm.Code 4901-1-28(B). Upon consideration of OCC's motion to strike these two objections to the Staff Report, the Commission finds that it is without merit and should be denied.

III. SUMMARY OF THE EVIDENCE AND DISCUSSION

A. Overview

As stated previously, a Stipulation was filed by some of the parties to these cases and, as part of that Stipulation, the parties agreed to litigate the issues related to the Applicant's recovery of costs associated with investigation and remediation of Duke's two MGP sites, the East and West End sites, at the evidentiary hearing. Therefore, in this Order, the Commission will first address the uncontested portion of these cases in its review and consideration of the Stipulation. Upon our consideration, we conclude that the Stipulation should be approved and adopted. Thereafter, we consider the contested issue regarding Duke's request to recover the deferred environmental investigation and

remediation costs associated with former MGP sites. After a thorough review of the legal issues and the record in these matters, the Commission concludes that Duke's request to recover MGP investigation and remediation costs for the period from January 1, 2008 through December 31, 2012, should be approved to the extent set forth below in this Order.

B. Summary of the Local Public Hearings

The Commission received significant public correspondence related to these cases. In addition, each of the local public hearings was well attended: 25 witnesses testified at the Hamilton hearing, 28 witnesses testified at the hearing held in Union Township, eight witnesses testified at the Middletown hearing, and 14 witnesses testified at the hearing held in Cincinnati. Most of the testimony received at the local public hearings expressed a general opposition to any increase in Duke's natural gas rates. Witnesses also expressed concern with the compensation received by Duke executives and they asserted that Duke did not pay sufficient taxes.

C. Stipulation

1. Summary of the Stipulation

A Stipulation, signed by Duke, Staff, OCC, OPAE, GCHC, CBT, Kroger, Direct Energy, and PWC, was filed on April 2, 2013, as corrected on April 24, 2013 (Jt. Ex. 1). The Stipulation was intended by the signatory parties to resolve all outstanding issues in these proceedings, with the exception of Duke's request for cost recovery associated with remediation of the former MGP sites. On April 8, 2013, Cincinnati filed a letter in support of the Stipulation. On April 22, 2013, IGS filed a letter stating that it elected not to become a signatory party to the Stipulation, noting that the Stipulation does not address its objections in the cases, but that there are means, other than the Stipulation, by which its concerns can be addressed. In support of the Stipulation, Duke filed the testimony of William Don Wathen (Duke Ex. 19B), OCC filed the testimony of Beth E. Hixon (OCC Ex. 1), and Staff filed the testimony of William Ross Willis (Staff Ex. 2).

The following is a summary of the provisions agreed to by the stipulating parties and is not intended to replace or supersede the Stipulation:

(1) Revenue Requirement - Duke's revenue requirement is $241,326,770, which reflects a $0 increase in the sum of annualized revenues from current base rates. The $241,326,770 excludes gas costs and includes the annualized revenues from the accelerated main replacement program rider (Rider AMRP) and the advance utility rider (Rider AU) effective at the time of

the filing. Upon approval of the new rates in these proceedings, Rider AMRP and Rider AU will be reset to recognize recovery of investment through the date certain, March 31, 2012, in base rates.

(2) Return on Equity - Duke's actual capital structure of 53.3 percent equity and 46.7 percent debt, and a return on equity (ROE) of 9.84 percent, shall be established. The ROE shall not be used as precedent in any future gas proceeding, except for the purpose of determining the revenue requirement for collection from customers in proceedings addressing Duke's SmartGrid rider, currently known as Rider AU, and Rider AMRP. Duke shall use 5.32 percent as its cost of debt for determining carrying charges for future gas deferral requests until the cost of debt is reset as part of the resolution of Duke's next gas distribution rate case. Duke shall bear the burden of proof with respect to any future ROE request not otherwise provided for in this Stipulation.

(3) Depreciation - Duke shall use the depreciation rates as reflected in the Staff Report.

(4) AMRP - The incremental increase to the AMRP for residential customers will be capped at $1.00 annually on a cumulative basis. When rates become effective as a result of these cases, the AMRP rates shall be capped at $1.00 per customer per month, as supported in *In re Duke Energy Ohio, Inc.*, Case No. 12-3028-GA-RDR, et al. The cap for recovery from residential customers beginning in 2014, 2015, and 2016 shall be $2.00, $3.00, and $4.00 per customer per month, respectively. The Rider AMRP revenue requirement calculation will include amortization of Duke's deferred camera work expense, approved in *In re Duke Energy Ohio, Inc.*, Case No. 09-1097-GA-AAM, over a five-year period and will also include expenses related to ongoing camera work related to the AMRP activity during the period 2001 through 2006. Duke may seek recovery from customers of the unamortized balance of the deferred camera work, via an existing or newly proposed rider, prior to, but not after, the expiration of the five-year amortization period.

Except as modified in the Stipulation, the revenue requirement calculation and procedural timelines for Rider AMRP will be

the same as was approved in prior proceedings; however, the cost of capital shall be calculated using the debt and equity established in the Stipulation.

(5) Rider AU - Duke will continue recovering costs associated with deployment of SmartGrid for its gas distribution business. To the extent practicable, Duke will file Rider AU contemporaneous with its annual filings for the electric Rider Distribution Reliability – Infrastructure Modernization (Rider DR-IM). Duke will include in its Rider AU revenue requirement, and not in base rates, amounts related to recover deferred grid modernization, operation and maintenance (O&M) expense and carrying costs, incremental O&M savings and gas furnace program incentive payments and administrative expenses.

(6) MGP - Duke may establish a rider (Rider MGP), subject to the terms of this Stipulation and subject to Commission authorization after hearing from the parties in litigation, for recovery of any Commission-approved costs associated with Duke's environmental remediation of MGP. The parties agree to litigate their positions at the evidentiary hearing in the above-captioned proceedings, for resolution by the Commission in its Order in these cases. Staff agrees to litigate its positions as stated in the Staff Report on the MGP issues, subject to the usual caveat to allow for correction of errors, if any, or updated information. Any recovery of costs from customers for environmental remediation of Duke's MGP shall be allocated among classes as follows:

Residential Service (RS)/Residential Firm Transportation Service (RFT)/Residential Service Low Income Pilot (RSLI)	68.26 percent
General Service (GS)/Firm Transportation Service (FT) Small	7.76 percent
GS/FT Large	21.68 percent
Interruptible Transportation Service (IT)	2.30 percent

(7) Residential Rate Design – Duke will submit a cost of service study in its next natural gas general base rate proceeding that

separates its residential class into a heating class and a nonheating class.

(8) Reconnection Charge - Duke will withdraw its request for approval of a change to its Reconnection Tariff, meaning that the reconnection charge will remain at the current amount.

(9) Accelerated Service Replacement Program (ASRP) - Duke will withdraw its request for approval of an ASRP. If Duke proposes an ASRP or a similar program in the future, its proposal shall ensure that rates for such a program will not go into effect before January 1, 2016.

(10) Facilities Relocation - The mass transportation rider (Rider FRT) will not be approved in these proceedings.

(11) Line Extension Rider (Rider X) - Duke's proposed changes to Rider X, to use a net present value (NPV) analysis to determine whether the customer will contribute to the costs of construction or will receive the facility extension free of charge, shall be approved. In addition, Duke will include all volumetric base distribution revenues and fixed monthly charge revenues in the determination of whether the customer will contribute to the cost of construction or will receive the facility free of charge. For purposes of applying its NPV analysis, Duke will use 5.32 percent as the discount rate and, for residential customers, it will assume a term of no less than 10 years.

(12) Right-of-way Tariff Language - Duke shall modify its proposed right-of-way tariff to read as follows:

> The customer, without reimbursement, shall furnish all necessary rights-of-way upon or across property owned or controlled by the customer for any and all of the Company's facilities that are necessary or incidental to the supplying of service to the customer, or to continue service to the customer.
>
> The customer, without reimbursement, will make or procure conveyance to the Company, all necessary rights-of-way upon or across property owned or controlled by the customer along

dedicated streets and roads, satisfactory to the Company, for the Company's lines or extensions thereof necessary or maintenance incidental to the supplying of service to customers beyond the customer's property, in the form of Grant or instrument customarily used by the Company for these facilities.

Where the Company seeks access to the customer's property not along dedicated streets and roads for the purpose of supplying or maintaining service to customers beyond the customer's property, the Company will endeavor to negotiate such right-of-way through an agreement that is acceptable to both the Company and the customer, including with compensation to the customer. Notwithstanding the foregoing, the Company and its customers maintain all their rights under the law with respect to the Company acquiring necessary rights-of-way in the provision of service to its customers.

(13) PWC Weatherization Funding - Duke will provide PWC $350,000 per year through shareholder contributions to be used for low-income weatherization in Duke's service territory. The funds will be made available to PWC as agreed in either these proceedings or in settlement of the *Duke Electric Rate Case*, but not in both. PWC may elect, at its discretion, to use the funds, in whole or in part, for either electric or natural gas weatherization programs. This annual shareholder funding is in addition to the $1,795,000 that is currently being collected and that will continue to be collected from customers through Duke's base gas distribution rates for PWC's weatherization program and all such collections from customers and funding of PWC shall remain in place until the effective date of the rates in Duke's next gas distribution base rate case.

(14) OPAE Energy Fuel Fund - The parties recommend and seek the Commission's approval in continuing the waiver of Ohio Adm.Code 4901:1-14 granted to Duke, in *In re Duke Energy Ohio, Inc.*, Case No. 08-1285-GA-WVR, Entry (Dec. 19, 2008) (*Duke Waiver Case*), to allow distribution of fuel fund dollars as requested in that waiver application, so long as the refund

dollars are available. In seeking approval of the continuation of that waiver, the parties also recommend that the eligibility requirements be changed from 175 percent to 200 percent of the poverty level to from 0 percent to 200 percent of the poverty level for pipeline refund dollars.

(15) Economic Development - Duke shall withdraw its request for authorization of ratepayer funding for an economic development fund via the proposed economic development rider (Rider ED).

(16) Supplier Rate Codes - Duke shall make available to competitive retail natural gas suppliers (suppliers) up to 80 rate codes per supplier to be provided under Duke's current fee structure as set forth in Duke Rate Retail Natural Gas Supplier and Aggregator Charges (SAC), PUCO Gas No. 18, Sheet No. 45.2, meaning that 25 rate codes will be provided at no charge and any rate codes above 25 used by a supplier will be provided at a cost of $30 per rate code per month. Duke shall make these additional rate codes, up to 80, available to suppliers within 60 calendar days of the Order in these cases.

Duke shall enter into good faith negotiations with suppliers to: (1) determine ways in which the supplier could help streamline rate code processing to lessen or avoid costs associated with additional incremental rate codes above 80; and (2) to the extent necessary, establish a supplier paid fee structure to compensate Duke for its incremental costs for processing additional incremental rate codes above 80. Duke shall not charge, through distribution rates or any other recovery mechanism, the incremental cost of making additional rate codes available to suppliers to Duke's customers. Duke shall work with suppliers to complete, within 12 months of the date of the Order in these proceedings, a plan for a permanent billing system modification to replace the current rate code per month fee structure, if such permanent billing system modifications are more economical than long-term continuation of the per rate code per month structure. Upon mutual agreement that permanent billing system modifications are more economical, Duke and suppliers shall work in good faith to agree upon the details of implementing, and suppliers paying for, the permanent billing system modification, including a reasonable time frame for completion. Duke shall

not charge, through distribution rates or any other recovery mechanism, the cost of any such billing system modification to Duke's customers. These provisions do not, and are not intended to, inhibit or preclude suppliers from recovering such costs from their customers through the suppliers' rates and have no effect on Duke's collection of such charges on behalf of suppliers or the purchase of receivables from suppliers.

(17) Tariffs - Duke shall file applicable compliance tariffs within 14 days of the submission of the Stipulation. The compliance tariffs shall include the tariff language filed with the application, as amended by the Staff Report and the Stipulation. All work papers supporting the tariffs shall be provided to interested parties upon request. Interested parties will review and comment within 10 days of receipt of the proposed tariffs.

(18) Waiver of Standard Filing Requirements - Duke does not need to provide a comparison of 12 months actual income statement to the partially forecasted income statement as required by Ohio Adm.Code 4901-7, at Appendix A, Chapter II(A)(5)(d), page 11.

(19) Natural Gas Vehicle (NGV) Tariff and Rate Gas Generation Interruptible Transportation (GGIT) - Duke's proposed tariffs Rate NGV and GGIT shall be filed for approval. Both shall be administered in a competitively neutral manner.

(20) Staff Report Resolves Other Issues - The Staff Report resolves the remaining issues not addressed in the Stipulation, with the exception that Duke will not submit a facilities-based cost of service study in its next gas distribution base rate case.

(Jt. Ex. 1 at 5-14.)

2. Rate Base

The following information presents the value of Duke's property used and useful in the rendition of natural gas distribution services as of the March 31, 2012 date certain, as stipulated by the parties (Staff Ex. 2 at Sch. B-1):

Plant-in-Service	$1,623,220,034
Depreciation Reserve	(447,052,644)
Net Plant in Service	$1,176,167,390
Customer Advances for Construction	$ (3,597,473)
Customer Service Deposits	(8,521,562)
Post Retirement Benefits	(14,645,755)
Investment Tax Credits	(6,554)
Deferred Income Taxes	(282,950,314)
Other Rate Base Adjustments	15,796,710
Rate Base	$882,242,442

The Commission finds the rate base stipulated by the parties to be reasonable and proper and adopts the valuation of $882,242,442 as the rate base for purposes of these proceedings.

3. Operating Income

The following information reflects Duke's operating revenue, operating expenses, and net operating income for the 12 months ended December 31, 2012 (Staff Ex. 2 at Sch. C-1):

Operating Revenue	
Total operating revenue	$384,015,062
Operating Expenses	
O&M	$221,071,618
Depreciation	44,082,034
Taxes, other	24,898,498
Federal income taxes	25,765,571
Total Operating Expenses	$315,817,721
Net Operating Income	$68,197,341

The Commission finds the determination of Duke's operating revenue, operating expenses, and net operating income, pursuant to the Stipulation, to be reasonable and proper. The Commission will, therefore, adopt these figures for purposes of these proceedings.

4. Rate of Return and Authorized Increase

As stipulated by the parties, Duke has a net operating income of $68,197,341 under its present rates. Applying Duke's current net operating income to the rate base of $882,242,442 results in a rate of return of 7.73 percent. Such a rate of return is sufficient to provide Duke with reasonable compensation for the service it renders to its customers.

The parties have agreed to a recommended rate of return of 7.73 percent on a stipulated rate base of $884,242,442, requiring a net operating income of $68,197,341. The revenue requirement agreed to by the stipulating parties is $384,015,062, including gas costs, which results in a zero percent increase in the sum of annualized revenues from current base rates. (Staff Ex. 2, Sch. A-1 and C-1.)

5. Stipulation Evaluation and Conclusion

Ohio Adm.Code 4901-1-30, authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *See Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves almost all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (Dec. 30, 1993); *In re Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (Jan. 31, 1989); *In re Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), *citing Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). Additionally, the Supreme Court stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. *Consumers' Counsel* at 126.

Duke witness Wathen, Staff witness Willis, and OCC witness Hixon testify that the Stipulation is a product of serious bargaining among capable, knowledgeable parties. The witnesses state that the stipulating parties regularly participate in rate proceedings before the Commission, are knowledgeable in regulatory matters, and were represented by experienced, competent counsel. (Duke Ex. 19B at 3; Staff Ex. 2 at 3; OCC Ex. 1 at 4.) Specifically, Mr. Wathen notes that the parties to the Stipulation represent all stakeholders' interests, including both residential and nonresidential customers, as well as low-income customers. According to Mr. Wathen, negotiations in these proceedings occurred via in-person meetings, telephone conferences, and email exchanges, with all parties being invited to attend these meetings and all issues raised by the parties being addressed in reaching the Stipulation. (Duke Ex. 19B at 3-4.) Therefore, upon review of the terms of the Stipulation, based on our three-prong standard of review, the Commission finds that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties, is met.

With regard to the second criterion, Duke witness Wathen, Staff witness Willis, and OCC witness Hixon assert that the Stipulation benefits ratepayers and the public interest (Duke Ex. 19B at 5; Staff Ex. 2 at 3; OCC Ex. 1 at 4). Mr. Wathen explains that the Stipulation addresses the recommendations contained in the Staff Report and benefits all customer classes, as customers will experience a substantially lower base rate increase than that which Duke proposed in its application. Moreover, Mr. Wathen explains the Stipulation provides for many benefits through the agreed-upon rate design and provides a direct benefit for low-income customers through shareholder-funded contributions to support weatherization initiatives and other programs. (Duke Ex. 19B at 5-6.) In addition, Mr. Willis points out the Stipulation: avoids the cost of litigation; results in a $0 increase in base gas retail rates; caps the increase to Rider AMRP for residential customers at $1.00 annually on a cumulative basis; saves $317 million in rates over a 9- to 10-year period, because Duke withdraws its request for an ASRP; maintains the reconnection charge at the current level; provides that Rider FRT will not be approved; establishes a rate of return of 7.73 percent based on an ROE of 9.84 percent and a cost of debt at 5.32 percent; and provides for shareholder-funded low-income weatherization programs and a low-income fuel fund (Staff Ex. 2 at 3-4). Ms. Hixon adds that the Stipulation: provides for a cost of service study separating the residential customers into heating and nonheating classes for the next rate case; recommends changes to Rider X to use the NPV analysis to determine if

a customer will contribute to the costs of construction; changes the right-of-way tariff language; and withdraws Duke's request for Rider ED (OCC Ex. 1 at 5-9). Upon review of the Stipulation, we find that, as a package, it satisfies the second criterion as it benefits ratepayers by avoiding the cost of litigation and is in the public interest.

Duke witness Wathen, Staff witness Willis, and OCC witness Hixon also testify that the Stipulation does not violate any important regulatory principle or practice (Duke Ex. 19B at 6; Staff Ex. 2 at 5; OCC Ex. 1 at 10). The Commission finds that there is no evidence that the Stipulation violates any important regulatory principle or practice and, therefore, the Stipulation meets the third criterion.

Accordingly, we find that the Stipulation entered into by the parties is reasonable and should be adopted.

6. Effective Date and Tariffs in Compliance with Stipulation

As part of its investigation in these matters, Staff reviewed the various rates, charges, and provisions governing terms and conditions of service contained in Duke's proposed tariffs. On April 15, 2013, Duke filed compliance tariffs in these proceedings in accordance with the provisions of the Stipulation. No comments were received regarding Duke's compliance tariffs. Upon review, the Commission finds the proposed revised tariffs filed on April 15, 2013, to be reasonable and in accordance with the Stipulation; therefore, such tariffs should be approved. Consequently, Duke shall file final tariffs reflecting the revisions approved in conformance with the Stipulation in these cases. The new tariffs will become effective on a date not earlier than the date upon which complete final tariff pages are filed with the Commission.

D. Litigated MGP Issue

The remainder of this Order is devoted to the Commission's consideration of Duke's request for recovery of MGP-related costs and our ultimate conclusions on the legal issues. Initially, we review the history of MGPs and Duke's Ohio MGP sites specifically. We then overview the costs Duke is requesting to recover and the parties' responses. Next, we provide a detailed description of the East and West End sites and the investigation and remediation actions, as set forth by Duke and the parties on the record in these cases. Thereafter, we consider the legal arguments regarding: Duke's remediation obligations; the used and useful requirement set forth in R.C. 4909.15(A)(1), as it applies to Duke's proposal; the requirement for recovering costs for rendering public utility service set forth in R.C. 4909.15(A)(4), as it applies to Duke's proposal; and whether the costs sought to be recovered by Duke were prudently incurred, in accordance with R.C. 4909.154. Ultimately, we determine that Duke should be authorized to recover $62.8 million, minus the amount requested for the purchased parcel on the East End site, the

2008 costs for the West End site, and all carrying charges, on a per bill basis, over a five-year amortization period.

1. MGP and the Stipulation

Although the Stipulation settled most of the issues in these proceedings, the stipulating parties agreed to litigate the recoverability of costs incurred by Duke for the environmental investigation and remediation associated with two former MGP sites that were owned and operated by Duke's predecessor companies. These sites are referred to throughout this Order as the East and West End sites and, as explained later in this Order, each site is divided into parcels. There is no provision in the Stipulation for the recovery of the MGP costs in base rates; rather, the Stipulation provides that Duke may establish a rider for recovery of any Commission-approved costs associated with Duke's environmental remediation of the MGPs. Furthermore, the Stipulation establishes how the MGP remediation costs would be allocated among customer classes, in the event recovery is authorized. (Jt. Ex. 1 at 8-9; Duke Ex. 19B at 2; Staff Ex. 1 at 31.)

At the hearing, in regard to the litigated MGP issue, Duke presented the following witnesses: Jessica L. Bednarcik, Manager of Remediation and Decommissioning, Senior Engineer with Duke Energy Business Services, LLC (DEBS); Shawn S. Fiore, Vice President of Haley & Alrich, a certified professional (CP) under Ohio Environmental Protection Agency's (EPA) Voluntary Action Program (VAP); Andrew C. Middleton, President of Corporate Environmental Solutions, LLC; Kevin D. Margolis, partner in the law firm of Benesch, Friedlander, Coplan & Aronoff LLP; William Don Wathen, Director of Rates and Regulatory Strategy for DEBS; and Gary J. Hebbler, General Manager, Gas Field and Systems Operations for Duke. Staff presented Kerry J. Adkins, Public Administrator 2, Accounting and Electricity Division. OCC presented: Kathy L. Hagans, Principle Regulatory Analyst with OCC, adopting the testimony of David J. Effron, a certified public accountant and a utility regulatory consultant; Bruce M. Hayes, Principle Regulatory Analyst with OCC; and James R. Campbell, President of Engineering Management, Inc. Kroger presented Neal Townsend, Director, Energy Strategies, LLC.

2. History of MGPs and Duke's MGP Sites

Duke states that the East and West End sites have waste products and contaminants that are considered hazardous substances, as defined by the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601, et seq.) (CERCLA). According to Duke, environmental remediation is primarily governed in Ohio by the Ohio EPA under R.C. Chapter 3746 and Ohio Adm.Code 3745-300-01 through 3745-300-14. Duke is cleaning up both MGP sites under the direction of an Ohio EPA CP employed by an environmental consulting firm. (Duke Ex. 21 at 7.) Duke opines it is acting prudently and in a reasonable and responsible manner in conducting

these activities under the VAP rules promulgated under R.C. Chapter 3746, which, in Ohio, is the statutory framework most commonly and reasonably utilized for the remediation of sites with historic contamination. (Duke Ex. 23 at 6; Tr. I at 141.)

Between 1816 and the mid-1960s, MGPs were used for the production of commercial grade gas from the combustion of coal, oil, and other fossil fuels, for use with lighting, heating, and cooking. During this era, three types of gas-making processes generally dominated the manufacture of gas: coal gas; carbureted water gas; and oil gas. (Duke Ex. 20 at 4-5; Staff Ex. 1 at 30.) Residuals resulting from the manufacture of gas included: tar and some form of sulfur removal residual from all three forms of processes; some form of ammonia residual from the coal gas process; and, at some plants, other residuals like light oil or naphthalene. Duke witness Middleton states that, if there was no market or economic use for the residuals produced, the residuals became wastes for disposal by the means customary at the time, which included onsite disposal at the MGP site. (Duke Ex. 20 at 14, 21.)

Duke witness Bednarcik explains that the East and West End sites have been used by Duke and its predecessor companies for gas transmission, production, and other utility services since the mid-1800s. Ms. Bednarcik details the facilities and structures associated with the MGP facilities and gas operations that, through the years, have been located on the East and West End sites. She submits that, while the two sites have undergone changes in operations and equipment over the years, they currently house a number of critical infrastructures that are necessary for the provision of utility services. (Duke Ex. 21A at 2, 7-16, Att. JLB 1-3.) Duke emphasizes that, while the remediation necessitated referencing the sites in geographic delineation used by the Ohio EPA, Duke views both the East and West End sites as single operating facilities used to provide utility services to customers (Duke Ex. 22C at 2).

MGPs were taken out of service for reasons including: the plant had reached the end of its useful life; it was more economical to provide gas from a larger plant; and because the introduction of natural gas made them obsolete. (Duke Ex. 20 at 21.) Even after natural gas became prevalent, some MGPs were used for peak shaving (Staff Ex. 1 at 30). Duke witness Middleton explains that the typical operating, disposal, and dismantling practice during the MGP era at former MGP sites resulted in environmental contamination of soil and groundwater. According to the witness, today's definition of contamination, as opposed to the definition during the MGP era, often requires remediation under state or federal laws. Dr. Middleton notes that, beginning in 1970, the United States (U.S.) Congress enacted a series of laws revolutionizing the approach to environmental regulation. He explains that the application of the site remediation process for MGP sites generally began in the 1980s. (Duke Ex. 20 at 24.)

Dr. Middleton explains that, when an area or site contains chemicals of environmental interest, a site assessment and remediation process will be implemented. Generally, this process entails the following steps: preliminary assessment; investigation and analysis of the data collected, sometimes concluding with a quantitative risk assessment; remedial action development; approval of the proposed remedial action; engineering design; construction contracting; construction; O&M and monitoring; and site closure. (Duke Ex. 20 at 32-35.)

The two MGP sites at issue in these cases are the West End site, which began operations in 1843 and is located on the west side of downtown Cincinnati, and the East End site, which began operations in 1884 and is located four miles east of downtown Cincinnati. Manufactured gas production stopped in 1909 at these sites, after natural gas arrived in Cincinnati, but was reinstated in 1918 at the West End and in 1925 at the East End, because the amount of natural gas delivered to the city could not adequately supply customers. Subsequently, manufactured gas operations ended at the West End plant in 1928 and at the East End plant in 1963. After the plants closed, the above-ground equipment and most of the associated structures were removed. However, several below-ground structures and related residuals remained, including: remnants of gas holders, oil tanks, tar wells or ponds, purifiers, retorts, coal storage bins, and generator houses, as well as associated residuals such as coal tar, scrubber waste, and other chemicals. (Duke Ex. 21 at 5-6; Duke Ex. 20A at 2-3; Staff Ex. 1 at 31; Tr. I at 183.) Duke witness Middleton asserts that the management of the residuals at the East and West End sites appear to have followed the common industry practices at the time of operations (Duke Ex. 20A at 2).

Duke witness Bednarcik is the manager of the remediation and decommissioning team for Duke. She explains that Duke, currently, is working on 48 MGP sites in Indiana, North Carolina, South Carolina, and Florida, in addition to the two MGP sites in Ohio for which Duke believes it has liability. Ms. Bednarcik states that the two sites in Ohio are the largest footprint in Duke's portfolio, and some of the largest MGPs in the country. (Tr. I at 189, 191; Tr. II at 284.)

Ms. Bednarcik argues that it is undeniable that the contamination on these two sites was due to the existence and operations of MGPs used in the provision of gas service to customers (Duke Ex. 21A at 2). Duke witness Middleton explains that the following types of residuals are found at the East and/or West End sites: coal gas, carbureted water gas, and boiler ash at both the East and West End sites; producer gas only at the West End site; and oil gas and propane gas only at the East End site (Duke Ex. 20A at 8-9).

Ms. Bednarcik states that MGP-related obligations at the two sites have been anticipated by Duke since 1988, when Duke began its MGP-related program. However, prior to 2006 and 2009 on the East and West End sites, respectively, these sites were considered lower priorities because they were owned by Duke and had limited access, the

groundwater was not used as a source of drinking water at the sites or by surrounding properties, and contact was limited because the sites were essentially capped by asphalt, concrete, or soil. (Duke Ex. 21A at 17, 19.) According to Duke witness Bednarcik, the environmental investigation and remediation was initiated at the East and West End sites in 2007 and 2010, respectively, due to changing conditions at the sites that could have led to new exposure pathways (Duke Ex. 21 at 8-9).

Ms. Bednarcik explains that, at any MGP or environmentally impacted site, the extent of liability is unknown prior to the performance of environmental investigation activities. According to the witness, once the existence of impacted material was confirmed during the initial subsurface investigation at the East and West End sites in 2007 and 2010, Duke moved prudently to address the impacts, based on the current and future use of the sites, and discussions with the Ohio EPA CPs. (Duke Ex. 21A at 20.)

In 2009, once the environmental investigations began at the East and West End sites, Duke filed an application seeking Commission approval to defer cleanup costs at the sites in *In re Duke Energy Ohio, Inc.*, Case No. 09-712-GA-AAM (*Duke Deferral Case*) (Duke Ex. 21 at 9). By Order issued November 12, 2009, in the *Duke Deferral Case*, the Commission approved Duke's application to modify its accounting procedures to defer the environmental investigation and remediation costs for potential recovery in a future base rate case (Staff Ex. 1 at 30). In its January 7, 2010 Entry on Rehearing in the *Duke Deferral Case*, the Commission stated that it will make the necessary determinations regarding recovery of the deferred costs at such time as Duke files a request for recovery (Staff Ex. 1 at 32).

3. Overview of Duke's MGP Cost Recovery Proposal and Parties' Positions

In its application, Duke requests recovery of: approximately $45.3 million for deferred remediation costs incurred from January 1, 2008 through March 31, 2012; $15 million in projected costs for the period April 1, 2012 through December 31, 2012; and approximately $5 million in carrying charges (Staff Ex. 1 at 35; Duke Ex. 2, Vol. 7, Tab 1 at Sch. C-3.2b). Subsequently, Duke updated the requested MGP recovery amount to include the actual deferred costs incurred from April 1, 2012 through December 31, 2012, which reduced the amount requested in the application by approximately $3 million. According to Duke witness Wathen, Duke now requests authorization to recover $62.8 million in actual MGP costs over a three-year amortization period for the two former MGP sites, which equates to approximately $20.9 million annually. 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. (Duke Ex. 19C at 3; Staff Ex. 1 at 30-31; Tr. III at 784.)

Duke witness Bednarcik explains that the variables that affect the costs for the clean up of the MGP sites include: the regulatory agency's standards related to source-like material; the number of years the plant operated; the amount of gas produced at the sites; the types of processes used to manufacture the gas; disposal options; current and future site use; whether the utility owns the property; physical barriers or obstructions at, or close to, the site; the depth of the subsurface confining layer; groundwater flow rate and depth; the time when remediation occurred; and the site area. Ms. Bednarcik notes that, since the East and West End sites have a long history of operation, were large gas producers, have on-site barriers, *i.e.*, sensitive underground utilities and a bridge, and have impacts at depths greater than 20 feet, it would be expected that the remediation costs would be higher than a site that only operated for a few years with contamination only a few feet deep. (Duke Ex. 21A at 30-31.) Specifically, on the sites at issue in theses cases, the costs incurred by Duke include:

(a) Environmental consultants that: investigate the soil and groundwater impacts; perform perimeter air monitoring during remedial actions; and provide detailed remedial design, oversight, and construction management, and who subcontract with construction firms to carry out the remedial actions;

(b) Site security;

(c) External analytical laboratories that analyze soil, groundwater, and ambient samples;

(d) An environmental contractor to assist in the management and review of reports on the sites;

(e) An engineering consulting firm to provide vibration monitoring;

(f) Fuel for on-site construction equipment;

(g) Landfill disposal;

(h) Miscellaneous external costs include: electricity, communications support, utility clearing services, street flaggers, personal protective and air monitoring equipment;

(i) Expenses for Duke employees working on the project who are located in North Carolina, *e.g.*, air travel, rental cars, and hotels;

(j) Oversight by Duke of the: analytical laboratory in North Carolina, which perform audits of the analytical laboratories and perform quality control and review of analytical data; and power delivery and gas operations personnel while working in close proximity to sensitive electrical and/or gas utilities;

(k) Duke's internal survey support, as well as project management oversight, salary, and benefits.

(Duke Ex. 2, Vol. 7, Tab 1 at Sch. C-3.2b; Duke Ex. 21 at 19-20; Duke Ex. 21A at 35-40.) Duke asserts that the processes and personnel employed by the Company in implementing its investigation and remediation activities are designed to achieve the desired results in a cost-effective manner (Duke Br. at 35).

Staff states that its determination of the reasonableness of the MGP-related expenses was limited to verification and eligibility of the expenses for recovery from natural gas distribution rates. Staff did not investigate or make any finding or recommendations regarding necessity or scope of the remediation work performed by Duke. (Staff Ex. 1 at 40.) Staff witness Adkins notes that Staff finds it reasonable to accept the opinion of Duke's Ohio EPA CP on these issues, because Staff currently has limited expertise in the area of verifying the adequacy of environmental remediation efforts under applicable legal standards (Staff Ex. 6 at 25). OCC believes that Staff should have addressed the scope and necessity of the remediation activities to determine the prudency of the MGP-related costs (OCC Ex. 14 at 27).

Staff recommends Duke be permitted to recover $6,367,724 in remediation costs through Rider MGP. According to Staff, the record reflects that the majority of the remediation costs are not associated with facilities that are used and useful as required by R.C. 4909.15. In summary, Staff recommends that: for the West End site, none of the expenses incurred be recoverable, because none of the remediation was done in the section of the site used for gas distribution; for the central parcel of the East End site, all of the expenses are recoverable because this parcel is currently used for gas operations; and for the eastern and western parcels of the East End site, since Duke was unable to breakdown the annual costs, only costs for remediating land within a 50-foot buffer zone around the pipelines on the eastern parcel of East End site and costs associated with the northeastern corner of the western parcel of the East End site that falls within a 50-foot setback from an existing vaporizer building should be recoverable. (Staff Ex. 1 at 45-46; Tr. IV at 914; Staff

Br. at 13, 19, 24.) OMA urges the adoption of Staff's recommendations, stating that they are in compliance with R.C. 4909.15 and achieve the balance between investor and consumer interests (OMA Reply Br. at 4).

Kroger asserts that the Commission should reject Duke's proposal to recover the deferred remediation costs; however, if some recovery is permitted, Kroger states that it should be limited to those costs that are just and reasonable and currently used and useful, or a maximum of $6,367,724, as recommended by Staff. Kroger believes Staff's recommendation appropriately limits the recovery to portions of the former MGP sites that are currently used and useful. However, Kroger asserts that an investigation into the prudency of the costs incurred by Duke is necessary and appropriate to determine the proper recovery of remediation expenses and Staff's recommended recovery should be reduced by the amount of costs that were imprudently incurred by Duke. (Kroger Br. at 10-12.)

OCC witness Hayes offers that Duke should not be permitted to recover the MGP-related costs from customers, arguing that the shareholders should be responsible for these costs. OCC argues that the costs associated with the two former MGP sites were previously recovered from customers in past rates. In OCC's view, Duke's shareholders have been aware of the risks associated with the MGP-related remediation concerns and have not addressed these concerns; instead, shareholders have benefited from the Company's rate of return, which Duke's customers have previously and continuously paid. (OCC Ex. 14 at 18, 35.) OCC/OPAE recommend that, if recovery is approved in theses cases, the permitted level of costs be borne equally by Duke's shareholders and its customers, net of any amounts recovered from insurance and third-party liability claims. Along with sharing the responsibility between customers and shareholders, OCC/OPAE believe that, since Duke has not been the sole owner of the MGPs dating back to the 1800's, *e.g.*, Columbia owned Duke's gas operations from 1909 to about 1946, a ratio of Duke's nonownership of the total MGP operational period should be applied to the amount Duke is permitted to recover. Likewise, OCC/OPAE argue that the same ratio approach should be applied to the purchased property that Duke did not own during the period of contamination. In addition, they contend that there should be a ratio developed to exclude costs related to time periods of MGP operations that predated the Commission's regulation of Duke, *i.e.*, prior to 1911. (OCC/OPAE Br. at 4, 92-93).

If Staff's proposal for limiting recovery to the used and useful portions of the property is adopted, OCC recommends Duke only be permitted to recover $1,164,144, which includes carrying costs, for the investigation and remediation. This amount is configured using OCC witness Campbell's estimates of what costs should be permitted as follows: $698,724 for the eastern and western parcels at the East End site; and $465,420 for the property at the East End site that contains sensitive infrastructure. For the West End site, Dr. Campbell asserts that no investigation and remediation costs should be

recoverable. (OCC Ex. 15 at 30-32, 38; OCC/OPAE Br. at 87-88.) OCC/OPAE state that, if Duke is permitted to collect investigation and remediation costs from customers, Duke should not be authorized to collect carrying costs (OCC/OPAE Reply Br. at 71).

Alternatively, if the Commission rejects Staff's proposal and determines that the entire East and West End sites are used and useful, OCC witness Campbell recommends Duke only be permitted to recover $8,027,399, which includes carrying costs, for the investigation and remediation at both the East and West End sites. This amount provides for recovery of $4,372,574 for the East End site and $3,654,825 for the West End site. (OCC Ex. 15 at 38-39; OCC/OPAE Br. at 88-89.)

4. Specific Investigation and Remediation Actions

a. Ohio EPA's Voluntary Action Program (VAP)

Duke witness Margolis states that Duke is acting prudently and in a reasonable and responsible manner in conducting these activities under the Ohio EPA's VAP rules. Mr. Margolis believes the VAP enables a party to have more control over the cleanup process, save time and money, and be able to expeditiously and efficiently conduct a site investigation and remediation. (Duke Ex. 23 at 6, 9; Tr. I at 141.)

The VAP, which is prescribed in R.C. Chapter 3746, is a set of rules, regulations, guidance, and other directives from the Ohio EPA that establish a process by which contaminated sites may be investigated and remediated to Ohio EPA standards (Duke Ex. 23 at 5; Duke Ex. 26 at 2, 5). According to Duke witness Fiore, a licensed professional geologist and an Ohio EPA CP for the remediation of Duke's East End site, the VAP is a voluntary program that was created in 1994 for the purpose of providing remediating parties with a process to investigate and remediate contamination, and then receive either a no further action (NFA) determination from a CP or a covenant not to sue (CNS) from the state of Ohio that no more remediation activities were required. If the remediating party opts to proceed with remedial activities without a CP, the party may not obtain an NFA letter or a CNS from the state. CPs act as agents of the state, within the VAP, and the VAP contains a comprehensive program regulating CPs, regarding items such as education, experience, initial and ongoing training, professional competence, and conduct, as further delineated in Ohio Adm.Code 3745-300-05. CPs are responsible for verifying that properties are investigated and cleaned up to the levels required by the VAP rules. Mr. Fiore explains the Ohio EPA: administers the VAP and Urban Setting Designations (USD); provides user-paid technical assistance to assist remediating parties regarding the VAP; is responsible for monitoring the performance of the CPs; and is required by law to conduct audits of 25 percent of the properties taken through the VAP to ensure that the sites have been properly addressed and that CPs and laboratories have performed work properly. (Duke Ex. 26 at 5-9; Tr. II at 549; Tr. III at 629.)

Mr. Fiore states that the VAP does not require a specific type of remediation and does not address cost analysis (Tr. II at 553-554). Duke witness Fiore states that a feasibility study, which is an exhaustive evaluation of potential remedial alternatives is required under the federal CERCLA, but it is not required under the VAP. However, he points out that the remediation at the East and West End sites is being done pursuant to the VAP and not under CERCLA; therefore, a feasibility study is not required. Duke did, however, evaluate different remedial alternatives to come up with its current plan, *i.e.*, excavation and in-situ solidification (ISS) at the East End site. According to the witness, there are other more expensive alternatives that Duke could have elected, *e.g.*, removal of all the impacted material down to the bedrock and putting in a containment structure. Mr. Fiore emphasizes that the excavation and ISS techniques are presumptive remedies, that remove the source material at the lowest cost for that material. These remedies are so presumptive the Ohio EPA allows landfills to provide discounts if a party is working under the VAP and disposes of the material in a landfill; thus, there is a financial benefit to exaction and disposing of the material under the VAP that is not present under CERCLA. (Tr. III at 640-644.)

According to Mr. Fiore, under the VAP rules, an NFA letter is very desirable because it is confirmation that a site has been appropriately investigated and remediated and that there are no unacceptable risks to current and reasonably anticipated future land users. In addition, an NFA letter is required to obtain liability relief in the form of a CNS. Also, the Ohio EPA, generally, will not issue an enforcement order on properties on which work is being undertaken in conformance with the VAP. (Duke Ex. 26 at 22.) Mr. Fiore states that, not only does the remediating party benefit from receiving an NFA letter and CNS, because it knows that all applicable standards have been met and there are no unacceptable risks to current or reasonably anticipated land users, but, often, third parties to a transactional-type process, such as buying and selling, require the NFA letters and CNS (Tr. III at 590).

b. Overview of the Investigation and Remediation on East and West End Sites

i. General - Remediation Technologies

The environmental work at the East and West End sites has been conducted following the guidelines of the Ohio EPA's VAP, under the direction of a VAP CP. For both the East and West End sites, VAP phase I and phase II assessments were conducted. The VAP phase I property assessments for the two sites determined that there was reason to believe that releases of hazardous substance or petroleum have or may have occurred on, underlying, or are emanating from the sites. The purpose of the VAP phase II property assessment was to determine whether all applicable standards are met or to determine that

remedial activities conducted in accordance with the VAP at the property meet, or will achieve, applicable standards. As a result of the VAP assessments, remediation action plans for portions of the sites, were prepared and, in some instance, implemented. (Duke Ex. 21A at 21-24.)

Ms. Bednarcik explains that the technologies typically considered for MGP remediation include: monitoring natural attenuation, excavation, solidification, in-situ chemical oxidation, thermal heating, containment, engineering controls, and institutional controls. In determining the remedial actions at the impacted sites, Duke worked with environmental consultants and took into consideration factors typically analyzed in a U.S. EPA feasibility study, including: whether remedial action is protective of human health and the environment; its effectiveness, both short-term and long-term; the ability to implement a particular action; and its cost. Duke also took into consideration the current and future use of the site, and the short-term and long-term liability of the site, based on the chosen remedial action. Risk assessments are performed, looking at the current risk to a number of potential groups of people that may be present or exposed to the site. Another factor considered is the state's regulatory cleanup program as it relates to the presence of source material on the site. For example, she notes that, based on discussions with the VAP CP, Duke proceeded with removal and/or in-situ treatment of source material, such as oil-like material (OLM) and/or tar-like material (TLM) in the subsurface, because the VAP requires the removal or treatment of such material to the extent technically feasible. In making the decisions on the recommended approach, Duke involved its in-house environmental professionals, its environmental consultants, including CPs, its legal advisors, and the Company's environmental and operations management. (Duke Ex. 21A at 24-25; Tr. I at 207-209; Duke Br. at 35-36.)

Mr. Fiore opines that a CP would not be able to issue an NFA to the East and West End sites based solely on the remedies of either implementation of engineering controls, such as asphalt or concrete, or on institutional controls, such as land use restrictions, because such controls, would not meet all applicable VAP standards. To meet the VAP criteria at these sites, removal or stabilization of the coal tar is necessary. According to the witness, other, less expensive activities, such as environmental covenants or surface capping, would allow the site to meet some standards, but not all applicable standards and would not be as protective of human health and the environment. (Duke Ex. 26 at 20-21, 23; Tr. III at 645.)

OCC/OPAE assert Duke produced no evidence that institutional and engineering controls would not have been adequate to control human exposure to chemicals of concern (OCC/OPAE Br. at 72-73). OCC witness Campbell asserts that Duke's expenditures were excessive and imprudent for MGP remediation. Dr. Campbell observes Duke's approach to remediation does not appear to have considered cost as a relevant factor. Dr. Campbell notes that, since the two sites were already capped with asphalt, concrete, or soil layers,

which limited human contact with potential residuals, the scope of the remediation should have been limited. He believes it would have been prudent for Duke to have developed remedial action plans incorporating cost-effective, protective measures for the MGP sites, instead of the much more expensive excavation and disposal approach employed by Duke. Dr. Campbell contends the Ohio EPA's VAP rules provide for protective remedial alternatives that are far less costly than those chosen by Duke, include engineering controls and institutional controls. For example, he states that, by applying institutional controls and adopting commonly used risk mitigation measures, soil remediation at the sites could have been accomplished without significant excavation, by construction of soil cover to prevent human exposure to contaminated soil. He explains that, with institutional controls, the point of compliance is from the ground surface to a minimum depth of two feet, and at depths greater than two feet when it is reasonably anticipated that exposure to soil will occur through excavation, grading, or maintenance. He further offers that one less expensive alternative to the approach taken by Duke is to control direct contact exposure to contaminated soils by constructing engineering controls, such as covers or asphalts. Institutional controls can then be established to limit future use of the site or prohibit excavation of the contaminated soil without protective equipment and soil handling requirements. (OCC Ex. 15 at 5, 8-12, 15; OCC/OPAE Br. at 62.)

Duke points out that OCC witness Campbell is not a VAP CP, does not possess any environmental certifications in Ohio, has never been involved in cleaning up an MGP, or any other site, under the VAP, and has no experience with and has not performed any work under the VAP. Thus, while Dr. Campbell offers opinions and other approaches that he believes would be appropriate for remediation on the sites, such approaches would not meet the applicable VAP standards. (Duke Reply Br. at 21-22.)

ii. Groundwater and Free Product

Duke witness Fiore explains that a USD under the VAP allows a remediating party to exclude potable groundwater use as an exposure pathway from further consideration. USD is a recognition by the Ohio EPA that groundwater in certain urbanized areas, serviced by community water systems, is not used for potable purposes and that chemicals from past industrial activities that may be present in such groundwater pose no perceptible risk to consumption by the community, because the groundwater is not being used and will not be used for drinking water purposes in the foreseeable future. Mr. Fiore points out that there are stringent regulatory criteria in Ohio Adm.Code 3745-300-10 for obtaining a USD and, based on these criteria, there would be complications obtaining a USD for the two MGP sites being considered in these cases. (Duke Ex. 26 at 14-17.)

Mr. Fiore notes that there is significant free product, which is defined as a separate liquid hydrocarbon phase that has a measureable thickness of greater than one one-hundredth of a foot, at the East and West End sites, in the form of liquid mobile coal tar.

He states that the VAP assumes that properties with free product exceed applicable standards for unrestricted potable use of groundwater. However, the Ohio EPA generally requires that free product, regardless of source, be removed, or mitigated to the extent practical, prior to issuance of an NFA under the VAP. Mr. Fiore offers that, while NFA letters have been issued to sites with free product, in limited instances in which free product did not impact groundwater and was stable, and where the director of the Ohio EPA granted a variance from the standards, no NFA has been issued to MGP sites in Ohio where free product remains. He states that the free product at Duke's sites will impact groundwater in excess of the standards and it is not stable; therefore, issuance of an NFA letter is impossible. In addition, the mobile free product could migrate from the two sites at issue to the Ohio River which is adjacent to the sites; thus, making the issuance of an NFA letter impossible. Moreover, the free product on the sites has migrated onto the ground surface, causing exposure to land users. For these reasons, Mr. Fiore contends that VAP requirements for migration of free product at the sites includes the removal of the free product. (Duke Ex. 26 at 17-19.) OPAE/OCC state that Duke witness Fiore's discussion of free product is in error and does not rebut Dr. Campbell's position that limited remediation of free product is necessary (OCC/OPAE Br. at 38).

OCC/OPAE state that, for groundwater, there are several considerations for protection under the VAP. First, groundwater can be protected by preventing chemicals of concern from reaching groundwater; however, this exposure pathway can only be protected if groundwater is not already contaminated and Duke determined that the exposure pathway could not be protected as groundwater was already contaminated. The second protection exposure pathway for groundwater under the VAP is soil saturation; however, this protection is not applicable because of the types of contamination at Duke's MGP sites. (OCC/OPAE Br. at 63; OCC. Ex. 15 at 15.)

According to OCC witness Campbell, for critical zone groundwater, such as at these MGP sites, the VAP rules call for use of institutional controls, USDs, and variances, to affect how and where groundwater standards are applied. Dr. Campbell asserts that the points of compliance for groundwater are the property or USD area. He states that remediation is only required to the extent needed to meet applicable Unrestricted Potable Use Standards (UPUS), found in Ohio Adm.Code 3745-300-08, at the boundaries. He believes that groundwater standards may not be exceeded at the property boundaries and would not be exceeded at the appropriate USD boundaries. Therefore, at the MGP sites, remediation beyond engineering and institutional controls is not required to meet UPUS inside those boundaries. He also states that Duke could have applied for a variance suspending or modifying UPUS within the boundaries or beyond the boundaries. He believes Duke's soil excavation below 20 feet and solidification of shallow and deeper soil to address groundwater is not required by the VAP rules; therefore, Duke exceeded reasonable VAP requirements. He states that, while Duke correctly concluded that potable use of groundwater at the MGP sites is not a complete exposure pathway, Duke

inappropriately applied the UPUS to all groundwater beneath the sites, which increased the costs of remediation. (OCC Ex. 15 at 17-18, 24-25.)

For the MGP sites, OCC asserts that, where the contaminant is on the property, the VAP rules require implementation of institutional controls, *e.g.*, use restrictions, or engineering controls, *e.g.*, fences or soil covers, to prevent on-site exposure to contaminated groundwater. Dr. Campbell explains that the VAP rules then require that groundwater emanating from the property must not exceed the UPUS. If the UPUS or surface water standards are not exceeded at the property boundary, no additional groundwater remedy is required. If a USD has been granted to the area around the property, then the same requirements apply, except that the point of compliance is the USD area boundary. If the UPUS are or will be exceeded at the property, surface area, or USD area boundary, the VAP rules require that groundwater beyond the boundary be restored to the UPUS or a reliable alternate water supply to be provided to affected users. (OCC Ex. 15 at 17-18.) Therefore, in the absence of evidence of groundwater or surface water failing to meet the UPUS beyond the property boundaries, there is no justification for Duke to spend money to remediate groundwater or soil to protect groundwater to meet a point of compliance beyond property boundaries, according to OCC/OPAE. Moreover, because groundwater at the MGP sites is not and cannot be used for potable purposes, and, in light of Cincinnati Municipal Code 00053-3, additional measures to remediate groundwater for potable use are not necessary. Therefore, OCC/OPAE assert that Duke need not have spent money for cleanup to protect groundwater beyond property boundaries. (OCC/OPAE Br. at 67-68.) Dr. Campbell offers that there is no indication that the groundwater discharging into the Ohio River has or will cause surface water standards in the Ohio River to be exceeded. In addition, there is no indication that the groundwater upgradient, or the groundwater east and west of the MGP sites, exceeds the UPUS (OCC Ex. 15 at 19).

According to Dr. Campbell, tar free product was not identified at the West End site or the eastern parcel of the East End site; however, it was identified at the western parcel of the East End site. While free product requires remediation, the witness asserts that it can be limited. Dr. Campbell states that the requirement under the VAP rules applies only to the extent groundwater beyond the property or USD area boundaries may be affected. The presence of free product does not require the extensive and imprudent soil remediation conducted by Duke, according to Dr. Campbell. Moreover, even if the free product affected groundwater at the property or USD boundaries, Duke could have applied for a variance under the VAP rules to limit the scope of remediation due to: technical infeasibility; the costs substantially exceeding the economic benefits; the proposed remediation, *i.e.*, institutional or engineering controls, will ensure that public health and safety will be protected; and the proposed remediation method is necessary to preserve, promote, protect, or enhance employment opportunities or the reuse of the affected property. (OCC Ex. 15 at 22-23.) OCC/OPAE state that the availability of

variances from applicable standards for USDs, free product, and other quantitative and qualitative standards is a key component of the VAP. Such variances are given because of the impracticality of a solution where the costs substantially exceed the economic benefits, according to OCC/OPAE. They believe Duke's failure to use the variance procedure to implement a more cost-effective remediation is indicative of imprudence. (OCC/OPAE Br. at 77-78.)

c. History and Description of Investigation and Remediation East End Site

Duke witness Bednarcik explains that cleanup began at the East End site because Duke was contacted by a developer who had land located adjacent to the site and the developer was planning to construct a large residential development. In addition, the developer had easements across a portion of the East End site for ingress and egress and utilities, as well as a landscape easement on part of the western parcel of the site to provide a buffer between the residential development and Duke's property and operations. (Duke Ex. 21 at 8-10; Duke Ex. 21A at 17-18; Staff Ex. 1 at 32; Tr. I at 256.)

Duke asserts that the entire East End site is presently used and useful in service to Duke's gas customers and it is a major component in Duke's gas supply portfolio that affects the integrity of its system and service to customers (Duke Ex. 22C at 10). The East End site is currently a gas operations center and is used by Duke's construction and maintenance division of the gas department for storage, staging of equipment, and offices (Duke Ex. 21 at 7; Staff Ex. 1 at 32). Propane produced gas from the East End site currently supplements Duke's provision of natural gas to its customers (Duke Ex. 20A at 4). With regard to future use of the East End site, Ms. Bednarcik states that Duke will retain and continue to maintain the current gas lines, construct new gas transmission lines, and operate the gas plant on the property (Duke Ex. 21A at 16).

Ms. Bednarcik explains that the remediation activities on the East End site have been sequenced to facilitate planned improvements on the site, so that gas activities could continue. According to the witness, the active use of the East End site necessitated the separation of the site into separate parcels. (Duke Ex. 21A at 18-19.) The Ohio EPA allows the segregation of sites into multiple identified areas (IAs) for environmental investigation and remediation purposes. Therefore, the East End site was separated into three smaller IAs, the central, western, and eastern parcels, as well as one purchased parcel. (Duke Ex. 21 at 10, 17; *See* map Staff Ex. 1 at 64.)

Duke witness Bednarcik notes that the eastern and western parcels were given a higher priority than the central parcel, because of their proximity to the planned residential development. In conjunction with the investigations, a risk assessment was conducted to determine the potential risk to human health due to the impacts on the

surface soil (top two feet of soil) and subsurface soil (top 15 feet of soil, which is the typical depth of construction activities). The risk assessment considered the possibility of inhalation of fugitive dust and chemicals of concern, and ingestion of, and dermal contact with, soil. (Duke Ex. 21 at 10-11; Duke Ex. 21A at 25; Staff Ex. 1 at 33.)

In 2010, the remediation action plans for both the eastern and western parcels of the East End site were finalized and permits were acquired from the Ohio EPA, Cincinnati, and others. For the East End site, a remedial action plan was developed to address potential environmental and human health impacts in the top 15 feet of soil, and to address potential environmental impacts in the form of OLM and/or TLM below 15 feet. In addition, air samples were obtained from Duke's onsite buildings and a communications plan, which included a community open house, fact sheets, and meetings with government officials and stakeholders, was executed. During the remedial activities on the eastern and western parcels, an independent environmental consulting firm monitored the ambient air at the perimeter of Duke's property. An air monitoring model and a dust action level were established. (Duke Ex. 21 at 11, 14; Duke Ex. 21A at 22, 25; Staff Ex. 1 at 33.)

With regard to the central and purchased parcels at the East End site, Duke witness Bednarcik testified that, based on the results of the soil and groundwater samples, a decision will be made regarding whether remedial actions are required. She notes that, without additional information concerning the presence or extent of impacts to these two IAs, cost estimates for their clean up can not be generated. On the eastern and western parcels, groundwater monitoring recommenced in 2012 to evaluate whether the concentrations meet the Ohio EPA standards. If the groundwater does not meet applicable standards, additional remedial measures may be required. In addition, excavation and in-situ solidification activities are planned for 2014 or 2015 for an abandoned road between the eastern and central parcels of the East End site, and remediation in the central parcel may be necessary in the future. (Duke Ex. 21 at 17-18; Staff Ex. 1 at 33; Tr. I at 183.)

OCC witness Campbell specifies a remedy for the East End site that limits the need for excavation to two feet in most locations, with 20 feet in the former tar pit. Specifically, Dr. Campbell offers that remediation on the site should be limited to the portions that were used and useful, and should include: engineering controls, in the form of fencing and two-foot soil cover for protection of workers from direct contact with contaminated soil; and institutional controls, in the form of an environmental covenant restricting future use of the property to commercial/industrial use, prohibiting use of groundwater, and requiring risk mitigation measures in the form of a soil management plan. (OCC/OPAE Br. at 82; OCC Ex. 15 at 28.)

For both the eastern and western parcels of the East End site, OCC witness Campbell states that many of the activities conducted by Duke were not necessary; therefore, he recommends Duke not be permitted to recover costs for activities such as security, air and vibration monitoring, excavation, excavation shoring, water management and disposal, and off-site disposal of soil and solidification. He also recommends the investigation and designing costs be reduced and the amount of time required to complete the work be reduced to 45 days; thus, reducing Duke's internal and construction management costs. (OCC Ex. 15 at 30.)

Staff notes that there is sensitive infrastructure on the East End site that is currently used and useful for providing natural gas service. Staff recommends the MGP remediation expenses associated with this sensitive infrastructure be recoverable. (Staff Ex. 1 at 43.)

i. Eastern Parcel of East End Site

Duke witness Hebbeler asserts that the eastern parcel has continued to be used and useful during the entire operating history. He explains that there are, currently, three underground gas lines providing service to Duke's customers on the eastern parcel. These gas mains traverse the parcel and serve as feeds into the system and the propane injection facility that is located in the central parcel. One of the lines crosses the Ohio River. In addition, the eastern parcel is used for a clean fill area to dispose of spoils from main and service excavations (Duke Ex. 22C at 3-4, 7, 10).

Staff offers that a visual inspection of the eastern parcel reveals that it is a 9.7 acre vacant field without any visible permanent structures, except for a boundary fence. However, Staff reports that there are areas of the parcel that are used and useful for providing natural gas distribution service, because underground gas mains transverse the parcel to serve the propane injection facility and the city gate located in the central parcel, and they provide access to underground natural gas pipelines. Therefore, Staff recommends Duke only be permitted to recover MGP costs incurred for the land 25 feet on each side of the centerline of the gas pipelines; thus, providing a 50-foot buffer around the pipelines to allow for the maintenance and repair of the pipelines. Staff witness Adkins states the 50-foot buffer is supported by his discussion with the Commission's gas pipeline safety staff and the U.S. Sixth Circuit Court of Appeals in *Andrews v. Columbia Gas Transm. Corp.*, 544 F.3d 618 (6th Cir. 2008) (Staff Ex. 1 at 41, Att. MGP-5, -12; Staff Ex. 6 at 12-13, 17, Att. KA-4; Tr. IV at 889, 895.)

The factors looked at by Duke when evaluating the eastern parcel of the East End site were: the parcel would be retained by Duke for extensive utility operations; there were high pressure gas mains traversing the site, which would need maintenance and eventual replacements; and TLM and OLM was present on the site. The available options for this

parcel included: excavation with off-site disposal, solidification, and capping. Duke witness Bednarcik offers that, while capping was the least cost option in the short term and the easiest to implement, it would not meet the VAP standards and would not reduce the long-term liability, as the mobile TLM and OLM would still be present. According to Ms. Bednarcik, after considering all factors, excavation and solidification were chosen as the proper remediation processes; thus, reducing long-term liability on the site and removing or binding the contaminants. Solidification was chosen as the preferred option due to cost-effectiveness, since it would minimize off-site disposal costs and to minimize future leaching and dermal contact. (Duke Ex. 21A at 25-26; Tr. II at 294.) Excavation and solidification, to bind up TLM and OLM in the top 20 feet of the site, on the eastern parcel of the East End site, occurred between 2011 and 2012 (Duke Ex. 21 at 11, 13-14; Staff Ex. 1 at 33.)

Duke disagrees with Staff's recommendation to only permit recovery of costs on the eastern parcel for the 25 feet on each side of the gas pipelines, noting that the entire eastern parcel was the location of historic gas-related utility operations that have resulted in environmental liabilities related to those gas operations. According to Ms. Bednarcik, this property continues to be an integral part of Duke's utility system. The witness asserts that Duke has the responsibility to remediate the contamination of the entire site under CERCLA. (Duke Ex. 21A at 3-4.) Moreover, Duke witness Hebbeler opines that Staff failed to recognize the necessity of the working area requirements on the eastern parcel when dealing with pipelines that cross a major body of water. Mr. Hebbeler notes that, if replacement of these facilities across the river is needed, such operations would require an area of approximately 200 feet by 200 feet. The witness also asserts that, when considering this issue, one must view the history of the site, and, based on past maintenance on the parcel, he could see a distance in excess of 310 feet affected by the excavation. He notes that the eastern parcel is only 415 feet wide. (Duke Ex. 22C at 4-5.)

Staff disagrees with Duke's assertion that it should be permitted to recover costs for the whole parcel because it may need to replace a pipeline. Staff submits that this argument is speculative and hinges on an underlying premise that may never occur. In addition, Staff notes that Duke ignores the location of the pipelines and the fact that remediation efforts on the eastern parcel are well over 100 feet from the pipelines. Moreover, Staff states that there is no evidence that the eastern parcel was used as a clean-fill site or that specific portions of the parcel will be used as a clean-fill site in the future. (Staff Br. at 20-21, 23.)

ii. Western Parcel of East End Site

Duke witness Hebbeler states that the western parcel includes new vaporizers for the propane facility, a new entrance road, and a new flaring station. Mr. Hebbeler states that the entire western parcel is needed as a buffer for the flaring operations. In addition, he states that Staff did not recognize the limits of the sensitive utility infrastructure on the western parcel and the need for the balance of the parcel to be used as a buffer for the sensitive infrastructure limits. (Duke Ex. 22C at 8-9.)

Staff points out that the new flaring station referred to by Duke was not operational until November 1, 2012, seven months after the date certain; therefore, it was not used and useful on the date certain. Staff also notes that the old flaring station mentioned by Mr. Hebbeler is portable and it was not located on the western parcel during Staff's investigation. In addition, Duke did not mention the flare-off valve until it filed Mr. Hebbeler' s second supplemental testimony, almost four months after the Staff Report was filed. Moreover, Staff states that there is no evidence that remediation was necessary to operate or maintain the portable flaring station, or that the entire western parcel is needed or used to operate the old flare-off valve. Furthermore, Staff argues that Duke's buffer zone argument is similar to those raised by applicants, but rejected by the Commission, in previous rate case proceedings. *See In re Ohio Edison Co.*, Case No. 77-1249-EL-AIR, Opinion and Order at 4 (Nov. 17, 1978); *In re Ohio American Water Co.*, Case No. 79-1343-WW-AIR, Opinion and Order (Jan. 14, 1981). (Staff Br. at 27-28; Tr. III at 722.)

According to Staff, until very recently, the western parcel of the East End site was vacant, with no above-ground structures and no underground gas mains. While, in 2012, Duke began construction of new vaporizers for its propane facility near the northeast corner of the western parcel by the current vaporizers, the new vaporizers were not in operation on the date certain in these cases. Therefore, Staff concludes that none of the remediation costs at the western parcel were incurred to operate, maintain, or repair natural gas plant that was in service and used and useful at the date certain, except for expenses incurred in a small area in the northeast corner of the parcel. Staff recognizes a 50-foot minimum setback from the existing vaporizer building based on the National Fire Protection Association Code requirements for liquid-gas vaporizers and gas-air mixers. Therefore, Staff believes the land within 50 feet of the existing vaporizer building is used and useful, and may be recovered; however, none of the expenses incurred in the remainder of the western parcel should be recoverable in rates. (Staff Ex. 1 at 42-43; Staff Ex. 6 at 14-15; Tr. IV at 889.)

Duke witness Bednarcik explains that the factors taken into consideration for the remediation of the western parcel of the East End site include: Duke's retention of the property; the extent of TLM and OLM, especially the location of a former tar lagoon; the fact that impacted groundwater was likely migrating outside the property; and the

presence of sensitive underground infrastructure. While solidification was considered, excavation was ultimately chosen, in part, due to the presence of sensitive underground utilities. (Duke Ex. 21A at 27.) Ms. Bednarcik states that excavation began on the western parcel of the East End site in 2010 and was finalized in 2011. For the western parcel, Duke used vibration monitors to regulate work in order to protect sensitive underground utilities and facilities, including sewer and process lines. In addition, Duke employed a retention and bracing system to excavate and remove impacted soil. In the southern half of the western parcel of the East End site, impacted material was excavated to a depth of approximately 40 feet, due to the presence of deeper OLM and TLM impacts. Solidification was not used on the western parcel due to the presence of limestone boulders, which made the solidification process impractical. Duke witness Bednarcik states that impacts below 40 feet will be treated by another remedial action in future phases of the site work. (Duke Ex. 21 at 11-14; Staff Ex. 1 at 33.) In addition, Duke expects to implement institutional controls on both the eastern and western parcels, such as land use and/or groundwater restrictions as part of its final remedy (Duke Ex. 21A at 28).

iii. Central Parcel of East End Site

According to Mr. Hebbeler, the central parcel is comprised of natural gas operations that occupy the entire parcel. The operations in the central parcel are: the propane peak shaving plant, sensitive utility infrastructure, pipelines, and field operations, including parking and storing materials and equipment. He states that all three permanent buildings on the parcel were constructed during the MGP era and are currently used in the process for making propane air and mixing it with natural gas. (Duke Ex. 22C at 7-8.)

Staff states that its investigation of the central parcel of the East End site revealed active natural gas operations on the entire parcel. Such operations include a propane injection facility, a city gate transfer point between Duke Ohio and Duke Kentucky, meeting facilities, a field operations center, materials storage for field construction activities, and an equipment parking and staging area. Staff believes the entire central parcel was both used and useful for providing natural gas distribution service on the date certain in these cases; therefore, the remediation costs incurred at this parcel should be eligible for recovery. (Staff Ex. 1 at 42; Staff Ex. 6 at 14.) OCC believes Duke has not completed investigation or conducted remediation on the central parcel. However, OCC states that remediation costs for the central parcel should be limited to prudently incurred costs. (OCC Ex. 15 at 30.)

iv. Purchased Parcel of East End Site

Duke sold part of the original MGP site on the East End site, located west of the western parcel, in 2006; however, this property was reacquired by Duke in 2011. As part of this 2011 real estate transaction, Duke also acquired nine acres of numerous contiguous

properties located to the west, which were suspected of being impacted by the former MGP operations. (Duke Ex. 21A at 13.) The property sold by Duke in 2006 constitutes only a small portion of the nine acres Duke purchased in 2011 (Tr. II at 342). According to Ms. Bednarcik, an investigation in 2011 on a portion of the purchased property indicated the presence of MPG impacts and a more thorough study was scheduled for 2012. (Duke Ex. 21 at 15; Staff Ex. 1 at 64.) The person who sold the nine acres to Duke in 2011, bought the parcels that comprise the nine acres for a combined total purchase price of approximately $1.9 million (OCC Ex. 9; Tr. II at 365). Mr. Wathen states that the purchased property was recorded on the Company's books as nonutility plant; it is not part of rate base. Therefore, if it is sold, any proceeds would go to the shareholders, since customers had no investment in the property. Mr. Wathen believes ratepayers should pay for the remediation on the purchased property, because the remediation expenses are necessary business expenses that do not have anything to do with who owns the plant. (Tr. III at 755-756.)

According to Staff, Duke purchased the property for $4.5 million and the $2,331,580 included for recovery in the application in these cases represents the amount over and above the fair market value of the land that Duke paid in order to acquire the property (Staff Ex. 1 at 34). Staff notes that, historically, the purchased parcel was a residential neighborhood that was never part of the former East End MGP site. Currently, Staff describes the property as a large vacant field with no visible structures or underground facilities that are used and useful in providing natural gas distribution service. According to Staff, Duke is requesting to recover the premium it paid to the developer so it could purchase the land in order to protect itself from future liability arising from the presence of MGP impacts. Therefore, Staff recommends that none of the deferred expense associated with the purchased parcel be recovered from customers. (Staff Ex. 1 at 43; Staff Ex. 6 at 15-16, Att. KA-6.) Staff further notes that Duke witness Wathen admits the purchased property is not included in rate base and is not used and useful (Staff Br. at 17; Tr. III 755, 792). Moreover, there is no evidence, according to Staff, that the purchased property will eventually be used to provide gas service to customers. Staff argues that, although Duke claims it needs the purchased property for some future purpose, past precedent reveals the Commission has refused to accept similar future use arguments for the basis of recovery. *In re Toledo Edison Company*, Case No. 75-758-EL-AIR, Opinion and Order (Nov. 30, 1976). (Staff Br. at 17-18.)

Kroger asserts the costs associated with a premium Duke paid to a developer to purchase property back are not O&M expenses related to rendering gas service and cannot be recovered from customers. Kroger states that the purchased property is a nonutility asset, was not used and useful in the provision of gas distribution service as of the date certain, and, therefore, the costs associated with the purchased property should not be recovered from customers. (Kroger Br. at 9.)

OCC/OPAE believe Duke's decision to sell this portion of the East End site in 2006 was imprudent, as it changed the property use so as to cause or accelerate the need for remediation and potentially heighten the level of remediation. Prior to the sale in 2006, OCC/OPAE state that the property had both engineering and institutional controls in place and these controls were considered adequate prior to the sale of the property. Therefore, given that the initial sale of the property was imprudent, the scope and necessity of remediation was also imprudent. (OCC/OPAE Br. at 58-60.)

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 cleanup of any impacts off-site that can be linked to the operations conducted at the site while under Duke's ownership. Ms. Bednarcik states that future use of the purchased parcel will be determined based on the needs of Duke after the completion of any required investigation and remediation. (Duke Ex. 21A at 5, 16.)

d. History and Description of Investigation and Remediation West End Site

Duke witness Bednarcik explains that cleanup began at the West End site because, once the Ohio Department of Transportation and the Kentucky Department of Highways finalized their preferred location for a new Brent Spence Bridge Corridor Project, which directly crosses the West End site, certain Duke facilities on that site needed to be relocated, including a large substation, a number of transformer bays, and underground transmission lines, as well as the replacement of a transmission tower. Because the surface cap on the West End site, which worked as an interim measure to limit contact with potentially impacted material, would be disturbed with the bridge construction and the relocation of power delivery equipment, Duke decided to plan for a phased remedial investigation. Moreover, according to Ms. Bednarcik, the remediation schedule was also accelerated because the new bridge structures, if constructed prior to remediation, would hinder and greatly increase the cost of future remediation work due to accessibility restrictions. (Duke Ex. 21 at 8-9, 15; Duke Ex. 21A at 19; Staff Ex. 1 at 32.)

The West End site is parceled into three IAs: Phase 1, the area south of Mehring Way between the two substations; Phase 2, the majority of the area north of Mehring Way; and Phase 2A, the westernmost portion of the property north of Mehring Way. (Duke Ex. 21 at 15-16; *See* map Staff Ex. 1 at 61-62.)

Ms. Bednarcik explains that, at the West End site, a portion of the 1916 generating station is still standing and is currently used for electrical storage and for housing electrical relays. In addition, the property contains transmission towers, two large substations, and transformer bays. A gas pipeline also crosses the Ohio River, directly east of the Brent Spence Bridge, and enters Ohio at the West End site. A gas generating/pump

house is also on the West End property and a northern portion of the property, Phase 2, is used by Duke employees for parking. (Duke Ex. 21 at 7, 16; Staff Ex. 1 at 34.)

In determining the proper remediation for the West End site, Ms. Bednarcik states that the factors considered include: Duke's retention of the property; the presence of TLM and OLM; and the nature and extent of construction work in connection with the bridge project and associated electrical utility relocation. Ultimately, Ms. Bednarcik explains that containment was eliminated as a remedy due to the cost and keying the containment wall into the bedrock at the site. Rather, excavation and solidification were chosen as the preferred options for the West End site. (Duke Ex. 21A at 28.)

Phases 1 and 2 were the first parcels to be addressed, because those are where Duke will be constructing the new electrical equipment to replace equipment impacted by the bridge construction. In 2010, for Phases 1 and 2: the majority of the soil and groundwater investigation occurred; the remedial design was developed and consultants contracted through a bid process for the detailed design, construction management, and air monitoring; the communications plan was developed; and permits were obtained. Remedial action for Phases 1 and 2 started in 2011 and continued into 2012, wherein the soil would be excavated to 20 feet, with solidification of deeper material impacted by OLM and TLM. Remediation work was expected to be completed in 2012 for Phases 1 and 2. In addition, in 2012, Duke was to extend the remediation to Phase 2A, which was expected to be completed in 2013. Ms. Bednarcik states that, once Duke completes the construction of the new electrical equipment and the demolition of the current equipment, in Phases 1 and 2, environmental work will recommence. Potential off-site impacts will be evaluated once the areas where the main former MGP processes were located have been evaluated and remediated. (Duke Ex. 21 at 15-16, 18-19; Staff Ex. 1 at 35.)

OCC witness Campbell calculated the cost of the remedy for the West End site to include: institutional controls, in the form of maintenance of the fence and maintenance of the previously existing engineered cover for Phase 2 for the West End site (OCC Ex. 15 at 35).

Duke witness Hebbeler asserts that the entire West End site is presently used and useful in service to Duke's gas and electric customers and it is a major component in Duke's gas supply portfolio that affects the integrity of its system and service to customers. He states that the West End site is entirely included as plant-in-service for electric customers today. (Duke Ex. 22C at 11, 14). According to Duke witness Bednarcik, the environmental remediation costs for the entire West End site should be recoverable because the historic manufactured gas produced at this site was distributed and used by gas ratepayers during the time the MGP was in operation, thus, Duke customers benefitted from the services provided by the operation of the MGPs at this location. (Duke Ex. 21A at 5-7; Tr. I at 273.)

i. Phase 1 of West End Site, South of Mehring Way

Staff states that most of the Phase 1 parcel on the West End site is used for electric distribution and transmission facilities. Staff notes that, while there are two natural gas pipelines and a small structure that houses a city gate metering and regulating station on the eastern edge of the parcel, all of the MGP remediation work was conducted in areas devoted to electric transmission. None of the remediation work was performed on the parcel devoted to the natural gas pipelines; therefore, Staff contends the expenses incurred were not related to the operation, maintenance, or repair of natural gas distribution facilities and should not be recoverable through gas rates. (Staff Ex. 1 at 44-45, Att. MGP-10; Staff Ex. 6 at 9-10, Att. KA-3.)

Currently, Duke owns and operates two gas transmission pipelines on Phase 1 that supply natural gas to the Ohio distribution system. The termination point of this transmission pipeline is the meter and regulator station located on Phase 1. In addition, this building houses the remote terminal units equipment, which is part of the supervisory control and data acquisition system that monitors and controls the natural gas distribution system. This line supplies approximately 20,000 customers at peak hour. Duke plans to install a new gas transmission line at this property. As with the eastern parcel of the East End site, Mr. Hebbeler notes the necessity for a work area on the Phase 1 parcel to install and maintain the pipeline crossing the Ohio Rive. (Duke Ex. 21A at 11-12; Duke Ex. 22C at 12-13.)

OCC witness Campbell testifies that reasonable expense for the Phase 1 parcel on the West End site would have been: the construction of an upgraded two-foot soil cover in areas where needed to protect workers; soil excavation for relocation of the electrical substation following a soil management plan; institutional controls through an environmental covenant restricting future use of the property to commercial/industrial uses and prohibiting groundwater use; soil excavation limited to a 20-foot depth in the area where the new underground electric cables would be routed; and groundwater monitoring (OCC Ex. 15 at 35).

ii. Phase 2 of West End Site, North of Mehring Way

Much of the Phase 2 parcel on the West End site was formerly used by Duke employees from various departments as a parking lot (Duke Ex. 22C at 12; Staff Ex. 1 at 44). Phase 2 also includes a multipurpose building that was not used for utility service and transmission towers. The parking lot and multipurpose building were removed for the remediation work and have not been replaced. Staff states that the parcel is now mostly compacted gravel devoid of any permanent structures, except for the electric transmission towers. Staff submits that there are no facilities on the Phase 2 parcel that

were used and useful for providing natural gas service to customers at the date certain in these cases. Therefore, Staff recommends Duke not be permitted to recover any of the O&M expenses incurred during remediation activities on the Phase 2 parcel, because they were not related to the operation, maintenance, or repair of natural gas plant-in-service. (Staff Ex. 1 at 44, Att. MGP-9; Staff Ex. 6 at 8-9, Att. KA-2.) Staff notes that the parking lot was used by numerous Duke units that were not solely devoted to providing services for gas customers. Therefore, Staff asserts that, if Duke is entitled to recover remediation costs related to the parking lot, these costs should be allocated among various units so gas customers only pay a portion of the costs. (Staff Br. at 14-15.)

Duke witness Hebbeler notes that, while it is not possible to continue using the Phase 2 property while it is undergoing remediation, when remediation is complete, the Company plans to continue use of the property. (Duke Ex. 22C at 12.) Specifically, Duke intends to retain the Phase 2 parcel for electric transmission and distribution use, and it is anticipated that parking for Duke employees at this location will be reinstated after the completion of remediation efforts (Duke Ex. 21A at 12).

5. MGP Legal Arguments

a. Legal Obligation to Remediate

Duke notes that no party has questioned that the Company has liability for the remediation of the East and West End MGP sites or that remediation is necessary (Duke Br. at 31; Tr. IV at 884). Duke explains that, under federal and state environmental laws, CERCLA and R.C. Chapter 3746, as the current owner of the MGP sites and as a direct successor to the company that formerly owned and operated the MGPs, Duke is responsible for environmental cleanup on the sites. Duke contends it is responsible not only for the impacts within the boundaries of the historic site directly under the location of historic equipment, but also for any cleanup required off-site that can be linked to the operation conducted at the MGP site while under Duke's ownership and/or operation. (Duke Ex. 21A at 33-34; Duke Ex. 23 at 6.)

According to Duke, CERCLA imposes retroactive and strict liability for remediating contaminated sites on current and past owners or operators of a site. In addition, the state of Ohio imposes liability on parties that own or operate contaminated properties, *e.g.*, R.C. Chapters 3734 and 6111. The state has also enacted laws and regulations to encourage voluntary cleanup, as a proactive, flexible, and cost-effective substitute for a sanction-based enforcement liability approach. According to Duke, the VAP is one such proactive program. Duke states that, while the VAP is labeled voluntary, based on the liability imposed by CERCLA, there is really nothing voluntary about it, other than the flexibility with respect to accomplishing the remediation. (Duke Br. at 5-6.)

In response, Kroger points out that Duke's remediation efforts under the VAP will not necessarily meet CERCLA standards. Kroger offers that Duke has provided no evidence to show that the VAP standards are equal to or more stringent than the CERCLA standards. Therefore, Kroger asserts that Duke's argument that it is necessary to conduct this remediation in order to comply with CERCLA should be ignored, as Duke's own testimony shows that Duke has made no effort to actually comply with CERCLA. (Kroger Reply Br. at 8-9.)

While CERCLA authorizes the Ohio EPA to respond to releases or threatened releases of hazardous substances that may endanger public health, welfare, or the environment, OCC points out that Duke voluntarily undertook the remediation at the MGP sites and has not been faced with an enforcement action by either the U.S. EPA or the Ohio EPA. OCC states, and Kroger agrees, that the strict liability provisions of the CERCLA apply to owners and operators, not customers. (OCC/OPAE Br. at 11-12; Kroger Reply Br. at 8.)

As noted by the Company, no party disagrees that there is liability attached to the remediation of the MGP sites at issue in these cases. There is no dispute that CERCLA imposes retroactive and strict liability for remediating MGP sites on past and present owners. In addition, no party disagrees that the Ohio EPA's VAP is an appropriate program for responsible entities to use when remediating contaminated sites in Ohio. Rather, the primary disagreement amongst the parties is whether the statute permits the inclusion of the costs of such investigation and remediation in a rider charged to Duke's customers and whether the costs incurred, as of December 31, 2012, were prudent. While intervenors appear to infer that, since the VAP is a voluntary program, Duke could have chosen to waylay its remediation efforts, the Commission disagrees. As we stated in our Order in the *Duke Deferral Case*, the environmental investigation and remediation costs are business costs incurred by Duke in compliance with Ohio and federal regulations and statutes. Based on the record in these cases, the Commission believes that Duke acted appropriately in responding in a proactive manner to addressing its obligations to remediate the MGP sites in Ohio.

b. R.C. 4909.15(A)(1) - Used and Useful

i. Arguments by Parties

Staff states that, when fixing rates, the Commission must determine the rate base by the valuation as of the date certain of the property that is used and useful in rendering public utility service, pursuant to R.C. 4909.15(A)(1). In addition, the Commission must determine the cost to the utility of rendering the public utility service for the test period, pursuant to R.C. 4909.15(A)(4). Staff submits that the Supreme Court states, in *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 167, 423 N.E.2d 820 (1981) (*Consumers'*

Counsel 1981), that "R.C. 4909.15(A)(4) is designed to take into account normal, recurring expenses incurred by utilities in the course of rendering service to the public for the test period." (Staff Br. at 7-8.) OMA agrees precedent supports the principle that expenses related to property that is no longer used and useful is not appropriate for recovery (OMA Reply Br. at 4).

According to Staff, the real issue in these cases is whether the remediation costs Duke seeks to recover are recoverable expenses under R.C. 4909.15(A)(4). Staff asserts that it is a well-established precedent that expenses associated with property that is not used and useful must be excluded from recovery. Staff relies on the Commission's decision in *In re Ohio Edison Co.*, Case No. 89-1001-EL-AIR, Opinion and Order (Aug. 16, 1990) (*Ohio Edison I*), for the principle that various kinds of expenses, including O&M expenses, must be matched with property that is used and useful during the test year. In *Ohio Edison I*, the Commission excluded O&M expenses associated with a facility that was not in operation during the test year. Staff also refers to *In re Ohio Edison Co.*, Case No. 07-551-EL-AIR, Opinion and Order (Jan. 21, 2009) (*Ohio Edison II*), wherein the Commission denied the recovery of expenses associated with securing and maintaining several retired generation facilities. (Staff Br. at 8-10.)

Staff witness Adkins states that, while Duke may be liable for remediation of the MGP sites under federal or state law, the fact that remediation costs may be necessary does not mean they are recoverable from ratepayers. These MGPs ceased operations in 1928 and 1963, so they were not used and useful on the March 31, 2013 date certain in these cases. Staff recommends that only expenses related to utility property that is both used and useful in rendering gas distribution service on the date certain be included in gas rates. To determine which segments of the sites were used and useful on the date certain, Staff reviewed the data supplied by the Company, reviewed the historical aerial photographs from sources dating back to 1993, and Staff personally observed the sites. Staff used the following three-step process to determine whether portions of the sites should be assigned remediation costs: identify the site boundaries and all facilities and structures on the sites; determine whether identified structures and facilities were used and useful; and, if facilities and structures were used and useful, determine if remediation work was performed on the area. (Staff Ex. 6 at 4-8, Att. K-1.)

Staff asks that the majority of the remediation costs requested by Duke be disallowed, asserting that, under Ohio law, the used and useful standard must be applied in these cases to determine the recoverability of the MGP costs. In addition, Staff argues that allowing Duke to recover all of its remediation costs causes inequitable cross-subsidies, including that current customers would be subsidizing: electric customers by paying for the remediation of electric facilities; prior generations of Duke's customers by paying for remediation of MGPs that have not provided gas in 50 years; and future generations of Duke's customers by paying for the remediation of vacant properties that

may or may not be used in the future to provide gas service. (Staff Br. at 2-3.) Duke disagrees with Staff's argument, contending that Staff overlooks the critical fact that the remediation of the MGPs stems from the Company's status as a real property owner and a former MGP owner and operator. Duke notes that the rules and events necessitating remediation did not exist when the MGPs were in operation and the costs are current costs the Company is incurring today; there would have been no basis for seeking recovery of the prior generations of customers. (Duke Reply Br. at 11.)

Duke witness Hebbeler disagrees that the current use of MGP sites is relevant for purposes of these proceedings because: environmental remediation at these sites is a current cost of business, due to the Company's ownership of these properties and liability for historic operations; and these MGPs were used to serve gas utility customers in the past. (Duke Ex. 22C at 2.) Columbia argues that Duke's request to recover deferred MGP-related expenses is authorized by statute, permitted under the Supreme Court's precedent, and consistent with past precedent of the Commission; therefore, Duke should be authorized to recover its necessarily and prudently incurred environmental investigation and remediation costs, regardless of whether the remediation sites were used and useful as of the date certain in these cases. (Columbia Reply Br. at 1).

Duke contends that Staff's argument that the Company's current used and useful operations must sit on top of the MGP residuals in order for cost recovery to be obtained is misplaced. Duke reasons that the ratemaking formula found in R.C. 4909.15 requires a three-part ratemaking formula. As part of that formula, under paragraph (A)(1), property must be used and useful in order to be reflected in the valuation of rate base for establishing rates; however, under paragraph (A)(4), which pertains to costs or operating expenses to the utility of rendering service, contains no limitation on the basis of used and useful. Duke asserts that the Commission already settled this issue in the *Duke Deferral Case* when it found that the MGP remediation costs represent necessary costs of doing business. Therefore, Duke advocates that the used and useful standard in R.C. 4909.15(A)(1), which applies to valuation of rate base or utility plant in service, is not applicable to an operating expense such as MGP remediation costs. (Duke Br. at 9; Duke Reply Br. at 10.)

Even assuming the Commission adopts the used and useful standard proposed by Staff, Duke maintains that full recovery is still appropriate because all of the properties where the former MGP operations were conducted and remediation is necessary under state and federal law are, in fact, currently used and useful in the provision of utility service. The sites being remediated by Duke have been continuously owned and operated by the Company, including its predecessors, in connection with its utility operations. Moreover, Duke contends that the costs were prudently incurred. (Duke Br. at 9, 15.)

Duke witness Wathen points to the Commission's decision in the *Columbia Deferral Case* to support Duke's position that, even if the MGP property is no longer used and useful, costs for remediation are recoverable. Mr. Wathen rationalizes that the Commission granted Columbia deferral authority for the MGP site at issue in the *Columbia Deferral Case*, acknowledging that Columbia no longer owned the property and that it was not currently used and useful, and stating that Columbia is the party responsible for the environmental clean up. Duke contends that, if the Commission's standard for recovering such costs was that the property had to be owned by the utility and currently used and useful, the Commission would not have allowed the deferral of costs in the *Columbia Deferral Case*. (Duke Ex. 19C at 6-7, 9.)

Duke states that *Ohio Edison I* is distinguishable from the instant cases, noting that, at issue in *Ohio Edison I*, was whether O&M costs directly related to maintaining an existing plant that was not in service for the benefit of customers during the test period should be reflected in rates. Duke emphasizes that, contrary to Staff's assertion, *Ohio Edison I* does not contain a broad pronouncement that all utility expenses must be directly matched with plant-in-service in order to be recoverable. Moreover, *Ohio Edison I* does not relate to environmental remediation costs, costs associated with real property, or costs that have been deferred. Similarly, Duke observes that, in *Ohio Edison II*, the recoverability of expenses was directly associated with maintaining a generating plant that was no longer providing service to customers; therein, the Commission questions the utility's elective expenditure of funds for a plant that was not being used. Conversely, in the instant cases, Duke points out the Commission is faced with legally required environmental cleanup costs, associated with real property, for which deferral has been granted. (Duke Reply Br. at 6.)

Duke responds that adoption of Staff's unsubstantiated concept of matching the expenses to used and useful plant would result in legitimate costs of providing service being unrecovered. Duke contends that there is no statute or regulation that requires such matching; instead R.C. 4909.15(A)(4) provides that recoverable expenses are those related to the rendition of service. According to Duke, in some cases, those expenses are tied to service that was previously rendered, such as when deferred costs are amortized and recovered through rates. (Duke Reply Br. at 5.) In addition, Columbia notes that the matching principle espoused by Staff is not a well-established precedent as maintained by Staff. Columbia notes that this principle has only been applied by the Commission three times in the last 35 years, primarily in instances where utilities sought to recover expenses they chose to incur by maintaining generating facilities that were no longer used. Here, Duke is seeking to recover costs it had to incur due to liability under CERCLA. (Columbia Reply Br. at 10.)

Staff disagrees with Duke's assertion that whether or not the MGP sites were used and useful is irrelevant, in that Duke believes it is automatically entitled to recovery of the

remediation costs if it proves that the costs were prudently incurred. Staff asserts that Duke's argument is inconsistent with Ohio law, referring to the Supreme Court's decision in *Dayton Power & Light Co. v. Pub. Util. Comm.*, 4 Ohio St.3d 91, 102-103, 447 N.E.2d 733 (1983) for the concept that, although the costs were prudently incurred, the costs were not recoverable from ratepayers under R.C. 4909.15(A)(4). Staff believes the Supreme Court clearly stated that the used and useful standard is not limited to determining what property belongs in rate base; rather, the standard must be applied to costs utilities seek to recover under R.C. 4909.15(A)(4) as well. (Staff Br. at 11-13.)

OCC agrees that the costs related to investigation and remediation at MGP sites that are not currently used and useful for natural gas distribution service should not be recoverable from customers. (OCC Ex. 14 at 26.) OCC/OPAE emphasize that no one in these cases disputes that the underlying MGP facilities that caused the contamination are no longer used and useful. They state that the land and any gas facilities at the MGP sites that were determined to be used and useful, under R.C. 4909.15(A)(1), as of the date certain in these cases did not cause the contamination. In addition, OCC/OPAE offer that the expenses for investigation and remediation were not incurred in rendering public utility services, in accordance with R.C. 4909.15(A)(4). Therefore, such costs are not recoverable from customers. (OCC/OPAE Br. at 17-24.) Kroger agrees that Duke's request for recovery should be denied because the MGP sites have not been used and useful in the provision of manufactured gas service since, at least, 1963, and the MGP-related costs were not incurred by Duke in the rendering of public utility service during the test period, in accordance with R.C. 4909.15(A)(1) (Kroger Reply Br. at 7).

Columbia argues that the arguments by OCC and Kroger are irrelevant, noting that Duke has not sought to include the MGP properties in its rate base; instead, Duke lists its MGP investigation and remediation costs among jurisdictional adjustments to operating revenues and expenses. Therefore, Duke and Columbia agree that the used and useful standard, under R.C. 4909.15(A)(1), does not apply to Duke's recovery of MGP-related expenses, because they are not capitalized and incorporated into rate base. (Columbia Reply Br. at 2; Duke Reply Br. at 10.)

Columbia asserts that Staff improperly applied the used and useful requirement from the rate base determination found in R.C. 4909.15(A)(1) to the determination of the test-period expenses found in R.C. 4909.15(A)(4), in contravention of the Supreme Court's findings in *Cincinnati Gas & Electric Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 711 N.E.2d 670 (1999) (*CG&E*). Columbia notes that the Supreme Court, in *CG&E*, found that, if a utility's expenses are capitalized and treated as part of the company's rate base, such expenses are subject to a prudency review under R.C. 4909.154, and they must meet the used and useful requirement in R.C. 4909.15(A)(1). However, Columbia states that Duke's investigation and remediation expenses were not capitalized and incorporated into rate base; therefore, neither R.C. 4909.15(A)(1), nor its used and useful standard, apply to

Duke's recovery of those expenses. Instead, Columbia asserts that R.C. 4909.15(A)(4), which is designed to take into account the normal recurring expenses incurred by a utility in the course of providing service during the test period, is the applicable provision. *See Consumers' Counsel 1981.* Unlike R.C. 4909.15(A)(1), paragraph (A)(4) of that section does not require that the property that is the basis of the expense be used and useful; instead, costs recovered under paragraph (A)(4) must be prudent and necessary. (Columbia Br. at 4-5.)

Columbia emphasizes that expenses deferred in prior periods, when amortized to expense during a test year pursuant to a Commission order, may be treated as expenses incurred during the test year. Columbia asserts that prudently incurred MGP remediation costs are a necessary and reasonable cost of doing business in response to a federal law that specifically imposes liability on Duke for the remediation of the MGP sites. Columbia reasons that, if, ultimately, the standard for inclusion in test year expense is that the expenditure must be directly related to service rendered during the test year, it is difficult to imagine a circumstance when a regulatory asset composed of deferred expenses would ever be includable in test year expense. According to Columbia, such a standard would eviscerate the Commission's ability to authorize expense deferrals, because they would never be recoverable under R.C. 4909.15(A)(4). Columbia cites to *In re Ohio Power Company, et al.*, Case No. 94-996-EL-AIR, Entry on Rehearing (May 18, 1995) at 11 (*Ohio Power Rate Case*), wherein the Commission rejected an argument that Ohio Power could not recover expenses outside of the test year. Columbia notes that, in the *Ohio Power Rate Case*, the Commission concluded that it had previously given Ohio Power authority to defer the expenses and, therefore, Ohio Power's test year expenses should be adjusted to include the amortization allowance. (Columbia Br. at 10-11).

In addition, Columbia asserts, and Duke agrees, that Staff has imposed a requirement on the determination of test-period expenses that would effectively render meaningless the longstanding Commission practice of authorizing utilities to defer expenses for later collection. (Columbia Br. at 4; Duke Reply Br. at 12.) Columbia also points to the Commission's decisions authorizing Cleveland Electric Illuminating Company to defer its incremental demand-side management program expenses and authorizing FirstEnergy to recover a portion of its incentive compensation payments from ratepayers, to support its position that the expenses do not have to be matched to the used and useful plant and equipment standard. *In re Cleveland Electric Illuminating Company*, Case No. 93-08-EL-EFC, et al., Supplemental Opinion and Order (Aug. 10, 1994); *In re Ohio Edison*, Case No. 07-551-EL-AIR, et al., Opinion and Order (Jan 21, 2009) at 7. (Columbia Reply Br. at 10.) In response, Kroger states that, even if Columbia is correct that Duke only needs to show that the remediation costs were necessary and prudent, Duke still has not met its burden of proof under R.C. 4909.15(A)(4) (Kroger Reply Br. at 7).

Kroger asserts that the Commission should reject Duke's proposal to recover the deferred remediation costs, stating that the MGP sites have not been used and useful in the provision of gas service to customers for at least 45 years. Kroger asserts that, as acknowledged by Duke witness Fiore, Duke did not have to follow the VAP, as it is a voluntary program and it is not compulsory. Therefore, Kroger argues that Duke is attempting to recover from current customers the cost of remediation that Duke voluntarily chose to incur, and that were not necessary for the provision of gas services. Therefore, Kroger contends that the costs would be recovered from Duke's shareholders and not the customers. Moreover, Kroger advocates that Duke could have, and should have, chosen to remediate the sites in 1980 when it first learned of the need for remediation, at the time CERCLA was enacted, or when Duke began affirmatively reviewing the MGP sites in 1988. Had Duke requested to pass these costs on earlier, it would have been more likely that Duke would have been collecting the costs from customers that actually received manufactured gas services. Instead, Duke waited 30 years to begin remediation; thus, passing the burden of remediation costs onto customers that are unlikely to have received any benefits from the MGPs. According to Kroger, customers should not be responsible for the cost to remediate land that is owned by the shareholders, is not used and useful in the provision of service to current customers, and has never been used and useful in the provision of gas service to Duke's customers. (Kroger Br. at 2, 6-7, 10.)

ii. Conclusion - R.C. 4909.15(A)(1) - Used and Useful

R.C. 4909.15(A)(1) provides, in part, that, when fixing and determining just and reasonable rates, the Commission shall determine "[t]he valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service." Staff and the intervenors primarily focus their review of the MGP remediation costs and R.C. 4909.15 on the perimeters for determining whether the sites were used and useful as of the date certain in the test year. However, contrary to the positions espoused by Staff and the intervenors, the Commission views the recovery of the MGP costs proposed by Duke in these cases as separate and unique from the determination of used and useful on the date certain utilized for defining what will be included in base rates for rate case purposes.

Likewise, we find the Commission's decisions in *Ohio Edison I* and *Ohio Edison II* are not dispositive of the resolution of MGP cost recovery issue in these cases, as the facts of the Ohio Edison cases and the instant cases are distinguishable. As pointed out by Duke, the issues in both the *Ohio Edison I* and *Ohio Edison II* cases pertained to the recovery of expenditures for the maintenance of an existing plant that was not providing service to customers and a generating plant that was no longer providing service to customers. Conversely, in the instant cases Duke is requesting recovery for environmental clean-up costs for real property that had been used and useful for the production of manufactured

gas for the benefit of the customers of Duke and its predecessors, in compliance with both federal and state rules and regulations.

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, including, but not limited to: underground gas mains and pipelines; a gas operations center; storage, staging, and employee facilities; sensitive utility infrastructure; and propane facilities. Moreover, for the East End site, a residential development is planned adjacent to the site, and, for the West End site, construction and relocation of facilities resulting from the Brent Spence Bridge Corridor Project is necessary. 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 applied to the date certain for rate base costs 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.

c. R.C. 4909.15(A)(4) - Cost of Rendering Public Utility Service

i. Arguments by Parties

Consistent with the order in the *Duke Deferral Case* and R.C. 4909.15(A)(4), Duke argues that it is entitled to full recovery of the reasonably incurred MGP expenses through utility rates. Pursuant to R.C. 4909.15, in traditional rate applications, the Commission is to establish just and reasonable rates for jurisdictional service, subject to the following series of determinations: the valuation of the utility's property in service as of a date certain; a fair and reasonable rate of return on that investment; and the expenses incurred during the test year. According to Duke, these are three separate and distinct determinations and the last item, the expenses incurred by the public utility, concerns the costs to the utility of rendering public utility service. Moreover, R.C. 4909.154 states that, in fixing just, reasonable, and compensatory rates, the Commission is to consider the management policies and practices, and organization of the utility. Duke notes that the Commission may disallow O&M expenses that were incurred pursuant to management policies or administrative practices the Commission considers imprudent. Duke asserts it undertook to comply with applicable environmental regulation by remediating former MGP sites pursuant to a well-reasoned and efficient process. Such environmental cleanup expenses are a normal and necessary cost of doing business. These costs are necessary in order for Duke to stay in business and comply with current environmental laws and

regulations; thus, they are part of providing current service and are properly recoverable. Therefore, Duke argues it is entitled to full recovery. (Duke Br. at 4-6.)

Staff responds that the *Duke Deferral Case* has no bearing on whether the costs are recoverable, noting that the Supreme Court has held that the Commission's grant of deferral authority has no bearing on whether the utility is entitled to rate recovery. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 308, 871 N.E.2d 1176 (2007). (Staff Br. at 32-33.) OCC/OPAE agree that the Order in the *Duke Deferral Case* did not guarantee that Duke will be authorized to recover the deferred costs (OCC/OPAE Br. at 50).

In response, Duke points out that, in *Consumers' Counsel v. Pub. Util. Comm.*, 6 Ohio St.3d 405, 408, 453 N.E.2d 584 (*Consumers' Counsel 1983*), the Supreme Court affirmed the Commission's Order allowing amortization and recovery of a depreciation deficiency, noting that a depreciation reserve is an expense item and a cost to the utility of rendering the public utility service; thus, allowing recovery outside the test year. Therefore, Duke surmises that the test year concept is appropriate when used to evaluate O&M expenses directly related to plant-in-service, but not when considering expenses not directly related to the O&M of utility plant, *e.g.*, remediation expenses that have been deferred. (Duke Reply Br. at 8-9.)

Columbia disagrees with Staff and OCC, stating that Duke's MGP expenses are normal and recurring and distinguishes the Supreme Court's decision in *Consumer's Counsel 1981*. Columbia states that the Supreme Court later limited its holding in *Consumers' Counsel 1983*, stating that, in *Consumers' Counsel 1981*, it reversed the Commission's decision, because the Commission attempted to transform a major capital investment that had never provided any utility service to customers into an ordinary operating expense under R.C. 4909.15(A)(4), with no statutory authority to do so. Columbia argues that such is not the situation with Duke's request to recover the MGP expenses in these proceedings. Moreover, Columbia points to the Commission's decision in *Decommissioning Costs of Nuclear Generating Stations*, Case No. 87-1183-EL-COI, Entry (Aug. 18, 1987) at ¶4, for the determination that the costs of performing nuclear remediation on a facility that is no longer used and useful is a normal cost of providing electric service. Likewise, Columbia asserts that Duke's expenses for remediating past MGP sites after those sites are retired should be considered normal costs of providing gas service. (Columbia Reply Br. at 3-4, 7-9.)

GCHC/CBT emphasize that the recoverability of operating expenses is grounded in R.C. 4909.15(A)(4), which requires that, in order to recover the MGP costs, they must be attributable to public utility service rendered for the test period, *i.e.*, calendar year 2012. However, GCHC/CBT argue that the expenses for which Duke seeks recovery were incurred decades earlier and were not caused by Duke's provision of gas utility service during the test period; thus, the costs are not recoverable under the ratemaking formula.

GCHC/CBT offer that Duke's expenditures would have been required irrespective of Duke's current lines of business; therefore, the costs are the responsibility of the shareholders and not the ratepayers. (GCHC/CBT Br. at 5-6.) OMA agrees that it is fundamentally inequitable and contrary to precedent to shift responsibility for such costs from investors to ratepayers (OMA Reply Br. at 4).

Columbia asserts that the argument by GCHC/CBT that the expenses are not costs of rendering public utility service is contrary to the Commission's rules and procedures. For example, Columbia notes, and Duke agrees, that certain expenses, such as income taxes, customer service expenses, pension costs, uncollectible expenses, corporate compliance, Commission and OCC maintenance fees, and payroll, are categories of expenses incurred by companies not in the public utility business that are recoverable as legitimate business expenses. Nothing in the rules or statute limit a public utility to recovering costs of service that are unique to public utility companies. In fact, Duke notes that both the law and Commission precedent recognize these allowable costs support the ability of the Company to remain in business and to continue to provide utility service to customers. (Columbia Reply Br. at 6; Duke Reply Br. at 5-6.)

GCHC/CBT further state that Duke has not demonstrated that the MGP costs it expended were the result of providing past utility service. GCHC/CBT explain that, in 1909, Duke's predecessor, which owned the MGPs, was not a regulated utility, as the Commission did not have jurisdiction over gas utilities until 1911 with the passage of H.B. 325 that enacted G.C. 614-2. GCHC/CBT point out that these MGP sites were contaminated many years before Duke's predecessor was a public utility. GCHC/CBT argue that current utility customers do not benefit from the past operation of the MGP sites; the customers who received manufactured gas at the time the MGPs operated did. In the view of GCHC/CBT, current ratepayers are not the insurers of Duke's legacy environmental responsibilities and should not have to pay for past problems when they did not cause or benefit from the service provided. (GCHC/CBT Br. at 6-8; GCHC/CBT Reply Br. at 7.) In response, Columbia states that GCHC/CBT have missed the point that the past public utility operations of the MGP sites is not the basis for Duke's request for recovery in these cases; rather, Duke is requesting recovery of the current-day environmental remediation costs of operating and maintaining its business. (Columbia Reply Br. at 5-6.)

OCC argues that it would be inequitable for customers to be held liable for the MGP site remediation costs when they did not benefit from the sale of the MGP by-products; rather, it was the shareholders who benefitted from the operation of the MGPs through the sale of the manufactured gas by-products. Moreover, OCC/OPAE and Kroger agree that collecting MGP-related costs from customers would be inequitable because it would permit Duke's shareholders to profit from the use of the MGPs in the past, while avoiding any of the business risk associated with the past use of the plants. OCC/OPAE refer to

Consumers' Counsel 1981 for the proposition that, absent explicit statutory authorization, the Commission "may not benefit investors by guaranteeing the full return of their capital at the expense of rate payers." Kroger agrees Duke is not entitled to recovery under R.C. 4909.15(A)(4), because the statute is designed to allow for recovery of normal recurring expenses and Duke has admitted that these are one-time nonrecurring costs. (OCC Br. at 14-16; Kroger Reply Br. at 8, 12-13.)

Kroger asserts that the remediation costs should have been included in the rates at the time the MGPs were in operations. According to Kroger, Duke's failure to realize the environmental impacts of its plants when they were in operations cannot be compensated for through an increase to current customers' rates, as that constitutes retroactive ratemaking, which is prohibited by law. (Kroger Reply Br. at 12-13.)

In addition to being consistent with the law, Duke argues that recovery of the MGP expenses is consistent with the public interest by encouraging the utility to conduct prompt and thorough investigations and cleanups of environmental conditions at MGP sites to resolve liability and to protect public health and the environment. Duke posits that the state of Ohio has expressed strong public policy encouraging cleanup of contaminated sites by, among other things, enacting the VAP and providing incentives for use of the VAP. (Duke Br. at 21-22.) OCC/OPAE believe the public interest would be served by sparing customers from paying for Duke's cleanup, stating that Duke's arguments are self-serving and unsubstantiated in law or fact (OCC/OPAE Reply Br. at 31).

Duke asserts that denial of recovery of reasonably incurred costs could have adverse consequences, including: resulting in adverse credit quality for Duke; calling to question the Commission's previous decisions granting deferral authority; and putting Ohio in the distinct minority of states on this issue, thus, placing Ohio's reputation for constructive regulation at risk. Duke understands that a Commission order granting deferral authority does not guarantee recovery of such expenses, because the Commission may, at a later date, examine the prudence of the actual costs incurred. However, Duke asserts that a deferral order from the Commission has meant, and should mean, that the type of costs at issue are indeed recoverable, and will be recovered upon the requisite showing. (Duke Br. at 23.)

Duke and Columbia assert that the Staff's position is contrary to the positions and decisions in other states, noting that many states permit the recovery of deferred remediation expenses, as long as the expenses are prudently and necessarily incurred (Duke Br. at 10-14; Columbia Br. at 12-14). Kroger responds that the cases in other states cited by Duke involved situations where the public utility had been formerly ordered or mandated to cleanup their sites; conversely, Duke's remediation in these cases is voluntary, Duke has no legal mandate. (Kroger Reply Br. at 9-11.) Duke responds that there is nothing voluntary about the obligation to remediate an MGP site where liability

exists for the conditions present at the site; the only voluntary thing about this situation is how to address the obligation (Duke Reply Br. at 13). GCHC and OCC/OPAE also note that decisions in other states are not determinative under Ohio law (GCHC Reply Br. at 3-4; OCC/OPAE Reply Br. at 17-19, 21-29).

Columbia offers that the Commission can, and has, treated the amortization of previously deferred expenses as test year expenses under R.C. 4909.15(A)(4), *citing Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 116, 388 N.E.2d 1370 (1979); *In re Toledo Edison Co.*, Case No. 95-299-EL-AIR, Opinion and Order (Apr. 11, 1996). In addition, Columbia points out that, in *In re Columbus Southern Power Co.*, Case No. 11-351-EL-AIR, et al., Opinion and Order, (Dec. 14, 2011) (*CSP Rate Case*), the Commission approved a stipulation thereby authorizing recovery for six different pools of regulatory assets that were established years before the *CSP Rate Case* in 2011. The *CSP Rate Case* stipulation provided that the deferrals would become a cost of service; thus, becoming part of the test-year expense, under R.C. 4909.15(A)(4), in a future distribution rate case, and would be recovered through a rider. (Columbia Br. at 5-10.)

ii. Conclusion - R.C. 4909.15(A)(4) - Cost of Rendering Public Utility Service

R.C. 4909.15(A)(4) provides, in part, that, when fixing and determining just and reasonable rates, the Commission shall determine "[t]he cost to the utility of rendering the public utility service for the test period." Upon consideration of the arguments submitted by the parties in these cases, the Commission finds that this is the section of the Ohio Revised Code that is relevant to our determination of whether Duke is permitted to recover the MGP investigation and remediation costs through Rider MGP in these cases. Contrary to the opinions of Staff and the intervenors, we find that the determinative factor is whether the remediation costs, which were deferred by Duke and amortized to expense during the test year in accordance with our decision in the *Duke Deferral Case*, are costs incurred by Duke for rendering utility service and, thus, costs that may be treated as expenses incurred during the test year, in accordance with R.C. 4909.15(A)(4). We do not agree, however, that the Commission's mere approval of deferral authority, in and of itself, elicits an affirmative response to this question, as Duke and Columbia would have us find. Rather, it is still Duke's burden in these cases to prove that the costs that have been incurred and deferred, are costs that were incurred for rendering utility service and were prudent.

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. 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.

While the Commission finds that recovery in this context is permissible under the statute, we conclude that recovery of incurred costs should be limited to a reasonable timeframe commencing with the event that triggered the remediation efforts mandated by CERCLA and ending at a point in time where remediation efforts should reasonably be concluded. We believe that such determination of said timeframe is essential and in the public interest, and will provide certainty that the remediation will be carried out in a responsible and expeditious manner by the Company and its shareholders, so that recovery through Rider MGP will be finite. In determining the appropriate timeframe to impose for the recovery of the MGP remediation at these sites, we note that it is undisputed that Duke became aware of the changing conditions at the East and West End sites in 2006 and 2009, respectively (Duke Ex. 21A at 17). Thus, it was in 2006 and 2009, for the East and West End sites, respectively, that Duke's remediation responsibilities under CERLA became prevalent. Because we have determined that recovery of the costs incurred at these sites, due to the federal mandates imposed by CERCLA, are permitted in accordance with the Ohio Revised Code, we conclude that the commencement of the potential recovery period should be January 1, 2006, for the East End site, and January 1, 2009, for the West End site. In the *Duke Deferral Case*, we authorized Duke to defer on its books the costs incurred for the remediation costs beginning January 1, 2008, with the caveat that we would determine what costs would be recoverable at the time Duke sought such recovery. Therefore, based upon the record in these cases and the commencement of the applicability of the CERCLA mandate on these sites, we find that Duke should be permitted to recover the MGP remediation costs for the East End site commencing January 1, 2008. However, in light of the fact that the CERCLA mandate was not triggered for the West End site until 2009, recovery of costs for that site should be permitted beginning January 1, 2009. Therefore, the requested amount for recovery of costs incurred in 2008 on the West End site should not be included in the amount of costs to be recovered through Rider MGP pursuant to this Order.

In addition, 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. The record clearly reflects that the contamination of these sites has been prevalent for many years. While we agree that federal and state laws, as well as public policy, dictate that these sites must be remediated as part of the public utility service provided by Duke, we also find that it is incumbent upon the utility to commence its investigation and remediation, and request for recovery in a timely manner, so as to minimize the ultimate rate burden on customers. Therefore, given the

circumstances presented in these cases and the decades-long contamination that necessitated these utility costs, we find it appropriate to deny Duke's request for recovery of the associated carrying charges.

With regard to the purchased parcel located to the west of the western parcel of the East End site, we find that the record does not support a recovery of the $2,331,580 Duke is requesting be included in Rider MGP. 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 (Tr. II at 342). 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. 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 purchase 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.

Accordingly, the Commission finds that any prudently incurred MGP investigation and remediation costs related to the East and West End sites, less costs associated with the purchased parcel on the East End site, the costs incurred in 2008 on the West End site, and all carrying costs, should, in accordance with R.C. 4909.15(A)(4), be considered costs incurred by Duke for rendering utility service and be treated as expenses incurred during the test year.

d. R.C. 4909.154 - Prudently Incurred Costs

i. Arguments by Parties

Duke witness Bednarcik asserts that the actions taken by Duke at the East and West End MGP sites were prudent and reasonable, and designed to resolve the environmental liability and mitigate future risk to the Duke, ratepayers, shareholders, and others (Duke Ex. 21A at 3). According to Ms. Bednarcik, Duke employs a number of procedures to ensure that the scope of cleanup work is appropriate and the cost reasonable. When

determining the most prudent course of action for investigation and remedial work, the witness states that Duke worked with the Ohio EPA CPs and an environmental consultant to evaluate different options based on criteria, including: compliance with environmental regulations, best practices, feasibility, constructability, safety, prior experience, and cost. Duke builds these considerations into its request for proposals (RFPs) for the larger remedial actions. Duke solicits bids from environmental/engineering consulting firms that have a proven history of working on MGP sites. The minimum number of bidders for every RFP is three; however, for the Ohio MGP sites, Duke solicited bids from at least five firms. Initially, the bids are reviewed on their technical merits, due to the complex and technical nature of the work, and not on the cost; after technical screening, costs are evaluated. Ms. Bednarcik explains that the nature of environmental work requires flexibility; thus, when issues arise, changes to the scope of work are evaluated using the same criteria used with the RFP. To ensure that these changes do not become opportunities to inflate costs, during the RFP process, the bidders must provide rate sheets stating costs, *e.g.*, on a per-foot basis, for additional scope items that typically occur on MGP sites. During the initial review of bids, the evaluation considers the cost-per-hour for the different levels of professionals working on the project, the anticipated breakdown of junior and senior personnel, mark-ups on subcontractors, and the per-unit rate for individual items, *e.g.*, per diems and construction trailers. Changes to the initial scope of work require approval of Duke. Therefore, Duke representatives are actively involved in all aspects of work and, among other things, Duke employs an on-site remediation construction manager. (Duke Ex. 21 at 20-23; Duke Ex. 21A at 41-42; Tr. I at 211-212.)

With regard to subcontractors, Ms. Bednarcik notes that the majority of them are managed by the environmental consultant. Subcontractors with larger scopes of work require the environmental consultant to solicit multiple bids and Duke must be included in the decision-making process. In addition, there are a number of subcontractors that Duke directly contracts with because of the nature of the work or preferred pricing agreements. Ms. Bednarcik states that there are limited instances where Duke awards a sole-source contract; this typically happens only if a specialty contractor is needed, *e.g.*, the vibration monitoring contract for the East End site. Ms. Bednarcik went on to describe, in detail, the specific steps taken on both the East and West End sites to ensure the reasonableness of costs. (Duke Ex. 21 at 23-28.)

Moreover, Duke witness Bednarcik submits that Duke participates in a number of utility groups that share best practices and remedial strategies and in national conferences on the investigation and remediation of MGP sites. For example, she notes that the MGP Consortium, whose other members include 28 utilities, including Columbia and FirstEnergy, meets three times a year to discuss case studies on the remediation of MGP sites. (Duke Ex. 21 at 28.) Ms. Bednarcik also mentions that she is aware of a few municipalities that own MGP sites and that participate in MGP groups to share information, *e.g.*, the North Carolina MGP group (Tr. I at 261). In addition, she states that

Duke, as well as FirstEnergy, AEP Ohio, and Columbia are members of the Electric Power Research Institute Program 50: Manufactured Gas Plants, where the members meet regularly to share information on investigation and remediation of MGP sites. She emphasizes that, based on her participation in the industry groups and national conferences, the work being conducted at the Duke MGP sites is consistent with the practices undertaken by other utilities. (Duke Ex. 21 at 29.)

Duke submits that its management practices, decisions, and activities related to investigation and remediation of its MGP sites have been reasonable and prudent in all respects. Duke states that prudence in the context of utility ratemaking is defined as what a reasonable person would have done in light of the conditions and circumstances that were known or reasonably should have been known at the time the decision was made, *citing Cincinnati v. Pub. Util. Comm.*, 67 Ohio St.3d 523, 620 N.E.2d 826 (1993). (Duke Br. at 26-27.) Duke witness Fiore, an Ohio EPA CP, advises he reviewed the documents for both the East and West End sites, and he finds that the investigation and remediation work conducted at these cites have been prudent and reasonable, and in conformance with VAP regulations (Duke Ex. 26 at 20).

Ms. Bednarcik asserts that Duke's decision to proactively address and correct the conditions at these two sites is the responsible and prudent thing to do, and is in the best interest of Duke's shareholders and customers. According to the witness, being reactive and waiting until there is an enforcement action mandating cleanup, could result in Duke being forced to cease or curtail operations, or in Duke being forced to conduct remediation in a manner that may adversely affect operations at the site, thereby impacting Duke's customers. (Duke Ex. 21A at 34-35.)

Duke witness Bednarcik testifies there are no documents for the Commission to review and she believes that it would have been an imprudent use of funds to create such documentation, as it could be very costly (Tr. I at 215-216). OCC/OPAE allege, and Kroger agrees, that Duke has not met its burden of proof to demonstrate the reasonableness and prudence of its MGP costs, stating that Duke has offered no documentation, analysis, explanation, or testimony into evidence that documents the decision-making process supporting the remediation options chosen. OCC/OPAE note that none of Duke's witnesses offered any analysis of alternative remedial options available to Duke or the cost differential for the different remedial actions. In that Duke's witnesses failed to provide any substance regarding the different alternatives and the costs of such alternatives, OCC/OPAE maintain that such testimony has no value in terms of the Commission's review of the prudency of the costs for remediation at the MGP sites. OCC/OPAE emphasize that OCC witness Campbell discusses the range of remedial options at length and points to specific VAP standards in addressing the available approaches to remediation. (OCC/OPAE Br. at 25, 28-29, 32-34, 36, 39, 42-43; Kroger Reply Br. at 16.) For example, OCC witness Campbell states that Duke either excavated or

solidified more TLM and OLM than it needed to under the VAP. In addition, Dr. Campbell notes that he did not see documentation of any sort of analysis for alternative remedial actions. He states that, while the VAP does not require such analysis, prudency does. (Tr. IV at 962-964.)

In response to these assertions, Duke states that the intervenors have failed to identify any statue, regulation, or other authority requiring Duke to have created such documentation. According to Duke, to engage in such a rote exercise would have done nothing more than incur additional significant costs to record what Duke's experienced MGP remediation team already knew, based on the conditions at the sites. Duke attests that the process it followed was both comprehensive and reasonable, as evidenced by the record in these proceedings. Moreover, Duke emphasizes that it made its decision-making available for significant scrutiny by the Commission and the parties, through discovery, testimony, and the hearing. (Duke Reply Br. at 20.)

OCC/OPAE assert that Duke failed to provide proper oversight of the remediation process and the expenditures to ensure that charges to customers are reasonable. OCC/OPAE state that, as Duke witness Bednarcik testifies, the remediation activities did not result in a written report to document the process that resulted in the budget, other than the annual budget itself. Further, there were no written actual, versus budget, variance reporting to Duke's management; all discussions concerning variances with Duke management were done verbally. (OCC/OPAE Br. at 44-45; Tr. I at 251-252, 254.)

OCC/OPAE cite to *CG&E* for the standard used by the Commission in determining prudence. In *CG&E*, the Supreme Court states that "[a] prudent decision is one which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made. The standard contemplates a retrospective, factual inquiry, without the use of hindsight judgment, into the decision process of the utility's management." According to OCC/OPAE, application of this prudence standard should result in a significant disallowance in Duke's request to collect MGP costs. (OCC/OPAE Br. at 52.)

ii. Conclusion – R.C. 4909.154 - Prudently Incurred Costs

Pursuant to R.C. 4909.154, in fixing rates, that Commission may not allow O&M expenses to be collected by the utility through management practices or administrative practices the Commission considers imprudent. In arriving at our decision in these cases we are mindful of *In re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 967 N.E.2d 201 (2012), wherein the Supreme Court recently found that it is the utility that has to "prove a positive point: that its expenses had been prudently incurred."

As evidenced by the thousands of pages of testimony and transcripts in these matters and our detailed review of the evidence in this Order, the Commission has done its due diligence to ensure that our ultimate decision is factually based and supported by the evidence herein. We find that the record substantiates that Duke made reasonable and prudent decisions by: acknowledging its liability under state and federal law for the environmental conditions at the MGP sites; pursuing recovery of remediation costs by other potentially responsible third parties and insurers; acknowledging the changes in the use of the properties and adjacent properties in a timely manner; utilizing the Ohio EPA's VAP in a proactive manner; employing a VAP CP, as well as environmental and engineering consultants; and presenting MGP experts, including the Ohio EPA's VAP CP that is working on one of the sites, at the hearing to explain and support Duke's claims. In addition, the record reflects that Duke considered remediation alternatives and, in fact, has incorporated various engineering and institutional control measures mentioned by the intervenors in its remediation plans. Moreover, in selecting contractors, Duke has obtained competitive bids for the major phases of the work at both the East and West End sites and has an appropriate process in place to solicit experienced qualified contractors, and manage the cost of changes to the initial scope of work due to discoveries in the field.

The intervenors question the level of remediation employed by Duke and record evidence presented by Duke to support its proposal by presenting their own experts in the field of environmental remediation, in an effort to illustrate potentially less costly remediation alternatives. However, the record in these cases reflects that the witnesses presented by the intervenors did not have expertise with regard to the Ohio EPA's VAP and the associated rules and regulations, and, unlike Duke's experts, the intervenors' witnesses did not have the in-depth, firsthand knowledge of the MGP sites at issue. As pointed out by the intervenors, there were no documents presented by Duke to attest to the decision-making process of the Company in determining the course for remediation; however, the lack of documents does not, alone, render the totality of the record evidence indecisive on the prudency of the process. In fact, Duke presented expert witnesses who were subject to discovery, as well as extensive, and at times pointed, cross-examination. We believe that Duke's witnesses provided ample information on the process to support a conclusion on prudency in theses cases.

In balancing the weight of the evidence presented by Duke against the opposition submitted by the intervenors on the issue of the level of remediation efforts and the prudency of the costs thereto, the Commission finds that Duke has sustained its burden to prove that the MGP investigation and remediation costs for the period of January 1, 2008 through December 31, 2012, for the East End site, and for the period of January 1, 2009 through December 31, 2012, for the West End site, were appropriate and prudent, in accordance with R.C. 4909.154. Accordingly, Duke should be permitted to recover the proposed $62.8 million, less the $2,331,580 for the purchased parcel, the amount requested

for costs incurred on the West End site in 2008, and all carrying costs, as set forth previously.

6. Credits to Rider MGP

a. Arguments by Parties

Duke witness Bednarcik offers that Duke is pursuing other means of funding the remediation at the East and West End sites. For example, Duke has given notice to the insurance carriers that hold policies with Duke or its predecessor companies during the period of time when the MGPs operated or during the time when damages due to the MGPs occurred, to the extent such policies and carriers have been identified. In addition, Duke continues to research to determine if there are other potentially responsible parties for the conditions of the sites. Ms. Bednarcik indicates that, based on the research, Columbia is a potentially responsible party. In addition, Duke has evaluated whether additional sources of federal or state funding were available for financing some or all of the remediation, including the EPA Brownfields Program under the American Recovery and Reinvestment Act and the Clean Ohio Fund Program, Assistance and Revitalization Funds. Unfortunately, based upon certain restrictions these programs are not available. (Duke Ex. 21A at 31-33.)

Duke witness Margolis believes that Duke's strategy to pursue rate recovery, insurance recovery, and cost recovery from potential responsible parties is prudent and reasonable. However, he points out that, while CERCLA provides that parties that cleanup sites consistent with CERCLA may have a right to pursue other potentially responsible parties for cleanup costs, this process can be very litigious, costly, and time consuming. There is significant uncertainty that pursuing other potentially responsible parties will ultimately result in the recovery of any meaningful amount of response costs. Mr. Margolis believes that pursuing other parties responsible for MGP sites, whose operations go back many years, is even more difficult because evidence is often impossible to find and the other parties may not be in existence or have any assets. (Duke Ex. 23 at 13-15.)

Mr. Margolis explains that recovery of environmental remediation costs under modern general commercial liability policies, since 1985, may be difficult, because many policies exclude coverage for environmental remediation costs. In addition, for old sites, like MGPs, identifying any insurance coverage of such costs may take significant time and expense and, even if found, the policies may have small coverage limits because of the period in which they were issued. Finally, the insurance companies that issued the policies may no longer be in existence and, if they are in existence, they may fight the claim and have no incentive to pay. (Duke Ex. 23 at 14-15.)

OCC recommends that, if recovery is permitted, any insurance policy proceeds and third-party liability recovery be applied to the MGP-related costs, before they are split between the customers. OCC witness Hayes suggests that Duke be required to document its efforts to collect MGP-related investigation and remediation costs from insurance policies and predecessor owners, such as Columbia, and its collection efforts should be subject to review in a future proceeding in which its remediation costs are reconciled with its recoveries. (OCC Ex. 14 at 39-40.) To the extent the sums collected exceed the amount recoverable from customers, including any costs incurred in realizing such insurance proceeds, OCC/OPAE state that Duke should be permitted to retain such amount to offset its share of site assessment and remediation costs (OCC/OPAE Br. at 95).

In response to Duke's objection that Staff does not take into consideration the Company's costs in pursuing insurance claims, Staff witness Adkins notes that Duke has failed to show that the costs Duke seeks to recover are incremental to what is included in base rates for labor expenses and staff attorney, insurance specialists, and other personnel resources (Staff Ex. 6 at 23). Likewise, Staff recommends that proceeds from any insurance policies be, at least partially, credited against the total cost to recover from ratepayers through Rider MGP. Staff recommends that Duke be directed to use every effort to collect all remediation costs available under its insurance policies. Staff believes 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. The insurance reimbursements Duke makes to ratepayers should be net of carrying costs that Duke is entitled to retain pursuant to the *Duke Deferral Case*. Moreover, Duke should pay customers an interest rate that is linked to customers, not Duke, *i.e.*, the rate that Duke provides to customers when refunding customer deposits held more than 180 days or not less than three percent, in accordance with Ohio Adm.Code 4901:1-17-05(B)(4). (Staff Ex. 1 at 47; Staff Ex. 6 at 23.) Kroger and OMA agree with Staff's recommendation (Kroger Br. at 12-13; OMA Reply Br. at 5).

Duke agrees that it should actively pursue potential recovery of costs from third parties; however, the Company asserts that such pursuit should not delay its recovery of the incurred costs for complying with existing environmental mandates (Duke Br. at 55). Duke accepts Staff's recommendation as fair and reasonable, with the caveat that only proceeds, net of costs to achieve those proceeds, *e.g.*, litigation costs, be credited. With this same caveat, Mr. Wathen states that any third-party recovery would be handled in the same way. Furthermore, Duke witness Wathen states that, to the extent the proceeds relate to any MGP costs that the Commission disallowed, Duke is under no obligation to use these proceeds to offset the Rider MGP revenue requirement. However, he states that, to the extent any costs are being recovered from customers and Duke gets proceeds related to those costs, Duke would net out any incremental litigation costs and reduce the

regulatory asset by that amount to be recovered from customers in the future. (Duke Ex. 19C at 6; Tr. III at 780-781, 788.)

b. Conclusion - Credits to Rider MGP

The Commission agrees that Duke should continue to use every effort to collect all remediation costs available under its insurance policies, and Duke should continue to pursue recovery of costs from any third parties who may also be statutorily responsible for the remediation of the MGP sites. We find that any proceeds paid by insurers or third parties for MGP investigation and remediation should be used to reimburse the ratepayers. The Commission also concludes that any proceeds returned to ratepayers should be net of the costs to achieve those proceeds, *e.g.*, litigation costs. In crediting any proceeds back to the ratepayers, the Commission finds that no interest rate should be added to the credit. Finally, we agree that, to the extent the proceeds collected from insurers and/or third parties exceed the amount recoverable from ratepayers, Duke should be permitted to retain such amount.

7. Amortization Period

a. Arguments by Parties

Staff recommends that Duke be permitted to recover $6,367,724 in remediation costs through Rider MGP over a three-year period, including carrying costs set at the long-term debt rate approved by the Commission in these cases. The costs would be allocated to customers pursuant to the customer rate allocation adopted in these cases. Staff witness Adkins states, however, that, if the Commission authorizes Duke to recover significantly more MGP expenses than recommended by Staff, the amortization period should be longer than three years to avoid rate shock. If Duke is permitted to recover $62.8 million, Staff recommends an amortization period of 10 years. (Staff Ex. 1 at 46-47; Staff Ex. 6 at 25; Tr. IV at 917; Staff Br. at 34.) OMA agrees that any recovery granted be amortized over a period a time that is appropriate to minimize the impact of the increase on ratepayers (OMA Reply Br. at 5).

OCC notes that, while Duke's proposal for a three-year amortization period is based on the Company's assumption that three years is the approximate time expected between rate cases, there is no justification for choosing this period. OCC asserts that, given the potential magnitude of deferred MGP costs that customers may have to pay, the one-time nature of these costs, and the fact that the costs relate to the clean-up of plants that operated decades ago, an amortization period of at least 10 years would be appropriate. According to OCC, to impose the significant costs of remediation of the sites over a shorter period of time would be unreasonable. (OCC Ex. 13, Att. at 5.) Kroger witness Townsend agrees that any MGP costs approved for recovery should be amortized

over 10 years, in order to mitigate rate impacts on customers who did not receive the benefits of the MGPs at issue. Mr. Townsend believes that extending the amortization period would be appropriate, given the magnitude and vintage, over 50 years, of the environmental liability asserted by Duke. (Kroger Ex. 1 at 7; Kroger Br. at 14.)

Duke asserts that 10 years is an unreasonably long amortization period for MGP recovery. Duke offers that the Commission should take the following factors into account when determining an appropriate amortization period for deferred costs: "the amount of the deferral, the age of the deferral, the anticipation of additional deferrals being approved in the Company's next round of rate cases, and the proximity of the next set of rate cases." *In re Columbia Gas of Ohio, Inc.*, Case No. 88-716-GA-AIR, et al., Opinion and Order (Oct. 17, 1989). Duke notes that there is no evidence on the record that reflects a shorter period, such as the proposed three-year period, will result in any severe rate impacts for customers. According to Duke, amortizing the December 31, 2012 balance of $62.8 million over three years results in an average rate impact to customers of approximately three percent on a total bill basis. Duke also argues that any proposal to extend the amortization period beyond three years should come with the ability to continue accruing carrying charges on unrecovered amounts. (Duke Reply Br. at 34-37; Tr. III at 747.)

OCC/OPAE argue that, if Duke is permitted to collect investigation and remediation costs from customers, Duke should not be authorized to collect carrying costs. OCC/OPAE assert that, if carrying costs are permitted, there would be no incentive for Duke to expedite the remediation process. OCC/OPAE believe the sharing of costs between shareholders and customers, partially through the absence of carrying costs, will assist in balancing out the inequity that would result from the recovery of MGP-related costs from customers. (OCC/OPAE Reply Br. at 71, 73.)

b. Conclusion - Amortization Period

Upon consideration of the record and the arguments of the parties, the Commission finds that it is reasonable to permit Duke to amortize the amount authorized herein for recovery through Rider MGP over a five-year period. Given that the Commission adjusted the amount to be recovered through Rider MGP to reflect only those costs that were prudently incurred for the rendering of utility service, we find that a five-year period is reasonable and supported by the evidence. Moreover, the five-year amortization period balances the public interest, while allowing the recovery of the approved costs.

8. Allocation

a. Arguments by Parties

Duke proposes to allocate the costs between residential and nonresidential customers based on the allocation factors agreed to in the Stipulation. Duke would recover the allocated revenue requirement, through a nonbypassable rider, Rider MGP, on a per bill basis. Duke witness Wathen states that the billing determinants, *i.e.*, the number of bills, to be used in the calculation, would be updated on an annual basis to recover the then-current balance of the regulatory asset; however, for the initial Rider MGP, the billing determinants would be those agreed to in the Stipulation. (Duke Ex. 19B at 2-3; Tr. III at 746-747, 776-779, 785.)

Kroger states that, to ensure fairness within a rate class, Duke should recover the costs on an equal percentage basis. Therefore, Kroger argues that Duke's proposal to first allocate the revenue requirement between classes based on the allocation factors agreed to in the Stipulation and then divide that number by the number of bills should be rejected. (Kroger Br. at 15).

Duke notes that Kroger is raising this issue for the first time on brief. While Kroger's proposal, on its face, may not appear to be unreasonable, Duke believes the Commission should address and decide this issue in the first MGP rate design case. Duke rationalizes that there is no evidence of record on this topic in these cases and there could be unintended or unknown consequences that could result from Kroger's proposal, in the absence of a full review of the topic. (Duke Reply Br. at 39.)

b. Conclusion - Allocation

The Stipulation provides that recovery of costs from customers for environmental remediation of Duke's MGP shall be allocated among classes as follows: 68.26 percent to the RS, RFT, and RSLI classes; 7.76 percent to the GS and FT Small classes; 21.68 percent to the GS and FT Large classes; and 2.30 percent to the IT class. Duke proposes to determine, on an annual basis, the number of customers in each class and then allocate the costs within each class on a per bill basis. Duke's proposal for the allocation of the Rider MGP costs within the customer classes was filed as part of Mr. Wathen's prefiled second supplemental testimony on April 2, 2013. In addition, the record reflects that Mr. Wathen was subject to cross-examination on Duke's proposed intraclass allocation methodology.

The Commission notes that, rather than presenting evidence on the record in these cases to support an alternative methodology and providing Duke and other parties sufficient due process to ask questions regarding the alternative, Kroger chose to submit a different intraclass allocation proposal, for the first time, on brief. Kroger's failure to

timely present its proposal as part of the record evidence leaves the Commission no choice but to disregard the alternative methodology and support the best evidence of record.

Duke's intraclass allocation methodology is the only methodology presented on the evidentiary record in these cases and it was undisputed by any of the parties on the evidentiary record. Therefore, the Commission finds that Duke's proposed methodology for intraclass allocation is reasonable and should be approved. Accordingly, on an annual basis, Duke should file in these dockets the billing determinants to be used to determine the number of customers in each class; the allocated costs within each class should then be applied to customers on a per bill basis for the upcoming year.

9. Continued Deferral Authority and Rider MGP Updates

a. Arguments by Parties

Upon implementation of Rider MGP, Duke proposes, beginning March 31, 2014, and on or before March 31 in each subsequent year, to update Rider MGP based on the unrecovered balance and related carrying charges as of the prior December 31. In the present proceedings, Duke requests authority to continue to defer costs related to the MGP remediation; thus, the balance of the regulatory asset would be increased by additional deferral and carrying costs and decreased by the amount of revenue collected through Rider MGP. During the proceeding considering Duke's subsequent application to update Rider MGP, Duke witness Wathen affirms that any new costs the Company proposes to recover would be subject to a prudency review by the Commission, Staff, and other parties. (Duke Ex. 19C at 4; Tr. III at 750-751.) Staff recommends that the ongoing environmental monitoring costs continue to be deferred under the authority granted by the Commission in the *Duke Deferral Case*, with future recovery determined in a future rate proceeding (Staff Ex. 1 at 47).

On brief, OCC/OPAE object to Duke's proposal for continuing the deferral of MGP costs and the inclusion of such costs in Rider MGP in the future. OCC/OPAE believe that the request is contrary to the Staff Report and the Stipulation in these matters. Therefore, OCC/OPAE state that Duke should be limited to collecting only those authorized MGP-related investigation and remediation costs from its customers that have been deferred on or before December 31, 2012. In support of their position, OCC/OPAE claim that the Staff Report recommends that Rider MGP include: the ongoing deferral of Duke's environmental monitoring costs, but not any other investigation and remediation costs; and the future recovery, if any, of such deferrals to be determined in a future rate case. According to OCC/OPAE, despite disagreeing with these recommendations in the Staff Report, Duke did not include either issue in its objections to the Staff Report, Duke Ex. 30. Duke did not object to Staff's recommendation to limit future deferral, under the authority of the decision in the *Duke Deferral Case*, to ongoing environmental monitoring costs.

Therefore, OCC/OPAE opine that Duke must now file a new application in order to receive authority to defer MGP-related future investigation and remediation costs. Rider MGP can not be used to collect from customers costs which Duke does not currently have authority to defer. Moreover, OCC/OPAE state that the Stipulation does not rescue Duke's proposal, pointing out there is nothing in the Stipulation that envisions Duke collecting costs that have been deferred after January 1, 2013. (OCC/OPAE Br. at 98-100.)

Kroger states that the approval in these cases should be limited to the costs requested in these proceedings and not authorize subsequent remediation costs that may be incurred in the future. Rather, Duke should be directed to request, through subsequent proceedings, any additional costs that it may incur going forward; thereby requiring Duke to meet its burden of proof demonstrating that such costs were just and reasonable and currently used and useful. Moreover, Kroger notes that the Stipulation does not mention or envision a rider that allows Duke to collect from customers its ongoing investigation and remediation costs, which were incurred on or after January 1, 2013; the stipulating parties agree that the Staff Report resolves any remaining issues. Therefore, according to Kroger, the issue of continued deferral and collection through Rider MGP of future costs has already been settled in the Staff Report and the Stipulation. (Kroger Br. at 10-11; Kroger Reply Br. at 19.)

b. Conclusion - Continued Deferral Authority and Rider MGP Updates

R.C. 4905.13 authorizes the Commission to establish systems of accounts to be kept by public utilities and to prescribe the manner in which these accounts shall be kept. Pursuant to Ohio Adm.Code 4901:1-13-01, the Commission has adopted the Uniform System of Accounts for gas utilities, which were established by the Federal Energy Regulatory Commission (FERC).

Duke requests authority to continue to defer costs related to the MGP remediation after December 31, 2012. As we determined in the *Duke Deferral Case,* and continue to support in this Order, 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 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 costs 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 finite as set forth below. Therefore, Duke should separately identify all costs to be deferred in a subaccount of Account 182, Other Regulatory Assets. Furthermore, consistent with our decision in these cases, and the facts presented regarding these types of historical costs, we find that Duke should not be authorized to accrue carrying charges on the deferred amounts.

Duke also requests authorization to file an application in each subsequent year to update Rider MGP based on the unrecovered balance and related carrying charges as of the prior December 31. In light of the fact that the Commission has determined herein that Duke should be authorized to recover the prudently incurred costs of MGP investigation and remediation for these two sites, the Commission finds Duke's request for annual updates to Rider MGP in order to reflect the costs for the preceding year is reasonable and should be approved. Accordingly, the Commission finds that, beginning March 31, 2014, and on or before March 31 in each subsequent year, Duke must update Rider MGP based on the unrecovered balance, minus any carrying charges as required previously in this Order, as of the prior December 31. In these subsequent cases wherein Duke will be updating Rider MGP, Duke shall bear the burden of proof to show that the costs incurred for the previous year were prudent.

As we stated previously, recovery of incurred costs should be limited to a reasonable timeframe commencing on January 1, 2008, for the East End site, and on January 1, 2009, for the West End site, and ending at a point in time where remediation efforts should reasonably be concluded. The Commission believes that the imposition of such a timeframe is, in accordance with R.C. Title 49, reasonable and in the public interest, and will ensure that the remediation will be carried out in a responsible and expeditious manner, so that recovery through Rider MGP will be finite. Therefore, we conclude that the appropriate end point for recovery of such remediation costs should be 10 years from the date of the commencement of the remediation mandate under CERCLA. We believe that, absent exigent circumstances, this 10-year timeframe from the inception of the federal mandate to the closure of cost recovery is reasonable and necessary in order to protect the public interest and ensure the Company and its shareholders are held accountable. Having previously determined herein the commencement dates for cost recovery, with the 10-year termination date, we now find that Duke should be permitted to recover prudently incurred MGP remediation costs as follows:

(1) East End site - The recovery period for this site is January 1, 2008 through December 31, 2016. We determined, based on the record, that the CERCLA mandate for this site became prevalent in 2006; therefore, the termination date should be 10 years from January 1, 2006. However, since the deferral authority was granted commencing January 1, 2008, Duke may recover the prudently incurred remediation costs from January 1, 2008 through December 31, 2016.

(2) West End site - The recovery period for this site is January 1, 2009 through December 31, 2019. We determined, based on the record, that the CERCLA mandate for this site became prevalent in 2009; therefore, the termination date should be 10 years from January 1,

2009. While the deferral authority was granted commencing January 1, 2008, the CERCLA mandate for this site was not prevalent until 2009, therefore, Duke may recover the prudently incurred remediation costs from January 1, 2009 through December 31, 2019.

IV. CONCLUSION

In accordance with our conclusions above, the Commission finds the Stipulation filed by the parties is reasonable and should be adopted. The compliance tariffs filed by Duke on April 15, 2013, conform to the provisions of the Stipulation and should be approved. Therefore, Duke should file final tariffs with the Commission consistent with the Stipulation to become effective on or after the date the final tariffs are filed.

With regard to the litigated MGP issue, the Commission finds that Duke has the statutory obligation, under CERCLA, to remediate the East and West End sites. Duke has sustained its burden to show that the investigation and remediation costs incurred at these sites were a cost of providing public utility service in response to CERCLA, and are recoverable through Rider MGP, in accordance with R.C. 4909.15(A)(4). However, the Commission determines that Duke's request to recover the 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 should be denied.

Upon consideration of the evidence of record, the Commission concludes that Duke sustained its burden to prove, in accordance with R.C. 4909.154, that the MGP investigation and remediation costs for 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 31, 2012, were appropriate and prudent. However, we emphasize that Duke should continue to use every effort to collect all remediation costs available under its insurance policies, as well as pursue recovery of costs from any third parties who may also be statutorily responsible for the remediation of the MGP sites. Accordingly, we conclude that Duke should be permitted to recover the proposed $62.8 million, less the $2,331,580 for the purchased parcel, the 2008 costs for the West End site, and all carrying charges, as set forth in this Order. This amount should be recovered consistent with the interclass allocation methodology set forth in the Stipulation and the intraclass allocation should be on a per bill basis, over a five-year amortization period. Annually, Duke should file in this docket the billing determinants to be used to determine the number of customers in each class; the allocated costs within each class should then be applied to customers on a per bill basis for the upcoming year.

Accordingly, Duke should provide Staff with a detailed spreadsheet, in a form requested by Staff, of the $62.8 million costs through December 31, 2012, testified to by Duke witness Wathen. The $62.8 million should be broken down on a monthly basis and

separated into the actual costs, the purchased parcel amount of $2,331,580, the 2008 costs for the West End site, and the associated carrying costs. Duke should also file proposed tariffs reflecting the authorized amount to be included in Rider MGP for review and approval by the Commission.

Finally, the Commission finds that Duke should be authorized, pursuant to R.C. 4905.13, to continue to modify its accounting procedures and to defer costs related to the environmental investigation and remediation costs beyond December 31, 2012. Such deferral authority is limited to the East and West End sites and to a period of 10 years beginning with the commencement of the CERCLA remediation mandate on the sites; therefore, Duke should be permitted to recover the MGP remediation costs for the East End site from January 1, 2008 through December 31, 2016, and for the West End site from January 1, 2009 through December 31, 2019. In addition, beginning March 31, 2014, and on or before March 31 in each subsequent year, Duke must update Rider MGP based on the unrecovered balance, minus any carrying charges, as required previously in this Order, as of the prior December 31.

FINDINGS OF FACT:

(1) On June 7, 2012, Duke filed a notice of intent to file an application for an increase in rates. In that application, Duke requested a test year of January 1, 2012 through December 31, 2012, and a date certain of March 31, 2012. By Commission Entry issued July 2, 2012, the test year and date certain were approved and certain waivers from the standard filing requirements were granted.

(2) Duke's application was filed on July 9, 2012.

(3) On August 29, 2012, the Commission issued an Entry accepting the application for filing as of July 9, 2012.

(4) On January 4, 2013, Staff filed its written report of investigation with the Commission.

(5) Intervention was granted to OCC, Stand, IGS, Kroger, Cincinnati, OPAE, CBT, GCHC, PWC, OMA, and Direct Energy.

(6) The motion for admission pro hac vice filed by Edmund J. Berger for OCC was granted by Entry issued December 21, 2012. The motion of admission pro hac vice file by Kay Pashos for Duke was granted at the hearing on April 29, 2013.

(7) Objections to the Staff Report were filed by Duke, IGS, CBT, PWC, GCHC, OCC, Kroger, Direct Energy, and OPAE on February 4, 2013.

(8) Motions to strike Duke's objections related to the recommendations in the Staff Report regarding Duke's cost recovery for investigation and remediation of the Applicant's MGP sites were filed by Staff and OCC on February 7, 2013, and February 19, 2013, respectively. On February 26, 2013, Duke filed its memorandum contra the motions to strike filed by Staff and OCC.

(9) Local public hearings were held on: February 19, 2013, in Hamilton, Ohio; February 20, 2013, in Union Township, Cincinnati, Ohio; February 25, 2013, in Middletown, Ohio; and February 28, 2013, in Cincinnati, Ohio. Notice of the local public hearings was published in accordance with R.C. 4903.083 and proof of such publication was filed on February 19, 2013, and March 12, 2013.

(10) On April 2, 2013, as corrected on April 24, 2013, a Stipulation was filed, signed by Duke, Staff, OCC, OPAE, GCHC, CBT, Kroger, Direct Energy, and PWC. On April 8, 2013, Cincinnati filed a letter in the dockets indicating its support for the Stipulation. On April 22, 2013, IGS filed a letter stating that it elected not to become a signatory party to the Stipulation, noting that the Stipulation does not address its objections in the cases, but that there are means, other than the Stipulation by which its concerns can be addressed.

(11) The evidentiary hearing commenced, as rescheduled, on April 29, 2013, and concluded on May 2, 2013.

(12) Initial briefs were filed on June 6, 2013, by Duke, Staff, OCC/OPAE, Kroger, and GCHC/CBT. Reply briefs were filed by Duke, OCC/OPAE, Kroger, GCHC/CBT, and OMA on June 20, 2012. Columbia filed an amicus brief and an amicus reply brief, on June 6, 2013, and June 20, 2013, respectively.

(13) The value of all of Duke's property used and useful for the rendition of electric distribution services to customers affected by these applications, determined in accordance with R.C. 4909.15, is not less than $882,242,442.

(14) The current net annual compensation of $68,197,341 represents a rate of return of 7.73 percent on the jurisdictional rate base of $882,242,442.

(15) A rate of return of 7.73 percent is fair and reasonable under the circumstances presented by these cases and is sufficient to provide Duke just compensation and return on the value of Duke's property used and useful in furnishing electric distribution services to its customers.

(16) An authorized revenue increase of zero percent will result in a return of $68,197,341 which, when applied to the rate base of $882,242,442, yields a rate of return of approximately 7.73 percent.

(17) The allowable gross annual revenue to which Duke is entitled for purposes of these proceedings is $384,015,062.

CONCLUSIONS OF LAW:

(1) Duke is a natural gas company, as defined by R.C. 4905.03, and a public utility, as defined by R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission, pursuant to R.C. 4905.04, 4905.05, and 4905.06, Revised Code.

(2) Duke's application was filed pursuant to, and this Commission has jurisdiction of the application under, the provisions of R.C. 4909.17, 4909.18, and 4909.19 and the application complies with the requirements of these statutes.

(3) A Staff investigation was conducted and a report duly filed and mailed in accordance with R.C. 4909.18.

(4) Public hearings were noticed and held in compliance with the requirements of R.C. 4909.19 and 4903.083.

(5) With regard to the Stipulation, the ultimate issue for the Commission's consideration is whether the Stipulation, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted.

(6) The Stipulation was the product of serious bargaining among capable, knowledgeable parties, advances the public interest, and does not violate any important regulatory principles or

practices. The unopposed Stipulation submitted by the signatory parties is reasonable and should be adopted in its entirety.

(7) The existing rates and charges for natural gas distribution service are sufficient to provide Duke with adequate net annual compensation and return on its property used and useful in the provision of natural gas distribution services.

(8) A rate of return of not more than 7.73 percent is fair and reasonable under the circumstances of these cases and is sufficient to provide Duke just compensation and return on its property used and useful in the provision of natural gas distribution services to its customers.

(9) Duke sustained its burden to prove that it should be authorized to recover $62.8 million, less the $2,331,580 for the purchased parcel, the 2008 costs for the West End site, and all carrying costs, as set forth in this Order, for the MGP investigation and remediation costs incurred for the period January 1, 2008 through December 31, 2012, for the East End site, and January 1, 2009 through December 31, 2012, for the West End site..

(10) Duke should be authorized to continue to defer MGP costs for the East and West End sites for a 10-year period, and file annual updates to Rider MGP, as set forth in this Order.

(11) Duke should be authorized to withdraw its current tariffs and should file final revised tariffs, consistent with the Stipulation. In addition, Duke should file details of the MGP $62.8 million actual costs, as testified to by Duke witness Wathen, as directed in this Order, as well as proposed tariffs reflecting the authorized amount to be included in Rider MGP for review and approval.

ORDER:

It is, therefore,

ORDERED, That Columbia's motion for leave to file amicus curiae briefs is granted. It is, further,

ORDERED, That OCC's motion for administrative notice is denied. It is, further,

ORDERED, That Duke's motion to strike is granted and any references to the website documents is stricken from the brief and reply brief filed by OCC/OPAE and disregarded. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, OCC Exs. 6.1, 15.1 and 17.1 filed, under seal, in these dockets on February 25, 2013, and May 14 and 15, 2013, indefinitely, until otherwise ordered by the Commission. It is, further,

ORDERED, That the interlocutory appeal filed by OCC/OPAE is denied and the attorney examiner's April 29, 2013 ruling is affirmed. It is, further,

ORDERED, That OCC's February 19, 2013 motion to strike two objections to the Staff Report filed by Duke is denied. It is, further,

ORDERED, That the Stipulation filed on April 2, 2013, as corrected on April 24, 2013, is approved in accordance with this Opinion and Order. It is, further,

ORDERED, That, in accordance with the Stipulation, a continuation of the waiver of Ohio Adm.Code 4901:1-14 granted in the *Duke Waiver Case* is approved. It is, further,

ORDERED, That Duke be authorized to file, in final form, complete copies of its tariffs filed on April 15, 2013, consistent with the provisions of the Stipulation and this Opinion and Order. Duke shall file one copy in its TRF docket and one copy in these case dockets. The effective date of the revised tariffs shall be a date not earlier than the date upon which complete, printed copies of the final tariff pages are filed with the Commission. It is, further,

ORDERED, That the application of Duke for authority recover costs through Rider MGP is granted to the extent provided in this Opinion and Order. It is, further,

ORDERED, That Duke's request to file annual updates to Rider MGP is approved, subject to the directives in this Order. It is, further,

ORDERED, That Duke file the details of the MGP $62.8 million actual costs, as testified to by Duke witness Wathen, as well as proposed tariffs reflecting the authorized amount to be included in Rider MGP. It is, further,

ORDERED, That Duke be authorized to modify its accounting procedures and to defer costs related to the environmental investigation and remediation costs described above, subject to the conditions stated herein. It is, further,

ORDERED, That Duke shall notify its customers of the changes to the tariff via bill message or bill insert, or separate mailing within 30 days of the effective date of the revised tariffs. A copy of this customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability and Service Analysis Division, at least 10 days prior to its distribution to customers. It is, further,

ORDERED, That nothing in this Opinion and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this Opinion and Order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

CMTP/vrm

Entered in the Journal

NOV 13 2013

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.	))))	Case No. 12-1687-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-1688-GA-AAM

DISSENTING OPINION OF
COMMISSIONERS STEVEN D. LESSER AND ASIM Z. HAQUE

We respectfully dissent from our colleagues in this case. Duke is attempting to obtain relief that we are simply unable to grant as we are limited by the statutory authority given to this Commission under R.C. 4909.15. Specifically, Duke is attempting to recover the expenses for remediation of the subject properties under R.C. 4909.15(A)(4). We decline to extend the statutory language and the established precedent to interpret (A)(4) to include the remediation performed by Duke here, that is, we find that the remediation is not a "cost to the utility of rendering the public utility service" as being incurred during the test year, and is not a "normal, recurring" expense. Further, the public utility service at issue is distribution service, and Duke has failed to demonstrate the nexus between the remediation expense and its distribution service.

Steven D. Lesser

Asim Z. Haque

/vrm
Entered in the Journal
NOV 13 2013

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-1688-GA-AAM

ENTRY ON REHEARING

The Commission finds:

(1) Duke Energy Ohio, Inc. (Duke or Company), is a natural gas company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission, pursuant to R.C. 4905.04, 4905.05, and 4905.06.

(2) By Opinion and Order issued November 13, 2013, the Commission approved the Stipulation and Recommendation (Stipulation) signed by Duke, Staff, the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), The Greater Cincinnati Health Council, Cincinnati Bell Telephone Company, LLC, The Kroger Company (Kroger), Direct Energy Business, LLC, and Direct Energy Services, LLC, and People Working Cooperatively, Inc. As part of that Stipulation, the parties agreed to litigate the issues related to Duke's request to recover costs for the investigation and remediation of its manufactured gas plants (MGPs). Upon consideration of the record in these cases, in its Order, the Commission concluded that: Duke appropriately responded in a proactive manner to

addressing its obligations to remediate the East and West End MGP sites in Ohio; the Commission's consideration of the recovery of the MGP costs is separate and unique from the determination of used and useful on the date certain utilized for defining what will be included in base rates for rate case purposes; 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, R.C 4909.15(A)(1) and the used and useful standard applied to the date certain for rate base costs is not applicable to the review of whether Duke may recover the costs associated with its investigation and remediation of the MGP sites, therefore, it was not necessary to determine if the MGP sites would be considered used and useful under R.C. 4909.15; and Duke sustained its burden to prove that it prudently incurred MGP investigation and remediation costs related to the sites, less certain costs and charges, and said costs should, in accordance with R.C. 4909.15(A)(4), be considered costs incurred by Duke for rendering utility service and be treated as expenses incurred during the test year. Therefore, Duke was authorized to recover $62.8 million, less $2.3 million for the purchased parcel on the East End site, the 2008 costs for the West End site, and all carrying charges for both sites, on a per bill basis, over a five-year amortization period. In addition, the Commission authorized Duke to continue to defer such costs beyond December 31, 2012, limiting such deferral authority to the East and West End sites and to a period of 10 years beginning at the point the circumstances on the sites changed and Duke's remediation responsibilities under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601, et seq.) (CERCLA) became prevalent, *i.e.*, for the East End site from January 1, 2008 through December 31, 2016, and for the West End site from January 1, 2009 through December 31, 2019. Finally, the Commission determined that, beginning March 31, 2014, and on or before March 31 in each subsequent year, Duke may update Rider MGP based on the unrecovered balance, minus any carrying charges, as of the prior December 31.

(3) R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for

rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

(4) On December 13, 2013, Duke filed an application for rehearing of the Commission's November 13, 2013 Order requesting that the Commission reconsider the 10-year timeframe for the recovery of costs incurred for the environmental remediation, stating that such timeframe is not supported by the record. Duke argues that the evidence it presented demonstrates that flexibility is required to enable the Company to accomplish the remediation in an efficient and reasonable manner, taking into account numerous factors outside of the Company's control, *e.g.*, coordinating with third parties and internal project coordination. While Duke acknowledges the rationale for a reasonable timeframe, the Order did not include any provision for altering the timeframe specified therein. However, Duke acknowledges the Commission's statement in the Order that, "absent exigent circumstances, this 10-year timeframe***is reasonable***." Therefore, Duke requests the Commission either revise the Order to enable the Company to request that the timeframe be extended, if the need arises during the remediation efforts, or clarify the intent of the exigent circumstances language.

(5) On December 23, 2013, OCC, Kroger, the Ohio Manufacturers' Association, and OPAE (jointly referred to as the Consumer Advocates) filed a memorandum contra Duke's application for rehearing. Initially, they note that, in contravention of the requirements set forth in R.C. 4903.10, Duke fails to cite any specific law to support its allegation. Furthermore, the Consumer Advocates point out that Duke does not claim that the Commission's limitation is unreasonable. According to the Consumer Advocates, given that Duke's actions, to date, have not been prompt in addressing the pollution at the MGP sites, the Commission should be circumspect in entertaining any claim of exigency by Duke. Moreover, the Consumer Advocates state that the Commission cannot grant Duke's request to clarify the Order, as the proper way to seek further understanding of the intent of the Order is through an application for rehearing.

(6) Upon consideration of Duke's application for rehearing and the responsive pleading, the Commission reiterates its determination that it is essential that recovery from customers of the costs incurred to remediate the MGP sites be limited to a reasonable timeframe of 10 years. Initially, the Commission notes that Duke does not argue against the 10-year period; rather, Duke requests that it be permitted to seek an extension of the 10-year period in the future if the need arises. The Commission finds that the Order clearly provided for such a request in the event of an exigent circumstance, *i.e.*, an event beyond the control of the Company. Therefore, we find that clarification is unnecessary and Duke's request for rehearing on this issue is without merit and should be denied.

(7) On November 13, 2013, the Consumer Advocates filed a joint application of rehearing of the Commission's November 13, 2013 Order, citing 13 assignments of error. Duke filed a memorandum contra the Consumer Advocates' application for rehearing on December 23, 2013.

(8) In their first assignment of error, the Consumer Advocates state that the Commission erred when it disregarded Ohio law, including R.C. 4909.15, and authorized Duke to charge customers for costs that were related to plant that was not used and useful in the provision of natural gas service as of the date certain established in these cases, March 31, 2012. Pointing out that the Commission is a creature of statute, they offer that R.C. 4909.15(A)(1) sets forth the mandatory criteria to be used in the establishment of the valuation of utility property at the date certain for the purpose of setting reasonable rates. According to the Consumer Advocates, there are no exceptions to the applicability of the used and useful standard, and the MGP sites were not used and useful in rendering public utility service. The Consumer Advocates believe the Commission established an exception to the used and useful standard when it recognized the circumstances surrounding the two MGP sites and the fact that Duke was under a statutory mandate. Acknowledging that the used and useful standard has no applicability to the determination of a return on the MGP facilities, the Consumer Advocates go on to state that the used and useful requirement for the valuation of property still applies,

because expenses associated with property that is not used and useful cannot be included as test-year expenses and collected from customers. They insist the used and useful standard applies regardless of the fact that Duke is under a statutory mandate to perform environmental remediation. If there is a mandate under CERCLA to remediate, the liability applies to the owner/operator of the MGP sites, not the customers. Moreover, the Consumer Advocates argue that, in applying the principles of statutory construction, R.C. 4909.15 (A)(1) and (A)(4) should be read together and not as separate provisions, as applied by the Commission in its Order. They assert that, because the two subparts were enacted at the same time, because various subparts of this statute reference each other, and because of the interrelated subject matter of these two provisions, a harmonized reading of these subparts is required. Therefore, the Consumer Advocates argue rehearing should be granted because Duke failed to meet its burden of proving that the MGP costs are recoverable test-year expenses under R.C. 4909.15(A)(4) when the costs are not associated with plant that is used and useful under R.C. 4909.15(A)(1).

(9) In response to the Consumer Advocates first assignment of error, Duke asserts that the Commission's decision is in compliance with the statutes that provide the necessary authority. Furthermore, Duke points out that the Consumer Advocates raise the same arguments they made previously and ignore the Commission's explanation that the relevant law supporting the decision in these proceedings is R.C. 4909.15(A)(4), not division (A)(1). Likewise, Duke argues that the precedent cited by the Consumer Advocates in support of their notion that R.C. 4909.15(A)(1) are inapplicable and irrelevant for the Commission's consideration of the MGP costs in these cases. Duke submits that the question before the Commission relates to an ordinary and necessary business expense and not the recovery of, or on, capital investment. The Company has not sought to include any capital investment associated with the MCP facilities in its rate base. According to Duke, costs that do not relate directly to used and useful capital investment, but instead are related to the Company's business viability, are frequently allowed and included in rate proceedings. Duke notes that, if the Consumer Advocates' logic that only

costs directly associated with used and useful investment could be recovered, then utilities would be precluded from recovering costs such as gross receipts taxes, outside consultants, outside legal fees, and many other types of costs that the utility incurs in the provision of service, which may not be associated with any particular used and useful property.

With regard to the Consumer Advocates' argument that R.C. 4909.15(A)(1) does not provide an exception to the applicability of the used and useful standard, Duke emphasizes that this provision is not relevant to the Commission's decision, as it is inapplicable and the Consumer Advocates' arguments are based on the wrong statutory provision. The MGP costs are necessary in order for the Company to stay in business and comply with current environmental laws and regulations; thus, they are part of providing current service and are properly recoverable. Duke believes the General Assembly recognized that there are costs to provide utility service that are not necessarily directly related to used and useful; thus, R.C. 4909.15(A)(4) specifically provides for recovery of such costs and does not make recovery contingent on being associated with the calculation of rate base. Duke offers that the MGP remediation costs constitute normal and necessary business expenses similar to any other cost of remaining in compliance with Ohio and federal environmental laws.

Moreover, Duke submits that the Consumer Advocates' argument that Duke has no statutory mandate to remediate the MGP sites and there is no order by any environmental agency to remediate the sites is irrelevant and factually unsupported on the record in these proceedings. Instead, Duke's witnesses provided abundant expert testimony, which was recounted in the Order, explaining the Company's liability under state and federal law and the prudency of proceeding proactively to address the liability under the Ohio Environmental Protection Agency's (EPA) voluntary action program (VAP).

(10) The Commission, at great lengths in our Order, summarized and reviewed the statute, the applicable precedent, and the evidence and arguments submitted by the parties in these

cases and concluded that the collection of the MGP costs proposed by Duke is separate and unique from the determination of used and useful on the date certain that is utilized for defining what will be included in base rates for rate case purposes. Contrary to the assertions of the Consumer Advocates, the Commission did not create an exception to the used and useful standard in R.C. 4909.15(A)(1). Rather, we found that this division of the statute was not applicable to our consideration of Duke's proposed recovery of the MGP costs, for which it had been granted deferral authority, we acknowledged the federal mandate for remediation of the MGP sites, and appropriately considered Duke's request under the applicable standard set forth in R.C. 4909.15(A)(4). Accordingly, the Consumer Advocates' first assignment of error is without merit and should be denied.

(11) In their second assignment of error, the Consumer Advocates argue the Commission should not have authorized Duke to charge customers for MGP investigation and remediation expenses that are not costs to the utility of rendering public utility services during the test year, in violation of R.C. 4909.15(A)(4) and (C)(1). According to the Consumer Advocates, a critical component of the ratemaking formula is that the costs must be costs incurred to render public utility service and the underlying property that gave rise to the costs must be used and useful in providing service to customers on the date certain.

(12) Duke, in response to the Consumer Advocates' second assignment of error, submits that they once again confuse R.C. 4909.15(A)(1) with (A)(4) to support their position that only expenses associated with used and useful property are recoverable from customers. However, Duke points out that nothing in division (A)(4) mentions the used and useful requirement; rather, (A)(4) refers to the costs to the utility of rendering the public utility service for the test period, which include the costs of complying with applicable law. Duke states that, contrary to the assertions of the Consumer Advocates, the Commission was not confused or misinformed about the meaning and intent of the applicable statutes.

(13) The Consumer Advocates' second assignment of error is without merit. As we stated in the Order, the determinative factor under R.C. 4909.15(A)(4) is whether the MGP remediation costs, which were deferred by Duke and amortized to expense during the test year, are costs incurred by Duke for rendering utility service. Contrary to the opinion of the Consumer Advocates, when determining the appropriate costs to be included in rates, R.C. 4909.15(A)(1) and (A)(4) each provide for consideration of particular costs incurred by a utility. Under their proposal, the Consumer Advocates would have the Commission apply the used and useful standard set forth in provision (A)(1) to (A)(4) as well. However, such an application would not be appropriate. Therefore, their request for rehearing of this determination should be denied.

(14) Consumer Advocates, in their third assignment of error, assert the Commission erred by authorizing Duke to charge customers for MGP expenses that are not a normal recurring expenses, in violation of Ohio law, including R.C. 4909.15(A)(4). In addition, they submit that, even though the Commission has stated that the MGP remediation costs are business costs, not all costs incurred by a public utility are current or recoverable from customers, *e.g.*, charitable contributions, and promotional and institutional advertising. Classifying the costs as business costs does not overcome the fact that the costs did not provide a direct and primary benefit to Duke's current customers, according to the Consumer Advocates.

(15) In response to the Consumer Advocates' third assignment of error, Duke notes that, despite their attempts to add new words to R.C. 4909.15(A)(4), this provision does not contain the terms "normal" or "recurring" in the context used by the intervenors. Therefore, there is no legal requirement that the expense be normal or recurring in order to be recoverable from customers. In addition, Duke submits that the MGP costs provide a direct and primary benefit to customers, pointing out that the Company provided evidence supporting the legal and regulatory requirements related to the need to investigate and remediate the sites in order to be compliant with state and federal law, and to protect human health and the environment. Likewise, as the sites contain

ongoing regulated operations, the Company established, on the record, the need to ensure that its employees are protected, further noting that the sites are used to provide affordable, reliable, and safe utility services to customers. Remediation allows the sites to continue this ongoing service, while protecting the Company's employees and customers. Thus, Duke asserts the Commission recognized that the underlying property that gave rise to the costs was currently used and useful in providing service to customers and, therefore, constitutes costs to the utility of rendering the public utility service required by R.C. 4909.15(A)(4).

(16) With regard to the third assignment of error by the Consumer Advocates, the Commission fully reviewed and addressed this issue in the Order. There is no doubt that the remediation costs were a necessary cost of doing business by Duke in response to CERCLA. It is also undisputed that such remediation provides direct benefits to society, the Company and its employees, and the environment. Therefore, we find that the Consumer Advocates' third assignment of error is without merit and should be denied.

(17) In their fourth assignment of error, the Consumer Advocates contend the Commission should not have authorized Duke to charge for MGP expenses that are not expenses for Duke's utility distribution service, in violation of law, including R.C. 4909.15. The Consumer Advocates assert that Duke failed to meet its burden of proving that there is a nexus between the MGP investigation and remediation costs and the provision of natural gas service.

(18) Duke responds to the Consumer Advocates' fourth assignment of error noting the argument that there must be a nexus between the MGP costs and the provision of natural gas service is contrary to the plain words of the statute. While R.C. 4909.15(A)(1) directs the Commission to determine the valuation as of the date certain of the property of the public utility used and useful in rendering public utility service, the sites upon which the MGP sites are located are used and useful in rendering public utility services. However, according to Duke, it is not necessary to demonstrate any nexus in order for the Commission to find

that the investigation and remediation expenses are normal and necessary business expenses.

(19) Initially, the Commission notes that it is evident that manufactured gas was provided to customers through facilities on the sites and the MGP sites are part of the Company's current gas distribution operations. Upon considering Duke's request to recover the associated MGP remediation costs for the sites and applying the standard under R.C. 4909.15(A)(4), the Commission determined that the best evidence of record supports Duke's claim that the remediation costs were a cost of providing utility service and a necessary cost of doing business as a public utility. Therefore, the Consumer Advocates' argument that there is no nexus between the remediation costs and the Company's provision of natural gas services is without merit and their fourth assignment of error should be denied.

(20) The fifth assignment of error espoused by the Consumer Advocates is that the Commission failed to comply with the requirements of R.C. 4903.09 that specific findings of facts and written opinions must be supported by the record evidence. They contend the record did not support the Commission's order that: the used and useful standard under R.C. 4909.15(A)(1) is not applicable; the MGP investigation and remediation costs were costs of rendering public utility service under R.C. 4909.15(A)(4); and that strict liability for Duke under CERCLA means Duke customers should be responsible for paying the MGP expenses. The Consumer Advocates acknowledge that Duke faces strict liability for remediating contamination at the MGP sites under CERCLA; however, they state that Duke is not under an order from any court or environmental agency to do so and, instead, is voluntarily undertaking the remediation actions at the MGP sites. Further, the Consumer Advocates submit the Commission has not specified the exact circumstances relied upon to support the decision that Duke may recover the MGP costs.

(21) In response to the Consumer Advocates' fifth assignment of error, Duke submits that their arguments are illogical and unsupportable. First, Duke maintains the Commission's Order clearly and unequivocally supports the prudent

decision made by the Company, under applicable state and federal law, to investigate and remediate the MGP sites. Duke offers that Duke witness Margolis provided testimony explaining: the legal and regulatory requirements related to the liability under state and federal law; the application of CERCLA, noting that it establishes strict liability for sites that contain hazardous substances, which applies to current owners and operators of such sites; the advantages for managing the investigation and remediation of the sites under the VAP; and the risks the Company is under for third-party lawsuits. Duke points out that no other party presented evidence on the record to the contrary. Duke notes that, while the Consumer Advocates may disagree with the Commission's Order, there is no lack of support in the Order for the Commission's decision. Second, Duke asserts that the Consumer Advocates incorrectly assume that the Commission's statutory reliance is necessarily tied to the legal and regulatory environmental requirement. To the contrary, while the Commission correctly recognized the legal mandates imposed on the Company to comply with the law, the Commission found that the costs could be recovered as normal and necessary business expenses. Even if the Company was under a formal legal mandate, as espoused by the Consumer Advocates, the nature of the costs would still be the same and the costs would constitute normal and necessary business expenses and would not be subject to a determination with regard to the used and useful standard.

Duke notes that it is undisputed that the MGP sites served utility customers by providing manufactured gas and that the sites currently serve utility customers. According to Duke, the Order recognized, with ample support, that the remediation costs are a necessary cost of doing business as a public utility and are proper costs borne by customers. Duke states that, while the Consumer Advocates acknowledge that CERCLA is applicable and establishes strict liability, their implication that complying with the law is voluntary and the customers should not be required to pay for the remediation fails because the record in these cases establishes that the remediation is not voluntary. Duke contends it is incorrect to argue that compliance with the law and protection of human health and the environment, on a

prudent, proactive, and cost-effective basis, is voluntary. The liability for these sites was not voluntary and the need to investigate and remediate was caused by changing circumstances at the sites. Duke opines that the Consumer Advocates' argument is akin to arguing that, because the Company, rather than the customers, has the obligation to pay taxes, the tax expense should be excluded from rates.

(22) Upon consideration of the Consumer Advocates' fifth assignment of error, the Commission finds that it is without merit. A review of our 79-page Order reveals that the Commission diligently reviewed and considered all of the information submitted on the record in these cases. The Consumer Advocates' allegation that we did not set forth our findings and conclusions, and specify the exact circumstances we relied on to support the decision, is clearly unfounded. The Consumer Advocates simply do not agree with the Commission's review of the facts and the conclusions expounded upon in the Order; therefore, they chose to ignore the breadth of the evidence supporting the ultimate conclusion in these cases. Accordingly, we find that their fifth assignment of error should be denied.

(23) In their sixth assignment of error, the Consumer Advocates argue the Commission erred by making the remedy for Duke's pollution of the MGP sites the financial responsibility of the customers instead of Duke's responsibility. The Consumer Advocates submit that, prior to CERCLA, Ohio General and Local Acts Section 6925 (Jan. 6, 1896) (Section 6925) prohibited dumping into any rivers, lakes, ponds, or streams; they assert that, with the location of Duke's MGP sites along the Ohio River, this law would have applied to those sites. Therefore, the Consumer Advocates contend the MGP costs should be viewed as costs to remedy Duke's obligation under Ohio law that existed at the time the plants were operating and the pollution was being released.

(24) Duke responds to the Consumer Advocates' sixth assignment of error, noting that this was the same argument made in the reply briefs and it is fundamentally flawed and irrelevant. According to Duke, CERCLA imposes strict liability on owners and operators to clean up contaminated sites; however, Section 6925 was a nuisance statute that

prohibited intentional acts of throwing or depositing coal dirt, coal slack, coal screenings, or coal refuse from gas works upon or into any rivers, lakes, ponds, or streams. The Consumer Advocates failed to provide any evidence on the record that Duke would have any liability under Section 6925 or that Section 6925 would have obligated the Company to remediate the sites.

(25) The Commission agrees that Section 6925 is irrelevant and inapplicable to our consideration of the facts as we apply the ratemaking statutes to the circumstances presented in these cases. 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. In response to the commencement of the changed circumstances at the East and West End sites, the record reflects that Duke proactively addressed the situations by engaging the Ohio EPA's VAP. While the VAP enables Duke to ascertain the appropriate methodology for responding to the CERCLA mandate, to say that Duke's actions were voluntary and not mandated by law, the record reflects that such an assertion is incorrect. Moreover, the record before us supports our conclusion that the costs that have been incurred and deferred are costs that were incurred in the rendering of utility service. Thus, it is appropriate for the Commission to consider Duke's request for recovery of any prudently incurred MGP investigation and remediation costs under R.C. 4909.15(A)(4). Accordingly, the Commission concludes that the Consumer Advocates' sixth assignment of error is without merit and should be denied.

(26) The seventh assignment of error submitted by the Consumer Advocates states that the Commission erred by finding that Duke met its burden of proof to show that it was necessary to spend approximately $55.5 million in MGP remediation costs to meet the applicable standards and to protect human health and the environment. According to the Consumer Advocates, such a finding was unreasonable, unlawful, and against the manifest weight of the evidence, citing seven areas of concern.

(27) Duke responds that the record, when considered as a whole, overwhelmingly supports the Commission's determination that the expenses were prudently incurred. Duke asserts that it engaged in a comprehensive assessment of its legal liability and duty to clean up the sites, and exercised in-depth, prudent, and reasonable management of the investigation and remediation of the sites. The Commission's Order explains in great detail its analysis of the facts and arguments presented in these cases. According to Duke, the Consumer Advocates' argument with respect to the Commission's finding that Duke met the burden of proof boils down to a disagreement of the weight the Commission accorded to the evidence that it considered. Each of the Consumer Advocates' arguments are meritless and ignore the evidence presented in this case and considered by the Commission.

(28) The seven areas of concern cited by the Consumer Advocates in their seventh assignment of error and Duke's responses to each are as follows:

(a) The Consumer Advocates state Duke failed to produce a single written report documenting, or witness testifying, as to Duke's detailed consideration of alternative remedial options and their associated costs.

Duke responds that this argument is a red herring and is based on the false premise that a written document is required for the Company to meet its evidentiary burden, noting that the Consumer Advocates have failed to cite a statute, regulation, or other authority requiring such a document. This argument is at odds with the Commission's role to consider the totality of the evidence, not just documentary evidence. Moreover, the record is replete with competent and credible evidence that the Company's process was both comprehensive and reasonable, and that it did consider remedial options, best practices, feasibility, constructability, safety, prior experience, and

long-term and short-term impacts, as well as costs.

(b) The Consumer Advocates maintain that Duke's mere consideration of remediation alternatives and incorporation of various engineering and institutional control measures, independent of a detailed analysis of far less costly remediation alternatives, does not make Duke's environmental remediation plan reasonable and prudent.

Duke submits that, while OCC witness Campbell suggested other approaches that he speculated would be appropriate, he had no experience with and had not worked under the Ohio VAP. However, the overwhelming evidence in the record indicates that the approaches offered by Dr. Campbell would not meet applicable VAP standards. In contrast, Duke offered testimony by witnesses that are both familiar with the MGP sites and have expertise with regard to the Ohio VAP.

(c) The Consumer Advocates aver that Duke's use of the Ohio EPA's VAP, which does not specify or prescribe remedial options, was not a sufficient basis to find that Duke's selected remediation was reasonable and prudent.

Duke maintains that the use of Ohio's VAP is evidence of prudence, contending that the fact that the VAP is performance-based, rather than prescriptive, in no way impugns the reasonableness or prudence of the program. While the VAP does not mandate how the applicable standards are met, achieving those applicable standards while following the requirements of the VAP is evidence of prudence.

(d) The Consumer Advocates submit that reliance on the testimony of Duke witness Fiore was

misplaced, as the witness admitted he had not independently assessed, or priced out, the alternative remedial options available to Duke or the reasonableness and prudence of those alternative remedial options for reducing the costs. Mr. Fiore's determination that Duke's remediation was reasonable and prudent lacked an appropriate basis or methodology.

Duke responds that the Consumer Advocates misstate the Company's evidence and the Commission's Order, offering that the Company did not exclusively rely on Duke witness Fiore's testimony. The Company also presented substantial testimony from other witnesses to establish the reasonableness and prudence of the Company's identification and assessment of remedial options. However, Duke witness Fiore's testimony was offered to demonstrated that the remedial actions chosen by the Company were consistent with other MGP cleanups, reasonable within the framework of the VAP, and would meet the VAP requirements. His testimony also reflected that the options put forth by OCC would not meet the VAP standards.

(e) The Consumer Advocates maintain that the Commission relied on the fact that Duke's expert witnesses were subject to discovery, as well as extensive cross-examination, without examining whether their opinion regarding the prudence of Duke's expenditure of $55.5 million in MGP costs were reasonable, when their opinions lacked foundation and did not stand up to cross-examination.

Duke states that the Consumer Advocates fail to articulate how the Company's witnesses did not stand up to cross-examination; rather, they merely express their opinion that the responses on cross were poor. According to Duke, the Commission's conclusion that Duke's

witnesses presented ample information to support a finding of prudency was supported by substantial evidence.

(f) The Consumer Advocates allege that the Commission authorized $55.5 million in charges when Duke is required by law to minimize charges to customers and OCC produced uncontradicted evidence of a $7.1 million MGP remediation alternative that would also meet applicable standards.

According to Duke, there was no reason to challenge the estimated costs of the alternative suggested by OCC, because it clearly did not meet the threshold requirement that the remedy meet the applicable VAP standards and other appropriate factors.

(g) The Consumer Advocates assert the Commission disregarded the evidence that excavating to two feet and then applying a surface cap would have met applicable standards and protected human health and the environment across the MGP sites, rather than the 20 to 40 feet uniformly excavated by Duke, which resulted in greater costs. The Commission improperly disregarded evidence that excavation below two feet was not necessary to protect workers, as they could have been protected through an appropriate soil management plan. Further, the Commission ignored evidence that groundwater remediation, beyond institutional and engineering controls, and monitoring, was not necessary.

Duke responds that, contrary to the assertions by the Consumer Advocates, the Commission did not disregard OCC witness Campbell's suggested alternative; in fact, the Order clearly indicates that the Commission considered these suggestions. However, the Commission

> found that, unlike Duke's experts, the intervenor witnesses did not have the in-depth, firsthand knowledge of the MGP sites. While the Consumer Advocates may disagree with the weight the Commission accorded OCC witness Campbell's testimony, they cannot claim the Commission failed to consider the testimony.

(29) The Commission finds that the seventh assignment of error set forth by the Consumer Advocates is without merit. As we stated previously, while the Consumer Advocates' submit that the Commission's conclusions in these cases are against the manifest weight of the evidence, what they are really saying is that they do not agree with the Commission's rationale and ultimate findings and, therefore, the Commission should reconsider its decision. There is no dispute that the burden to proof that the Company's expenditure of funds for the remediation of the MGP sites is on Duke. At the hearing, Duke presented six credible expert witnesses, whose subject matter expertise ranged from managing the remediation of the MGP sites in question to an Ohio EPA certified professional reviewing Duke's remediation for compliance with the Ohio EPA's VAP, as well as other legal, environmental, rate management, and gas field operations professionals. The Commission is not, in any way, discounting the expertise of the witnesses presented by the intervening parties in these cases, one of which, OCC witness Campbell, is a learned environmental consultant and professional. However, it is the Commission's responsibility to review the totality of the evidence presented in these cases and determine whether Duke sustained its burden to prove the prudency of the costs expended thus far on the MGP remediation. The bulk of our 79-page Order thoroughly recounted and analyzed the facts and arguments presented by all parties in these cases. Ultimately, we found that Duke presented the best credible evidence supporting a finding that, with several exceptions, its expenditures were reasonable and prudent. Having reviewed the Consumer Advocates' seven areas of concern in this assignment or error and the responsive pleading, we find that they have not raised anything new that was not already thoroughly considered in our Order. Accordingly,

we find that the Consumer Advocates' seventh assignment of error should be denied.

(30) In their eighth assignment of error, the Consumer Advocates assert that the Commission erred by applying a standard which discounted the weight placed on the testimony of intervenor experts, favored Duke's witnesses, and created a presumption that Duke's actions were prudent in contravention of precedent. They assert that Duke could not meet its burden of proof without having performed, or presented, an analysis of remediation alternatives. The Consumer Advocates contend that the Commission shifted the burden of proof to opposing parties to show less costly remediation alternatives. According to the Consumer Advocates, OCC witness Campbell is an environmental engineer who reviews and addresses varying federal and state regulations throughout his work, and he provided a detailed estimate of a remediation alternative consistent with the VAP requirements. The Consumer Advocates note that neither Ohio law nor the Ohio Rules of Evidence limit the ability of engineers to testify as expert witnesses because they lack a certification or license as an Ohio registered professional engineer. They assert that there was no objective reason to ignore Dr. Campbell's testimony, as he had the qualifications to offer the opinion and the testimony that he provided was not contradicted by any witness. Moreover, the Consumer Advocates submit that Duke witness Fiore, whose testimony the Commission relied on to support a finding of prudency, had no more firsthand knowledge of the selection of the remediation options for the MGP sites than did OCC witness Campbell.

(31) Duke responds to the Consumer Advocates' eighth assignment of error contending that the testimony offered by OCC witness Campbell was unpersuasive. Conversely, Duke provided witnesses that testified as to: the exhaustive history of the MGPs; the nature of the Company's liability and the prudence of its efforts to address its legal liability in a cost-effective and efficient manner; the methodology used by the Company to remediate the sites and the actions required to comply with the applicable standards under the VAP; and the decision-making employed by Duke in overseeing and managing the site remediation. Duke notes

that the history of the sites was not rebutted and no party disagreed that there is liability attached to remediation of the sites. Moreover, Duke asserts that OCC witness Campbell does not have the experience with the VAP, other than that he read the regulations and looked at the Ohio EPA website. Duke opines that, while Dr. Campbell may be a reputable and reliable consultant in certain matters, he was not adequately qualified to offer an opinion with respect to the Ohio VAP, the remediation of the MGP sites, or the Company's decisions. Thus, Duke asserts that the record abundantly supports the Commission's Order.

(32) Upon consideration of the eighth assignment of error claimed by the Consumer Advocates, the Commission finds that it is without merit. Again we emphasize the diligence of our review and the fact that we judiciously considered the testimony of all witnesses, both from the Company and the intervenors. Contrary to the unfounded allegations by the Consumer Advocates, there was no presumption that Duke's actions were prudent and the burden of proof was in no way shifted to the opposing parties. The Commission painstakingly considered the totality of the record evidence and found that Duke presented credible and convincing support to sustain its burden of proof. While the Consumer Advocates would prefer that we found otherwise, they have presented nothing new that was not already considered and would warrant reversal of our well-founded conclusion in these cases. Accordingly, the eighth assignment of error should be denied.

(33) The Consumer Advocates, in their ninth assignment of error, believe the Commission erred by finding that Duke made a reasonable and prudent decision to investigate and remediate the East End site due to the changes in the use of the property and adjacent properties, when the changes in use may not have occurred, but for Duke's decision to sell a portion of the site. Moreover, they note that Duke's actions to sell the parcel and to grant a use easement were not utility activities, and Duke should have known that its actions would trigger the need to remediate. The Consumer Advocates believe the sale of the western parcel on the East End site was designed to benefit Duke's shareholders. They maintain the sale should have disqualified Duke from

charging customers for any costs of remediation resulting from the site's change in use.

(34) In response to their ninth assignment of error, Duke states that the need to investigate and remediate the East End MGP site was not triggered by Duke's decision to sell a portion of the site and the Consumer Advocates' assertion to the contrary is neither supported by the law or the record. Rather, the decision to remediate the East End site was necessitated by a change in the use at and adjacent to the property. Moreover, the Consumer Advocates ignore the fact that Duke's liability follows the MGP waste materials and is not tied solely to ownership and operation of the property.

(35) The Commission finds that the Consumer Advocates' conjecture pertaining to the sale of the parcel west of the East End site and the effect of such sale on the commencement of the need to remediate the site is not based on any evidence presented on the record in these cases. In actuality, the record reflects that the property sold by Duke represents only a small portion of the overall nine-acre purchased parcel, as it was referred to in the Order. Moreover, recognizing that the record did not distinguish between the small portion that had been sold by Duke, which had been associated with the MGPs, and the remainder of the nine-acre purchased parcel that had not been related to the MGPs, the Commission denied Duke's request to include the approximately $2.3 million associated with the purchased parcel in the MGP costs to be recovered in these cases. Therefore, we conclude that the Consumer Advocates' ninth assignment of error is without merit and should be denied.

(36) In their tenth assignment of error, the Consumer Advocates claim the Commission failed to comply with R.C. 4909.19, which required the Staff Report to include a determination of the prudence of Duke's MGP investigation and remediation costs. Instead, the Commission accepted Staff's decision not to investigate the necessity and scope of the remediation work performed by Duke, as well as Staff's acceptance of the opinion of Duke's Ohio EPA certified professional. According to the Consumer Advocates, an

outside consultant could have been hired by Staff to review the prudency of the costs. The Consumer Advocates, further, infer that the Commission deferred to Duke's expert witness on the prudence of the remediation activities; thus, providing Duke a presumption of prudence.

(37) In response to the Consumer Advocates' tenth assignment of error, Duke submits that, while R.C. 4909.19 requires the Commission investigate the facts set forth in the Company's application, it does not provide any further requirements with respect to how the investigation is to be conducted; rather, the General Assembly deferred to the Commission's discretion and judgment in terms of ratemaking. According to Duke, based upon the evidence, which reflected opposing positions, the Commission invoked its judgment and expertise in concluding that the remediation costs were a necessary expense associated with the provision of utility service and, but for a limited exception, were prudently and reasonably incurred by Duke. In so doing, Duke notes that the Commission rejected the findings of Staff, which the Commission is at liberty to do.

(38) The Consumer Advocates' tenth assignment of error is without merit. Contrary to the allegations of the Consumer Advocates, Staff thoroughly investigated and opined on the costs associated with the investigation and remediation efforts at Duke's MGP sites. Given Staff's position in these cases regarding recovery of the MGP expenses, there was no need for Staff to review the scope of the remediation work, as advocated by the Consumer Advocates, and there is no requirement, either in the statute or in the regulations, that Staff must investigate and present its position on the prudency of such costs. The Consumer Advocates' argument that the Commission deferred its decision on the prudency of the costs incurred for the MGP remediation to Duke's witness is unfounded. As pointed out numerous times by the Consumer Advocates and acknowledged by Duke and Staff in these proceedings, the burden of proof is on Duke to show the prudency of the MGP remediation expenditures. As evidenced by our thorough and detailed accounting in our Order of the facts and arguments presented by all parties, we weighed the evidence and based our conclusions regarding prudency on the best evidence of

record. There was no presumption of prudence for Duke; rather, as the record reflects, Duke presented credible, substantiated evidence that was specific to the MGP sites in question to support its assertion of prudency. Accordingly, we find that the Consumer Advocates' tenth assignment of error should be denied.

(39) The eleventh assignment of error set forth by the Consumer Advocates is that the Commission erred in finding that Duke has taken reasonable and prudent action to pursue recovery of investigation and remediation costs from other potentially responsible third parties and insurers. The Consumer Advocates maintain the Commission should examine Duke's collection efforts in a future proceeding and should address the prudence of Duke's efforts to collect such amounts at that time.

(40) Duke responds to the Consumer Advocates' eleventh assignment of error pointing out that the evidence reflects that Duke is pursuing other means of funding the costs of the MGP remediation and the Company accepts the Commission's expectation that it pursue these sources of funding. Although the Commission can ascertain in a future proceeding whether Duke is fulfilling its commitment to seek third-party funding for the cleanup, there is no present basis to delay Duke's recovery of costs that have been and will continue to be incurred.

(41) The Commission finds that the Consumer Advocates' eleventh assignment of error is without merit and should be denied. As provided in our Order, it is the Commission's expectation that Duke will use every effort to recoup remediation costs from all associated third parties, and the Commission will monitor this process closely. Moreover, the Commission will, at its discretion, initiate a review of Duke's efforts to recover third-party funding for the remediation costs.

(42) In their twelfth assignment of error, the Consumer Advocates offer that the Commission should not have authorized Duke to collect the deferred MGP costs from customers over an unreasonably short five-year period. The Consumer Advocates supported a longer 10-year

amortization period, which they continue to advocate for, arguing that the longer period will mitigate the rate impacts on customers. They argue the Commission's ultimate denial of Duke's request to recover carrying charges further supports a longer amortization period because the shareholders should bear some responsibility and the ultimate rate burden on customers should be minimized.

(43) In response to the twelfth assignment of error, Duke argues the Commission's decision to allow amortization over a five-year period is reasonably balanced and the Consumer Advocates did not offer a substantial basis for a longer period. Duke notes that OCC's witnesses did agree that, if three years was the actual expected period between rate cases, then three years was a reasonable timeframe for recovery and, in determining the appropriate amortization period, it is reasonable to consider the amount and age of the deferral, the anticipation of additional deferrals, and the proximity of the next rate case. Moreover, Duke points out that, despite advocating for a longer amortization period based on the concept of rate shock, the Consumer Advocate witnesses did not analyze or research the rate impacts that would result from differing proposed amortization periods. Finally, Duke asserts the Commission's decision to deny recovery of any carrying charges mitigates against a longer amortization period. Moving to a 10-year period unfairly shifts more of the burden to Duke, according to the Company.

(44) The record reflects proposed periods for amortization ranging from between three and ten years. The Commission considered the arguments regarding this issue provided by each of the parties. Based on our determination that the record supports Duke's recovery of some of the costs associated with the MGP remediation, the Commission believes the five-year amortization period appropriately weighs the interests of all parties. Accordingly, we conclude that the twelfth assignment of error by the Consumer Advocates should be denied.

(45) In their thirteenth assignment of error, the Consumer Advocates state that Duke should not have been authorized to collect from customers the MGP costs incurred after

December 31, 2012, through a rider. They assert the Commission's grant of authority to Duke to defer and recover future costs through Rider MGP is contrary to the Staff Report, which Duke did not object to, as well as the Stipulation, which requires Duke to file a subsequent rate case to collect expenses after December 31, 2012. Therefore, the Consumer Advocates state that only those MGP costs that are found to meet legal and regulatory requirements that were deferred before December 31, 2012, should be the subject currently being considered for recovery from customers.

(46) Duke, in response to the Consumer Advocates' thirteenth assignment of error, maintains that the grant of deferral accounting authority is well within the broad authority granted to the Commission under R.C. 4905.13. Duke asserts that, given the evidence of record, the Commission's decision to authorize continual deferral authority was reasonable.

(47) The Commission finds no merit in the thirteenth assignment of error offered by the Consumer Advocates. We agree that R.C. 4905.13 empowers the Commission to grant Duke's request for continued deferral authority within the context of these cases. However, as noted in our Order, authorization to permit the Company to make the necessary accounting adjustment to reflect the deferral is in no way a ruling on the prudency of the costs yet to be reviewed. Since we have determined in these cases that Duke should be permitted to recover the prudently incurred costs of the MGP investigation and remediation, it follows that Duke should be authorized to update Rider MGP on an annual basis based on the established 10-year timeframes mandated for the East and West End sites. Accordingly, we conclude that the Consumer Advocates' thirteenth assignment of error should be denied.

It is, therefore,

ORDERED, That the applications for rehearing filed by Duke and the Consumer Advocates be denied. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

CMTP/sc

Entered in the Journal
JAN 08 2014

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.	)	Case No. 12-1687-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 12-1688-GA-AAM

DISSENTING OPINION OF
COMMISSIONERS STEVEN D. LESSER AND ASIM Z. HAQUE

We again dissent from the majority upon rehearing of this case. Duke Energy Ohio, Inc. ("Duke") seeks to recover environmental remediation expenses from consumers based upon the statutory language set forth in R.C. 4909.15 (A)(4). As Duke should not recover under established precedent interpreting R.C. 4909.15 (A)(4), and since they have averred time and again that they do not seek recovery under 4909.15 (A)(1), then Duke should not be able to recover its requested environmental remediation expenses.

Steven D. Lesser

Asim Z. Haque

/vrm

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Barcy F. McNeal

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Secretary

BEFORE

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In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-1688-GA-AAM

ENTRY

The Commission finds:

(1) Duke Energy Ohio, Inc. (Duke or Company), is a natural gas company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission, pursuant to R.C. 4905.04, 4905.05, and 4905.06.

(2) By Opinion and Order issued November 13, 2013, the Commission approved the Stipulation and Recommendation (Stipulation) signed by Duke, Staff, the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy (OPAE), The Greater Cincinnati Health Council, Cincinnati Bell Telephone Company, LLC, The Kroger Company (Kroger), Direct Energy Business, LLC, and Direct Energy Services, LLC, and People Working Cooperatively, Inc. As part of that Stipulation, the parties agreed to litigate the issues related to Duke's request to recover costs for the investigation and remediation of its manufactured gas plants (MGPs). Upon consideration of the record in these cases, in its Order, the Commission, inter alia, concluded that Duke sustained its burden to prove that it prudently incurred MGP investigation and remediation costs related to the sites, less certain costs and

charges, and said costs should, in accordance with R.C. 4909.15(A)(4), be considered costs incurred by Duke for rendering utility service and be treated as expenses incurred during the test year. Therefore, Duke was authorized to recover $62.8 million, less $2.3 million for the purchased parcel on the East End site, the 2008 costs for the West End site, and all carrying charges for both sites, on a per bill basis, over a five-year amortization period. In addition, the Commission, while placing limits on the deferral, authorized Duke to continue to defer such costs beyond December 31, 2012. Finally, the Commission determined that, beginning March 31, 2014, and on or before March 31 in each subsequent year, Duke may update Rider MGP based on the unrecovered balance, minus any carrying charges, as of the prior December 31. Therefore, the Commission authorized Duke to file proposed tariffs reflecting the authorized amount to be included in Rider MGP for review and approval.

(3) On November 27, 2013, consistent with the November 13, 2013 Order, Duke filed its proposed tariffs for review and approval.

(4) By Entry on Rehearing issued January 8, 2014, the Commission denied the applications for rehearing filed by various parties, reaffirming its November 13, 2013 Order.

(5) On December 2, 2013, OCC, Kroger, OPAE, and the Ohio Manufacturers' Association (Movants) filed a motion for stay of the Commission's November 13, 2013 Order in these cases, with regard to its authorization of Duke to collect money from its customers, through Rider MGP, for the MGP-related expenses for investigation and remediation. According to Movants, a stay is necessary in order to prevent irreparable harm to Duke's customers during the pendency of the appeal of the Order. In the alternative, Movants request the Commission order that the rates paid by customers for Duke's deferred MGP-related costs be collected subject to refund to customers. *See In re Columbus & S. Ohio Elec. Co.*, Case No. 81-1058-EL-AIR, Entry (Nov. 17, 1982) and Order on Rehearing (May 1, 1984); *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 460 N.E.2d 1108 (1984).

(6) While Movants acknowledge there is no controlling precedent setting forth the conditions under which the Commission will

stay an order, they state the Commission has favored the following four-factor test governing a stay that has been used in courts when determining whether to stay an administrative order pending judicial review: whether there has been a strong showing that movant is likely to prevail on the merits; whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay; whether the stay would cause substantial harm to other parties; and the public interest. *See In re Intrastate Access Charges*, Case No. 00-127-TP-COI (*Intrastate Access Charges*), Entry on Rehearing (Feb. 20, 2003); *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 510 N.E.2d 806 (1987); *In re Northeast Ohio Pub. Energy Council*, Case No. 09-423-EL-CSS (*Northeast Ohio Pub. Energy Council*), Entry (July 8, 2009). Movants assert they have met this four-factor test. Had the Commission properly applied Ohio ratemaking laws, Movants contend Duke's request for recovery of the MGP costs should have been denied. In addition, Movants argue the Commission erred by relying on Duke's experts to determine whether Duke met its burden of proof regarding the prudency of the MGP expenses. Movants also note that the November 13, 2013 decision was not a unanimous decision, as two Commissioners dissented on legal grounds. Therefore, Movants opine that there is a strong likelihood that they will prevail on the merits. Movants offer that the Supreme Court traditionally looks to whether there is an effective legal remedy if the order takes effect to determine whether to stay the proceeding; noting that economic harm does become irreparable where the loss cannot be recovered. *See Tilberry v. Body*, 24 Ohio St.3d 117, 493 N.E.2d 954 (1986); *Sinnott v. Aqua-Chem, Inc.* 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217. In the instant cases, Movants believe the customers are unlikely to recover their losses in the event the Supreme Court overturns the Commission's decision. Movants note that Duke is likely to assert that there is no mechanism under Ohio law that permits the retroactive refund of over-collections from customers, where such payments are not made subject to refund. *See Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997); *Keco Industries v. The Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). The Commission, in its Order in these cases, while granting the request for recovery of the deferred MGP costs, denied Duke's request for associated carrying costs. Therefore, in order to

protect Duke from harm arising from a stay and, thus, the delay in collection of the deferred MGP-related costs from customers, Movants suggest the Commission authorize Duke to accrue reasonable carrying charges during the pendency of the stay. Movants assert that, given these difficult economic times, customers cannot afford unjustified increases in essential services. Therefore, the public interest would be furthered by a stay of the collection of the deferred MGP-related investigation and remediation costs.

(7) On December 13, 2013, Duke filed a memorandum contra Movants' motion to stay, stating that the motion is a veiled effort to reassert arguments already heard and decided by the Commission. Duke submits that the motion is procedurally and legally defective. Pursuant to R.C. 4905.32 and Supreme Court precedent, Duke argues a utility has no choice but to collect the rates set by order of the Commission, citing *Keco*. In addition, Duke notes that, in accordance with R.C. 4903.15, a Commission order is effective immediately upon its journalization, unless a different time is specified by the Commission. Moreover, Duke states the Supreme Court has affirmed that the collection of rates pursuant to a Commission order will not be stayed absent an application to the Court and the posting of a bond. *See Keco* at 258; *Office of Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 575 N.E.2d 157 (1991); *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. However, Movants ignore this established protocol and improperly seek to stay the Commission's Order. In addition, Duke points to Commission precedent wherein the Commission denied a motion to stay, noting that the legality of the decision was a question to be decided by the Supreme Court. *In re Ohio Edison Co.*, Case No. 90-718-EL-ATA, Finding and Order (Aug. 30, 1990). Duke further states that a stay of a proceeding is an action in equity and the Commission does not have any equitable jurisdiction. *State Alarm, Inc. v. Ameritech Ohio, Inc.*, Case No 95-1182-TP-CSS, Opinion and Order (Feb. 21, 1996). Duke submits that the four-factor test referenced by Movants cannot be sustained. According to Duke, the Commission's Order is well-founded and based upon ratemaking authority set forth in R.C. 4909.15, therefore, Movants cannot establish a likelihood of prevailing on the merits. Duke avers that Movants cannot establish and support the existence of irreparable harm to customers or other

parties, stating that the Supreme Court cases cited by Movants, *Tilberry* and *Sinnott*, in support of their claim are either remote from the matters under consideration in these proceedings or unrelated to Movants' present arguments. As to the public interest, Duke states that, for the Commission to stay its own decision would create doubt on those who maintain interest in the financial status of Duke and its regulatory oversight. Such uncertainty would have negative financial consequences on Duke and for its customers. Therefore, a stay is not in the best interest of the public. With regard to Movants' alternative proposal that the Commission should have made the rider subject to refund, Duke argues that any refund order would be contrary to Supreme Court precedent declining to engage in retroactive ratemaking. Duke notes that the Supreme Court has made it clear that the statutes protect against unlawfully high rates by allowing the Court to stay execution of Commission orders, in accordance with R.C. 4903.16. *See Keco; In re Application of Columbus S. Power Co.*

(8) Movants filed a reply to Duke's memorandum contra on December 20, 2013, reiterating the arguments made in their initial motion and arguing that, contrary to Duke's assertions, the Commission has the authority to grant a stay to protect Duke's customers during the process of rehearing and any appeals. Movants assert that, in accordance with R.C. 4903.10, the Commission may effect a stay of its Order, as long as that action is taken before an appeal occurs and jurisdiction is relinquished to the Supreme Court. Movants note, however, that the Commission, in the past, has granted stays pending the results of an appeal, citing *In re Ameritech Ohio, Inc.*, Case No. 99-938-TP-COI, Entry (June 26, 2002). Movants argue the Commission should take similar action in these cases pending judicial review.

(9) Upon review of Movants' motion to stay the Commission's November 13, 2013 Order, with regard to its authorization of Duke to collect from its customers the MGP-related expenses for investigation and remediation through Rider MGP, and the responsive pleadings, the Commission finds that the motion should be denied. In our Order and Entry on Rehearing, the Commission thoroughly reviewed and considered all arguments raised by the parties in these cases in rendering our decision on the merits of Duke's request to recover the MGP-

related costs. Our ultimate analysis and application of the statute and precedent was clearly delineated in those documents. Therefore, we believe it would be both antithetical to our decision in these cases and inappropriate for us to entertain Movants' motion to stay at this time. Moreover, when applying the four-factor test advocated by Movants to determine whether a stay should be granted in these proceedings, we conclude that Movants have failed to satisfy the criteria, as they have failed to demonstrate a strong showing that they are likely to prevail on the merits, that they would suffer irreparable harm absent the stay, that the stay would cause substantial harm to other parties, or that the public interest requires the stay. As for Movants' alternative proposal that the Rider MGP would be subject to refund, the Commission, likewise, finds that such a determination would be contrary to our decision in these cases approving Duke's request to recover the MGP-related costs. Accordingly, Movants' motion for stay should be denied.

(10) With regard to our review of Duke's proposed tariffs reflecting the authorized amount to be included in Rider MGP, which were filed on November 27, 2013, the Commission finds that such tariffs are reasonable and in compliance with our directives set forth in the November 13, 2013 Order; therefore, such tariffs should be approved. The new tariffs will become effective on a date not earlier than the date upon which complete final tariff pages are filed with the Commission.

It is, therefore,

ORDERED, That Movants' motion to stay the November 13, 2013 Order, with regard to its authorization of Duke to collect money through Rider MGP, is denied. It is, further,

ORDERED, That Duke's proposed tariffs, filed on November 27, 2013, reflecting the authorized amount to be included in Rider MGP, are approved. It is, further,

ORDERED, That Duke is authorized to file, in final form, complete copies of its tariffs filed on November 27, 2013, consistent with the provisions of the November 13, 2013 Order. Duke shall file one copy in its TRF docket and one copy in these case dockets. The effective date of the revised tariffs shall be a date not earlier than the date upon which complete, printed copies of the final tariff pages are filed with the Commission. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

CMTP/vrm

Entered in the Journal

FEB 19 2014

Barcy F. McNeal
Secretary

BEFORE

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In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-1688-GA-AAM

CONCURRING AND DISSENTING OPINION OF
COMMISSIONERS STEVEN D. LESSER AND ASIM Z. HAQUE

We concur, in part, and dissent, in part. We concur with the rest of our colleagues in their decision to deny Movants' motion to stay. However, we must continue to dissent from the majority on the substantive matter of Duke's recovery of its environmental remediation expenses. There is no basis under Ohio law for granting such recovery and, as such, we do not agree that Duke can include these expenses in its tariffs.

Steven D. Lesser

Asim Z. Haque

/vrm

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Barcy F. McNeal
Secretary