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.	)))	

MERIT BRIEF AND APPENDIX OF JOINT APPELLANTS THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, KROGER COMPANY, OHIO MANUFACTURERS' ASSOCIATION, AND OHIO PARTNERS FOR AFFORDABLE ENERGY

FILED
MAY 27 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. STANDARD OF REVIEW 2

III. STATEMENT OF FACTS 3

IV. LAW AND ARGUMENT 5

Proposition of Law 1 5

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. 5

A. The PUCO erred when it disregarded Ohio law, R.C. 4909.15(A)(1), that mandates only costs incurred from plant that is "used and useful" in rendering utility service may be collected from customers. 5

B. 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). 9

Proposition of Law 2 14

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). 14

Proposition of Law 3 17

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. 17

Proposition of Law 4 19

PUCO Orders May Be Stayed Pending An Appeal To The Supreme Court of Ohio Without The Posting Of A Bond Because The Bond Requirement In R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine. 19

Proposition of Law 5 26

PUCO Orders May Be Stayed Pending An Appeal By The OCC 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. 26

V. CONCLUSION 28

TABLE OF CONTENTS

APPENDIX **PAGE**

DECISIONS OF THE PUBLIC UTILITIES COMMISSION OF OHIO:

Joint Fourth Notice of Appeal to the Supreme Court of Ohio
In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in Gas Rates, et al.,
OSC Case No. 2014-0328 (May 27, 2014) Appx.000001

Third Notice of Appeal by The Kroger Company to the Supreme Court of Ohio
In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in Gas Rates, et al.,
OSC Case No. 2014-0328 (March 10, 2014) Appx.000013

Joint Second Notice of Appeal by the
Office of the Ohio Consumers' Counsel and
Ohio Manufactures' Association to the Supreme Court of Ohio,
In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in Gas Rates, et al.,
OSC Case No. 2014-0328 (March 10, 2014) Appx.000021

Notice of Appeal of Ohio Partners for Affordable Energy
to the Supreme Court of Ohio,
In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in Gas Rates, et al.,
OSC Case No. 2014-0328 (March 5, 2014) Appx.000030

In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in its Natural Gas Distribution Rates
PUCO Case No. 12-1685-GA-AIR et al.
Entry (February 19, 2014) 000037 ..... Appx.000037

In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in its Natural Gas Distribution Rates
PUCO Case No. 12-1685-GA-AIR et al.
Entry on Rehearing (January 8, 2014) Appx.000045

In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in its Natural Gas Distribution Rates,
PUCO Case No. 12-1685-GA-AIR et al.
Opinion and Order (November 13, 2013) Appx.000072

In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service,
PUCO Case No. 89-1001-EL-AIR
Opinion and Order (August 16, 1990) Appx.000152

In the Matter of the Application of Ohio Edison Company, The Cleveland electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals,
PUCO Case No. 07-551-EL-AIR et al.
Opinion and Order (January 21, 2009) Appx.000219

OHIO REVISED CODE:

R.C. 2505.12 ..... Appx. 000273
R.C. 4903.13 ..... Appx. 000273A
R.C. 4903.16 ..... Appx. 000274
R.C. 4909.15 ..... Appx. 000275
R.C. 4909.15(A) ..... Appx. 000275
R.C. 4909.15(A)(1) ..... Appx. 000275
R.C. 4909.15(A)(4) ..... Appx. 000276
R.C. 4909.15(C)(1) ..... Appx. 000277
R.C. 4911.02 ..... Appx. 000279
R.C. 4911.06 ..... Appx. 000280

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates, et al.
Second Joint Application for Rehearing by
Office of the Ohio Consumers' Counsel,
Kroger Company, Ohio Manufacturers' Association, and
Ohio Partners for Affordable Energy,
PUCO Case Nos. 12-1685-GA-AIR et al.,
(March 21, 2013) Appx.000282

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates, et al.
Application for Rehearing by Office of the Ohio Consumers' Counsel,
Kroger Company, Ohio Manufacturers' Association, and
Ohio Partners for Affordable Energy,
PUCO Case Nos. 12-1685-GA-AIR et al.,
(December 13, 2013) Appx.000307

TABLE OF AUTHORITIES

CASES: **PAGE**

Canton Storage and Transfer Co. v. Public Util. Comm.,
72 Ohio St.3d 1, 5, 647 N.E.2d 136 (1995). 2

Cincinnati v. *Pub. Util. Comm.*,
55 Ohio St.2d 168, 173 (1978) 16

City of Columbus v. Pub. Util. Comm., 170 Ohio St. 105, 163 N.E.2d 167 (1959) 23,26

City of Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114 19,20,21,22,23,24

Cleveland v. Pub. Util. Comm.,
63 Ohio St.2d 62, 73, 406 N.E.2d 1370 (1980) 14,16

Cleveland Electric Illuminating Co. v. Public Util. Comm.,
76 Ohio St.3d 521, 523, 668 N.E.2d 889 (1996) 3

Cleveland Electric Illuminating Co. v. Pub. Util. Comm., 42 Ohio St.2d 403, 330 N.E.2d 1 (1975) 5

Columbus Southern Power Co. v. Pub. Util. Comm.,
67 Ohio St.3d 535, 540, 620 N.E.2d 835, (1993) 7

Columbus Southern Power Co.,
128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 17 23,24

Consumers' Counsel v. Pub. Util. Comm.,
67 Ohio St.2d 153, 166 [O.O.3d 96] (1981) 5,14,15

Dayton Power & Light Co. v. Pub. Util. Comm.,
4 Ohio St.3d 91, 1983 Ohio Lexis 673 14

Dayton Communications Corp. v. Pub. Util. Comm. (1980),
64 Ohio St.2d 302, 307, 414 N.E.2d 1051 (1980) 5

Dorrian v. Scioto Conservancy Dist.,
27 Ohio St.2d 102, 271 N.E.2d 834 (1971) 8

Franklin County Welfare Rights Organization v. Pub. Util. Comm,
55 Ohio St. 2d 1, 1978 Ohio Lexis 606 14

Gen. Motors Corp. v. Pub. Util. Comm..
47 Ohio St.2d 58, 1 O.O.3d 35, 351 N.E. 2d 183 (1976) 7

Grafton v. Ohio Edison.
77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996) 3

Industrial Energy Consumers of Ohio Power Co. v. Public Util. Comm.,
68 Ohio St.3d 559, 563; 629 N.E.2d 423, 427 (1994) 3

Indus. Energy Users-Ohio v. Pub. Util. Comm.,
117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 6 8

MCI Telecommunications Corp. v. PUCO 31 Ohio St.3d 604, 605, 510 N.E.2d
806 (1987) 26

Montgomery County Bd. of Comm'rs v. Pub. Util. Comm.,
28 Ohio St.3d 171; 503 N.E.2d 167; 1986 Ohio LEXIS 818 (1986) 5

Nken v. Holder, 556 U.S. 418, 428-429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) 20

Office of Consumers' Counsel v. PUC,
58 Ohio St.2d 108, 118, 388 N.E.2d 1370 (1979) 2

Office of Consumers' Counsel v. Pub. Util. Comm.,
67 Ohio St.2d 153, 1981 Ohio Lexis 563. 14

Ohio Civ. Rights Comm. v. Countrywide Home Loans, Inc.,
99 Ohio St.3d 522, 2003 Ohio 4358, 794 N.E.2d 56 8

Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm.,
43 Ohio St.2d 175, 72 O.O.2d 98, 331 N.E.2d 730 (1975) 5

Ohio Water Service Co. v. Pub. Util. Comm.,
3 Ohio St. 3d 1, 1983 Ohio Lexis 643 14

Pike Natural Gas Co. v. Pub. Util. Comm.,
68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444 (1981) 5

Scripps-Howard Radio, Inc. v. Fed. Communications Comm., 316 U.S. 4, 17, 62
S.Ct. 875, 86 L.Ed. 1229 (1942) 20

Seaman v. The State of Ohio,
106 Ohio St. 177, 183 (1922) 12

Smothers v. Lewis,
672 S.W.2d 62, 64 (1984) 21,22

State v. Bodyke,
126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753 19

State v. Hochhausler,
76 Ohio St.3d 455, 466, 668 N.E.2d 457 (1996) 19

State ex rel. Bray v. Russell,
89 Ohio St.3d 132, 135, 729 N.E.2d 359 (2000) 19

State Ex Rel. Cunningham v. Industrial Commission of Ohio,
30 Ohio St.3d 73, 79 (1987) 12

State ex rel. Foster v. Bd. of Cty. Commr. of Lucas Cty.,
16 Ohio St.2d 89, 92, 242 N.E.2d 884 (1968) 19

State of Ohio v. Moaning,
76 Ohio St.3d 126, 196 Ohio 413, 666 N.E.2d 1115, 1996 Ohio LEXIS 440 (1996) 12

State v. Lowe,
112 Ohio St.3d 507, 2007 Ohio 606, 861 N.E.2d 512 8

State v. Smith,
131 Ohio St.3d 297, 299-300, 2012-Ohio-781,
964 N.E.2d 423, 2012 Ohio LEXIS 542 (2011) 8

Werlin Corp. v. Pub. Util. Comm.,
53 Ohio St.2d 76, 7 O.O.3d 152, 372 N.E.2d 592 (1978) 5

Wooster Republican Printing Co. v. Wooster,
56 Ohio St.2d 126, 132, 10 Ohio Op.3d 312, 315, 383 N.E.2d 124, 128 (1978) 12

PUCO CASES:

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase In its Natural Gas Distribution Rates,
PUCO Case Nos. 12-1685-GA-AIR, et al. ..... Passim

In the Matter of the Application of Ohio Edison Company,
PUCO Case No. 89-1001-EL-AIR 11,12,13

In the Matter of the Application Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority To Increase Rate for Distribution Service,
PUCO Case Nos. 07-551-EL-AIR, et al. 11,12,13

STATUTES:

R.C. 2505.12 26,27,28
R.C. 4903.13 2,22
R.C. 4903.16 ..... Passim
R.C. 4909.15 ..... Passim
R.C. 4909.15(A) 2,14
R.C. 4909.15(A)(1) ..... Passim
R.C. 4909.15(A)(4) ..... Passim
R.C. 4909.15(C)(1) 9
R.C. 4911.02 27
R.C. 4911.06 26

MISCELLANEOUS:

New York State Department of Environmental Conservation, 2008,
New York State's Approach to the Remediation of Former Manufactured Gas Plant Sites 3

I. INTRODUCTION

For the purpose of protecting approximately 420,000 residential, commercial and industrial natural gas customers of Duke Energy Ohio, Inc. ("Duke" or "Utility") from unlawful charges, the Office of the Ohio Consumers' Counsel ("OCC"), the Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA"), and Ohio Partners for Affordable Energy ("OPAE")[1] respectfully request this Court to reverse, vacate or modify the decision of the Public Utilities Commission of Ohio ("PUCO" or "Commission") in these cases. The PUCO's decision allowed Duke to charge customers $55.5 million for environmental investigation and remediation costs for the cleanup of coal tar residues caused by two manufactured gas plants ("MGP") that have not produced gas in more than 50 years, and thus were not used and useful in providing utility service to current and future customers.

The two MGP facilities are located in Cincinnati, and are known as the East End and West End MGP sites. They have been defunct since 1963 and 1928, respectively. In fact, many of Duke's current customers were not even alive or businesses were not in existence when Duke's predecessors operated the MGP facilities that caused the contamination, the clean-up of which the PUCO has authorized Duke to charge to customers.

Since 1911, Ohio utility customers have been protected by Ohio's public utility law, which balanced utility charges against consumer protection by not requiring customers to pay utilities for costs that are not incurred to provide those customers with current public utility service. Specifically, the PUCO's ratemaking statute, Appx. at

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[1] Collectively "Joint Appellants."

000275 – 000278, R.C. 4909.15, has protected customers from being charged and for paying for the costs associated with facilities that are not used to provide current service to customers. Appx. at 000275 - 000276, R.C. 4909.15(A).

The PUCO on November 13, 2013 ignored the ratemaking law, Ohio Supreme Court precedent, as well as the PUCO's own decisions, and required customers to pay $55.5 million in unlawful MGP-related investigation and remediation expenses. This Court sits as customers' last line of defense against the unlawful charges approved by the PUCO. Where the PUCO has disregarded Ohio law and precedent, as it has here, this Court on appeal must step in. On many occasions this Court has reminded the PUCO that it is a creature of statute, and must act within the confines of the statutory scheme put in place by Ohio's General Assembly. *Canton Storage and Transfer Co. v. Public Util. Comm.*, 72 Ohio St.3d 1, 5, 647 N.E.2d 136 (1995). In the cases below, the PUCO failed to adhere to the limits of the law; therefore, the PUCO's decision must be reversed, vacated, or modified to protect Duke's natural gas utility customers, and to uphold the law.

II. STANDARD OF REVIEW

Under Appx. at 000273-A R.C. 4903.13, the Court may reverse, modify or vacate a PUCO order if that order is "unlawful or unreasonable." The standard of review applicable to a PUCO order will turn on whether the issue presented is a question of law or one of fact. *Office of Consumers' Counsel v. PUC*, 58 Ohio St.2d 108, 118, 388 N.E.2d 1370 (1979).

Where the issue before the Court presents a question of law, the Court will review the issue *de novo*, giving the Court "complete, independent power of review." *Id.* Under a

de novo review, the Court will pursue a "more intensive examination" of the legal issues than it would in a review of factual issues. *Id.*

Joint Appellants raise only questions of law in this appeal. Accordingly, this Court should use a *de novo* standard of review to decide whether the PUCO's Order was unlawful or unreasonable. *Grafton v. Ohio Edison*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Cleveland Electric Illuminating Co. v. Public Util. Comm.*, 76 Ohio St.3d 521, 523, 668 N.E.2d 889 (1996); *Industrial Energy Consumers of Ohio Power Co. v. Public Util. Comm.*, 68 Ohio St.3d 559, 563, 629 N.E.2d 423 (1994).

III. STATEMENT OF FACTS

Manufactured gas plants began appearing in the United States in the early 1800s. Direct Testimony of Bruce M. Hayes at 17, Supp. at 000019, OCC Ex. No. 14. Manufactured gas plants produced methane from various raw materials, including coal, oil, and in some cases blending with natural gas to assure a consistent quality. *Id.*[2] The manufactured gas was, like natural gas, used for illumination (as in gas lamps before electricity was introduced) and eventually for other purposes. But the manufacturing process created pollutants that were left in the ground at MGP sites since the beginning of manufactured gas process, up to as long as 170 years ago.[3]

Duke's East End and West End MGPs began operation in 1884 and 1843 and continued to operate until 1963 and 1928, respectively. Direct Testimony of Jessica

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[2] Citing New York State Department of Environmental Conservation, *New York State's Approach to the Remediation of Former Manufactured Gas Plant Sites* (2008), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/nysmgpprogram.pdf (last accessed Jan. 16, 2013).

[3] From 1843 to 2013.

Bednarcik at 5, Supp. at 000052, Duke Ex. No. 21, *Duke Energy Ohio*, No. 12-1685-GA-AIR, et al. (July 20, 2013), *see also* Supp. at 000104, Tr. Vol. I at 183 (Bednarcik) (Apr. 29, 2013). While there has undoubtedly been contamination at these sites since manufacturing process commenced, Duke only began to investigate and remediate these sites in 2008 (East End) and 2010 (West End). Staff Report of Investigation at 36-37, Supp. at 000060-000061, Staff Ex. No. 1, *Duke Energy Ohio*, No. 12-1685-GA-AIR, et al. (Jan. 4, 2013).

Duke initially sought PUCO authority to defer its site investigation and remediation costs in 2007 in Case No. 07-912-GA-AAM. Duke deferred $62.8 million in investigation and remediation costs for the MGP sites through the end of 2012, including carrying costs. Third Supplemental Testimony of William Don Wathen, Jr. at 3, Supp. at 000090, Duke Ex. No.19C, *Duke Energy Ohio*, No. 12-1685-GA-AIR, et al. (Apr. 22, 2013); *see also* Supp. at 000094, Tr. Vol. III at 746 (Wathen) (May 1, 2013). In the cases below that are subject of this appeal, Duke then proposed to charge those costs to customers over three years through a Rider ("MGP Rider').

Duke's claims for MGP costs were challenged by Joint Appellants and other parties for both legal and evidentiary reasons.

On November 13, 2013, the PUCO issued its Opinion and Order in the above-captioned matters, authorizing Duke to charge customers nearly $55.5 million in environmental investigation and remediation costs for the two MGP sites. Tariff pages, PUCO Tariff No. 10 at Exhibit 1, Supp. at 000096, *Duke Energy Ohio,* Nos. 12-1685-GA-AIR, et al. (Nov. 27, 2013). Those two sites have not been used and useful in providing utility service to customers in over 50 years. Direct Testimony of Jessica

Bednarcik at 5, Supp. at 000052, *Duke Energy Ohio,* Nos. 12-1685-GA-AIR, et al.; *see also* Supp. at 000104, Tr. Vol. I at 183 (Bednarcik) (Apr. 29, 2013).

IV. LAW AND ARGUMENT

Proposition of Law 1

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.

A. The PUCO erred when it disregarded Ohio law, R.C. 4909.15(A)(1), that mandates only costs incurred from plant that is "used and useful" in rendering utility service may be collected from customers.

This Court has on numerous occasions reiterated the axiom that the PUCO is a creature of statute, and as such may only exercise the authority specifically set forth by statute. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 330 N.E.2d 1 (1975); *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 307, 414 N.E.2d 1051 (1980), *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166, 423 N.E.2d 820 (1981); *Montgomery County Bd. of Comm'rs v. Pub. Util. Comm.*, 28 Ohio St.3d 171, 503 N.E.2d 167 (1986); *see also Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 429 N.E.2d 444 (1981); *Werlin Corp. v. Pub. Util. Comm.*, 53 Ohio St.2d 76, 372 N.E.2d 592 (1978); *Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm.*, 43 Ohio St.2d 175, 331 N.E.2d 730 (1975).

That relevant statutory authority in this case begins with Appx. at 000275 – 000276, R.C. 4909.15(A)(1), which provides:

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, *shall determine:*
>
> (1) *The valuation as of the date certain* of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage

> disposal system company, projected to be used and useful as of the date certain, *in rendering the public utility service for which rates are to be fixed and determined.* (Emphasis added).

This section of the law requires a determination that the "property" in question must be used and useful as of the date certain and that it is used to render the public utility service for which rates are being determined. If the "property" is not being used or is not useful to provide the public utility service that is the subject of the rate proceeding, as of the date certain, then such property cannot be included in that valuation or the setting of rates.

Appx. at 000275 – 000278, R.C. 4909.15 provides **no exceptions** to the applicability of the used and useful standard in Ohio ratemaking. In the instant proceeding, the MGP facilities in question had not operated since 1928 and 1963. Those facilities, therefore, could not possibly be considered to have been used and useful in rendering public utility service as of the date certain, which was March 31, 2012.

Despite this clear directive, the PUCO created an exception to the statute. It stated:

> 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.

Opinion and Order at 54, Appx. at 000125, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 PUC LEXIS 259, at 128-29 (Nov. 13, 2013) (emphasis added).

The PUCO's determination that Appx. at 000275 – 000276, R.C. 4909.15(A)(1) was not applicable to its review, constitutes legal error. Appx. at 000276 – 000277, R.C.

4909.15(A)(1) does not state any circumstances under which it can be disregarded. Unless and until an exception exists, the only reasonable interpretation of this law is that it is applicable in all circumstances. There is no basis to recognize MGP-related "property" -- or the costs related to it -- in rates because that property was not used and useful in rendering public utility service during the time frame in question.

Construing Appx. at 000275 – 000276, R.C. 4909.15(A)(1) as it did, the PUCO rejected the statutory arguments presented by the Joint Appellants, other intervenors and even the PUCO's own Staff, that the used and useful standard was applicable to environmental investigation and remediation of property contaminated by long-defunct MGP operations. The PUCO misinterpreted the law and effectively created an exception to R.C 4909.15(A)(1) where no such exception is permitted. The PUCO held that the costs of cleaning up defunct property are "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." *Id.* at 53, Appx. at 000124. The application of the used and useful standard in Appx. at 000275 – 000278, R.C. 4909.15 is not discretionary. Rather, it is mandatory, as evidenced by the use of the word "shall." Appx. at 000275 - 000276, R.C. 4909.15 (A)(1); *see also Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 540, 620 N.E.2d 835, (1993) (citing *Gen. Motors Corp. v. Pub. Util. Comm.* (1976), 47 Ohio St.2d 58, 351 N.E. 2d 183).

Thus, it is clear that the legislature intended the used and useful standard to be a mandatory standard applied to all property that a utility seeks to include as part of its rate base, or seeks to collect associated costs from customers. This is a mandatory check and balance to protect customers. The Ohio Supreme Court has held that:

> When interpreting a statute, a court must first look to its language and apply it as written if the meaning is unambiguous. *State v. Lowe*, 112 Ohio St.3d 507, 2007 Ohio 606, 861 N.E.2d 512, ¶ 9. "[T]he word "shall" shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage." *Ohio Civ. Rights Comm. v. Countrywide Home Loans, Inc.*, 99 Ohio St.3d 522, 2003 Ohio 4358, 794 N.E.2d 56, ¶4, quoting *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), Paragraph one of the syllabus.

State v. Smith, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423, ¶ 9. Although the PUCO attempts to distinguish expenses associated with defunct property from the inclusion in rate base of that property in its interpretation of Appx. at 000275 – 000276, R.C. 4909.15(A)(1), it is clear that the PUCO's primary basis for its conclusion is because of the "circumstances" tied to an unreferenced "statutory mandate" to clean up the sites. But the PUCO's holding unlawfully modifies the public utilities law, R.C. Appx. at 000275 – 000276, 4909.15(A)(1), which the PUCO must follow.

This is an outcome this Court did not permit in another case because to do so would have negated the law to deregulate the electric generation industry. In that case, the Court held that the PUCO could not assert authority over the utility's application because the application included electric generation which had been removed from PUCO regulation. *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 6. Similarly, the PUCO's decision in the case at bar should not be upheld.

Based on the above precedent, the PUCO improperly exceeded its statutory authority in the Duke rate case proceeding by creating an exception that would permit it to disregard the "used and useful" requirement of Appx. at 000275 – 000278, R.C. 4909.15. This Court should reverse, vacate or modify the PUCO's decision in the cases below. The Court should find that because the MGP-sites were not used and useful in the

provision of utility service to current distribution customers, the expenses related to those properties cannot lawfully be charged to customers.

B. 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).

There is no question that the MGP-related investigation and remediation costs at issue in the instant proceeding were presented to the PUCO as part of a public utility rate case application, Supp. at 000107 - 000110, Duke Ex. No. 1, Pre-filing Notice at 1-4 (June 7, 2012), and that the ratemaking formula under Appx. at 000275 – 000278, R.C. 4909.15 was applicable to the PUCO's decision in this rate case proceeding.

According to Ohio ratemaking law, the utility has the burden to prove that the costs that have been incurred are costs that were incurred for rendering public utility service. Opinion and Order at 58, Appx. at 000129, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 PUC LEXIS 259, at 141 (Nov. 13, 2013).

Appx. at 000276, R.C. 4909.15(A)(4) states that:

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:
>
> > (4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

Appx. at 000277, R.C. 4909.15(C)(1) states:

> > Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be

> the test period proposed by the utility, unless otherwise ordered by the commission.

The critical component of these subsections of Appx. at 000275 – 000278, R.C. 4909.15 is that the costs determined for inclusion in rates must be costs incurred in "rendering the public utility service for the test period."

The PUCO's decision that authorized charging clean-up costs for defunct property to customers even though the defunct property itself could not be included in rates was also tied to the "circumstances" unreasonably relied upon by the PUCO that the cleanup of the MGP sites was allegedly mandated by environmental law. But the public utility ratemaking law does not allow for any exception, for federal and state rules and regulations requiring remediation, or otherwise. There is no basis to conclude that clean-up mandates may over-ride or change Ohio's ratemaking law that facilities must be used and useful for rendering public utility service to allow a utility to collect from customers any costs associated with those facilities. Moreover, even, assuming arguendo, that an environmental law mandate to clean up the sites exists in this proceeding, it is applicable solely to the utility, and is not a mandate to collect the costs associated with the remediation and investigation from customers.

These remediation and investigation costs relate to past periods of service (decades ago), not present ones. Consequently, Duke did not meet the requirement of this subsection and the PUCO erred by authorizing Duke to charge customers for these costs.

The PUCO attempts to justify its decision in the instant proceeding to authorize expenses related to defunct plants to be charged to customers by distinguishing it from its

prior decisions that did not permit a utility to collect costs from customers. Specifically, the PUCO found that:

> 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.

Opinion and Order at 53-54, Appx. at 000124 - 000125, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 PUC LEXIS 259, at 127-28. The PUCO's comparison between the instant proceeding and *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 89-1001-EL-AIR, Opinion and Order (August 16, 1990) (*"Ohio Edison I")* (Appx. at 000152 – 000218), and *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals*, PUCO Case Nos. 07-551-EL-AIR, et al., Opinion and Order (January 21, 2009) (*"Ohio Edison II")* (Appx. at 000219 – 000272) cases, however, reflects distinctions without the asserted differences. There is no material distinction to be made.

In both *Ohio Edison I* and *Ohio Edison II*, the associated expenses were disallowed for the same reasons that clean-up costs associated with defunct MGP plants must be disallowed in the instant proceeding. Those cases presented the same legal

analysis based on the same determinative factual circumstances that the PUCO was presented with in the instant proceeding. Even if environmental clean-up costs are not decommissioning costs as in *Ohio Edison I* and security costs for a retired electric generating plant as in *Ohio Edison II*, the nature of the expenses makes no difference. In all three cases, it is the fact that the property related to those costs was not used and useful that is the relevant common fact. Indeed, the PUCO has discussed two cases that better support Joint Appellants' position.

Additionally, under the PUCO's interpretation of Appx. at 000275 – 000278, R.C. 4909.15, subsections (A)(1) and (A)(4) are not connected and are treated as two completely separate sections of the Revised Code. Initial Post Hearing Brief of Duke Energy Ohio, Inc. at 4-5, 7, Supp. at 000119 - 000122, *Duke Energy Ohio*, 12-1685-GA-AIR, et al. (June 6, 2013). Such an approach to statutory construction is contrary to how the PUCO has long viewed Appx. at 000275 – 000278, R.C. 4909.15 (see *Ohio Edison I* and *Ohio Edison II*) and more importantly contradicts how this Court has directed that statutes are constructed and should be interpreted.

In *Seaman v. The State of Ohio*, this Court held that, "In giving construction to a statute all its provisions must be considered together." 106 Ohio St. 177, 183, 140 N.E. 108 (1922). The Court further emphasized this point in *The State, Ex Rel. Cunningham v. Industrial Commission of Ohio*, where it stated, "On the contrary, the rule of *in pari materia* requires that individual sections of a statute or rule on the same subject should be reconciled and harmonized if at all possible." 30 Ohio St.3d 73, 79, 506 N.E.2d 1179 (1987). More recently, the Court ruled:

> It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated

> body of law. *Wooster Republican Printing Co. v. Wooster* (1978), 56 Ohio St.2d 126, 132, 10 Ohio Op.3d 312, 315, 383 N.E.2d 124, 128. Statutes which relate to the same subject are *in pari materia.* Although [* * *6] enacted at different times and making no reference to each other, they should be read together to ascertain and effectuate the legislative intent.

The State of Ohio v. Moaning, 76 Ohio St.3d 126, 128 666 N.E.2d 1115, (1996). When these principles of statutory construction are applied to Appx. at 000275 – 000277, R.C. 4909.15(A)(1) and R.C. 4909.15(A)(4), it is clear that the two sections should be read together and not as separate provisions. The appropriateness of this statutory construction for Appx. at 000275 – 000277, R.C. 4909.15(A)(1) and R.C. 4909.15(A)(4), is most evident because those two subparts were enacted at the same time and the various subparts of Appx. at 000275 – 000278, R.C. 4909.15 reference each other.

These statutory provisions are part of the same section of the Revised Code and the inter-related subject matter requires a harmonized reading which is consistent with the PUCO's matching principle, as discussed by PUCO Staff. Initial Post Hearing Brief of the Staff of the PUCO at 8-13, Supp. at 000124 - 000129, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685-GA-AIR, et al. (June 6, 2013). The linkage between expenses for rendering public utility service and facilities that are used and useful during the test period was an important factor in the PUCO's disallowance in *Ohio Edison I* and *Ohio Edison II.* The PUCO completely missed and ignored this important linkage in authorizing Duke to charge customers $55.5 million for MGP-related investigation and remediation expenses for facilities that were not used and useful as of the date certain -- and have not been used and useful for at least 50 years.

This Court has been protective of the ratemaking formula contained in Appx. at 000275 – 000278, R.C. 4909.15, and has reversed the PUCO when its decisions have

strayed beyond the limits of this law.[4] The instant proceeding requires the Court to reverse, vacate, or modify the PUCO's Order in the proceeding below, in order to limit the PUCO's actions within the limits of Ohio's ratemaking statutes. Therefore, for all the above reasons, this Court should hold that the PUCO failed to properly apply the ratemaking statute -- Appx. at 000275 – 000276, R.C. 4909.15(A) -- by finding that the environmental investigation and remediation costs in the instant proceeding are not recoverable as test-year expenses under Appx. at 000276, R.C. 4909.15(A)(4) when the costs are not associated with plant that is used and useful under Appx. at 000275 – 000276, R.C. 4909.15 (A)(1). This Court should reverse, vacate or modify the PUCO's Order authorizing Duke to charge MGP-related investigation and remediation expenses to customers.

Proposition of Law 2

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).

In determining whether to include certain costs in customers' rates, the PUCO must decide whether the costs in question are "the cost to the utility of rendering the

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[4] *Office of Consumers' Counsel v. Pub. Util. Comm.,* 67 Ohio St.2d 153, 164, 423 N.E.2d 820 (1981); see also *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 1993 Ohio Lexis 2265. (1992); see also *Indus. Energy Users-Ohio v. Pub. Util. Comm.,* 117 Ohio St. 3d 486, 2008 Ohio Lexis 559 (2008); see also *Office of the Ohio Consumers' Counsel,* 58 Ohio St. 2d 449, 1979 Ohio Lexis 457; see also *Office of the Ohio Consumers' Counsel,* 58 Ohio St. 2d 449, 1979 Ohio Lexis 457; see also *Cleveland v. Pub. Util. Comm,* 63 Ohio St. 2d 62, 1980 Ohio Lexis 773; see also *Franklin County Welfare Rights Organization v. Pub. Util. Comm,* 55 Ohio St. 2d 1, 1978 Ohio Lexis 606; see also *Dayton Power & Light Co. v. Pub. Util. Comm.,* 4 Ohio St. 3d 91, 1983 Ohio Lexis 673 See also, *Ohio Water Service Co. v. Pub. Util. Comm.,* 3 Ohio St. 3d 1, 1983 Ohio Lexis 643.

public utility service for the test period." Appx. at 000276, R.C. 4909.15(A)(4). In addition, this Court has held 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." *Office of Consumers' Counsel v. Pub. Util. Comm.,* 67 Ohio St.2d 153, 164, 423 N.E.2d 820 (1981).

In *Consumers' Counsel,* this Court was unwilling to allow Cleveland Electric Illuminating Company to collect costs of a cancelled nuclear power plant from its customers as an operating expense. The Court stated:

> We seriously question whether the General Assembly contemplated that the commission would treat the type of expenditures controverted herein as costs under R.C. 4909.15(A)(4). The now terminated nuclear plants represented a major capital investment that ultimately would have been included in the rate base under R. C. 4909.15(A)(1), had the projects not been cancelled. *It is our opinion that R. C. 4909.15(A)(4) is designed to take into account the normal, recurring expenses incurred by utilities in the course of rendering service to the public for the test period. A non-exhaustive list of such expenses would include reasonable expenditures for repairs, maintenance, personnel-related costs, administrative expenses, and taxes.* Id. (Emphasis added).

The costs of remediating a defunct MGP facility are not normal or recurring costs, and should not be included as an allowable expense incurred by utilities in the course of rendering public utility service. Such expenses play no part in providing utility service to Duke's current and future distribution customers. This Court should decide that the PUCO erred by deciding otherwise.

The PUCO's decision disregarded the fact that the MGP-related investigation and remediation costs were not a normal and recurring expense. Post Hearing Brief by OCC and OPAE at 24, Supp. at 000131, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685-GA-AIR, et al. (June 6, 2013). In fact, the Applicant, Duke, did not even argue that the

MGP-related investigation and remediation costs were normal or recurring. Only Columbia Gas of Ohio, Inc., an Amicus filer in the cases below, made such argument. Opinion and Order at 55, Appx. at 000126, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 PUC LEXIS 259, at 132-33 (Nov. 13, 2013). The PUCO's Order did not adopt this argument and did not conclude that the MGP-related investigation and remediation costs were normal or recurring. *See id.* at 58-60, Appx. at 000129 - 000131. The key point to such a requirement is to assure that rates going forward do not include the collection on an ongoing basis for a one-time expense. Because there is no finding that the MGP-related investigation and remediation costs are normal or recurring, Appx. at 000276, R.C. 4909.15(A)(4) precludes Duke from charging these costs to customers.

Moreover, not all costs incurred by a public utility can be charged to customers. The PUCO has stated that the MGP remediation costs are business costs. Appx. at 000129, *Id.* at 58.. The mere fact that the PUCO has classified remediation costs as "business costs" does not mean that they can be collected from customers. There are other business costs that cannot be collected from customers. For example, charitable contributions are considered business costs, but they are not costs that can be collected from customers. *Cleveland v. Pub. Util. Comm.*, 63 Ohio St.2d 62, 73, 406 N.E.2d 1370 (1980).[5] Similarly, promotional and institutional advertising are business costs to the utility, but in *Cleveland,* the Ohio Supreme Court held:

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[5] The Court stated: "Applying this same standard to charitable contributions, this court finds that this item also cannot be sustained as a proper operating expense. While we recognize that this holding deviates from our decision in *Cincinnati* v. *Pub. Util. Comm.* (1978), 55 Ohio St.2d 168, 173, this court is persuaded by the record in the instant cause and by Justice Locher's well-reasoned dissent in *Cincinnati, supra, that such contributions are not a cost of rendering the public utility service.*" (Emphasis added).

> This court is of the opinion that this same presumption must be applied by appellee, if operating expenses are truly to reflect "the cost of rendering the public utility service." Therefore, institutional and promotional advertising expenses are to be disallowed, unless the utility can clearly demonstrate a direct, primary benefit to its customers from such ads.

Id. at 72-73.

Likewise the MGP-related investigation and remediation costs should not be considered costs of rendering current public utility service merely by the PUCO's classification of them as business costs. The classification alone does not overcome the fact that these costs are not, and were not found to be, a normal or recurring cost to Duke's current and future utility customers. Therefore, this Court should reverse, vacate or modify the PUCO's Order authorizing Duke to charge MGP-related investigation and remediation expenses to customers.

Proposition of Law 3

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.

The PUCO improperly found that Duke could collect from customers costs associated with cleaning up its manufactured gas operations from more than 50 years ago in a case that established the rates customers are paying now for natural gas distribution service. This is a point that was emphasized by two Commissioners who dissented in the proceeding below, concluding that the clean-up costs are not the costs of distribution service. Opinion and Order at Dissenting Opinion, Appx. at 000151, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685, et al., 2013 PUC LEXIS 259, at 189-90 (Nov. 13, 2013). Specifically, the dissenting Commissioners stated:

> 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. Id.* (Emphasis added).

As these dissenting Commissioners recognized, the cleanup costs relate to facilities that were once used to produce, not distribute, gas. Gas supply is now a competitive service. Charging distribution customers for costs associated with the production of gas supply more than 50 years ago is inconsistent with the current regulatory regime. There is no lawful link between the MGP-related investigation and remediation costs and the public utility service of distributing natural gas by a natural gas distribution company to the Utility's distribution customers.

The proceeding below was initiated in an application for a distribution base rate increase as noted by the Utility's pre-filing notice filed on June 7, 2012. Pre-Filing Notice of Duke Energy Ohio, Inc. for an increase in Gas Rates, Supp. at 000107 - 000117, *Duke Energy Ohio*, Pub. Util. Comm. No. 12-1685-GA-AIR, et al. (June 7, 2012). A base rate case is governed by Appx. at 000275 – 000278, R.C. 4909.15, which requires a report by the PUCO Staff of the Utility's property used and useful in rendering public utility service for customers, in this case in rendering distribution service. But even though the MGP-related investigation and remediation costs had nothing to do with Duke's provision of distribution utility service, Duke was allowed to charge these costs

related to defunct gas manufacturing operations, to distribution customers as part of a distribution rate case.

It is important to note that the dissent by two PUCO Commissioners (quoted above) does not disagree with the majority on issues of discretion or weight of the evidence arguments, but rather their dissent reflects a fundamental disagreement about ratemaking law. The dissenting opinion is consistent with the Joint Appellants' interpretation of Ohio's ratemaking law. The MGP-related investigation and remediation costs were not shown to be related to the provision of distribution utility service. This is a distribution rate case, yet the costs in question have no relationship to Duke's provision of distribution utility service to current distribution customers. These are not the costs of regulated distribution service. Regulated distribution utilities like Duke should not be permitted by the PUCO to charge distribution customers for these non-distribution costs.

Therefore, this Court should reverse, vacate or modify the PUCO's Order authorizing Duke to charge MGP-related investigation and remediation expenses to Duke's distribution customers.

Proposition of Law 4

PUCO Orders May Be Stayed Pending An Appeal To The Supreme Court of Ohio Without The Posting Of A Bond Because The Bond Requirement In R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine.

This Court should declare that the bond requirement of Appx. at 000274, R.C. 4903.16 is unconstitutional. Specifically, Appx. at 000274, R.C. 4903.16 is unconstitutional because the bond requirement (contained in that statute) restricts this Court's ability to exercise its inherent authority to issue stays, thereby violating the separation of powers doctrine. The Ohio Constitution inherently embraces the separation of powers doctrine. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 40; *City of Norwood*

v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114; *State v. Hochhausler*, 76 Ohio St.3d 455, 466, 668 N.E.2d 457 (1996). Through this doctrine, our government preserves the independence of each of the three branches of the government and prevents the encroachment by one branch upon the powers of another. "The reason the legislative, executive, and judicial powers are separate and balanced is to protect the people * * *." *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 135, 729 N.E.2d 359 (2000)(statute authorizing parole board to try, convict, and sentence inmates for crimes committed while in prison violated separation of powers doctrine). The proper administration of justice requires that the judicial branch remain independent and free from interference by other branches. *State ex rel. Foster v. Bd. of Cty. Commr. of Lucas Cty.*, 16 Ohio St.2d 89, 92, 242 N.E.2d 884 (1968)(a board of county commissioners could not interfere with the operations of the court by denying it essential funding). The judicial branch's power to administer justice cannot be impeded or controlled through another branch's exercise of its respective powers. "The legislative branch has no right to limit the inherent powers of the judicial branch of the government." *Hochhausler* at 464.

The judicial branch's "inherent authority includes the power to issue or to deny stays." *City of Norwood*, at ¶ 117. A stay prevents some action by temporarily suspending the source of the authority to act. The stay power is "'a power as old as the judicial system of the nation'" and "part of a court's 'traditional equipment for the administration of justice.'" *Nken v. Holder,* 556 U.S. 418, 428-429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) *quoting Scripps-Howard Radio, Inc. v. Fed. Communications Comm.*, 316 U.S. 4, 17, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)(distinguished on other grounds). A stay prevents irreparable injury to the parties and to the public pending the outcome of an appeal. *Id.* at 432 *(citation*

omitted). A stay also provides the appellate court the crucial time to review the legality of the appealed order. The power to grant or deny a stay is "essential to the orderly and efficient administration of justice." *Hochhausler* at 464. As such, this Court has stated that the legislative branch may not even impose limitations on the judiciary's inherent power to grant or deny stays. *City of Norwood* at 388 (*quoting Smothers v. Lewis*, 672 S.W.2d 62, 64 (1984)("[I]t is not within the purview of the legislature to grant or deny the power nor is it within the purview of the legislature to shape or fashion circumstances under which this inherently judicial power may be or may not be granted or denied.")).

In *City of Norwood*, this Court held that a statute's proscription on stays was unconstitutional as it violated the separation of powers doctrine. *City of Norwood* at 388. The statute prohibited courts from issuing stays or injunctions against the taking of appropriated property pending review of an eminent domain action. The Court noted that numerous jurisdictions recognize a court's inherent stay power. *Id.* at ¶ 118 . The significance of "the rights and risks implicated by eminent domain actions" also factored into the Court's order. *Id.* at ¶ 125. Moreover, the Court distinguished its decision that the statute unconstitutionally violated the separation of powers doctrine from its decisions in prior cases that upheld the same statute. *Id.* at ¶ 128-133. The Court reasoned that the prior cases did not consider whether the statute infringed on judicial authority and violated the separation of powers doctrine. *Id.* at ¶ 132.

In *Hochhausler*, the Court also held a statute's no stay provision unconstitutional, because it violated the separation of powers doctrine. 76 Ohio St.3d at 464. The statute's no stay provision denied any court the ability to stay an administrative driver's license suspension imposed for operating a motor vehicle while intoxicated. *Id.* at 463. Generally, legislation

enacted by the General Assembly is presumed constitutional. *Id.* at 458. However, legislation that usurps the powers of the judicial branch, violating the separation of powers doctrine, is unconstitutional. *Id.* at 464. The Court found that "[t]o the extent that [the statute] deprives the courts of their ability to grant a stay of an administrative license suspension, it improperly interferes with the exercise of a court's judicial functions." *Id.* at 463. The Court struck down the unconstitutional statute.

Even though the right to appeal a PUCO decision is a statutorily granted right, Appx. at 000273-A, R.C. 4903.13, its creation (by the Ohio General Assembly) does not give the legislature the right to encroach upon the constitutionally granted powers of the Supreme Court of Ohio. As this Court recognized in *City of Norwood* once an administrative action has ended and the right to appeal is triggered, the legislature is void of any right to control a subsequent judicial review. Specifically, the Court quoted the Supreme Court of Kentucky (when it struck a portion of a statute as unconstitutional) that held: "The statutorily granted right to appeal under [state statutes] was [appellant's] basis for this action * * *. However, the fact that the legislature statutorily provides for this appeal does not give it the right to encroach upon the constitutionality granted powers of the judiciary. Once the administrative action has ended and the right to appeal arises, the legislature is void of any right to control a subsequent appellate judicial proceeding. The judicial rules have come into play and have preempted the field." *City of Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 121 (*quoting Smothers*, 672 S.W.2d at 64-65).

Like the statutes scrutinized in *City of Norwood* and *Hochhausler*, Appx. at 000274, R.C. 4903.16 is unconstitutional. The proscription on stays examined in *City of Norwood*, the no stay provision examined in *Hochhausler*, and the bond requirement in Appx. at 000274,

R.C. 4903.16 affect the Court's stay powers in the same manner. All three statutes limit the Court's inherent authority to issue a stay, and impact the right of parties to seek recourse through appeals to the Court. The proscription on stays in *City of Norwood* prevented the Court from staying takings of appropriated property. The no stay provision in *Hochhausler* prevented the Court from staying an administrative license suspension. Similarly, the bond requirement in Appx. at 000274, R.C. 4903.16 prevents the Court from freely exercising its power to stay the PUCO's orders on appeal. Under Appx. at 000274, R.C. 4903.16, the Court may stay the execution of an order, only if the party seeking the stay posts a bond undertaking sufficient to pay for damages caused by the delay of the order in the event that the order is upheld. Essentially, the statute prohibits the Court from issuing stays if a party fails to post a bond in an amount sufficient to pay for damages caused by the delay of the PUCO order. *See e.g. In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 17; *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 163 N.E.2d 167 (1959) syllabus.

Several cases confirm the restrictive effect of the bond requirement upon the Court's stay power. *Id.* In *Columbus Southern Power*, the Court found that it was unable to stay the execution of a PUCO order, because the appellant did not post the bond required by Appx. at 000274, R.C. 4903.16. *Columbus S. Power Co.*, at ¶ 18. Indeed, the Court characterized the statute as the legislature attaching "a significant requirement to the **court's stay power**." *Id.* at ¶ 20. (Emphasis added.) Similarly, in *City of Columbus*, the City's application for stay was denied because the City was unwilling to furnish an undertaking in more than a nominal amount. *City of Columbus*, 170 Ohio St. at 109-110. Yet, as the Court stated in *City of Norwood*, the legislative branch may not even impose limitations on the judiciary's inherent

power to grant or deny stays. *City of Norwood* at ¶ 118. The bond requirement's limitation upon the Court's inherent authority violates the separation of powers doctrine.

Furthermore, although *Columbus Southern Power* and *City of Columbus* apply and uphold Appx. at 000274, R.C. 4903.16, these cases do not support its constitutionality. As in *City of Norwood*, the prior decisions do not control the outcome in the present case. In *City of Norwood*, the Court distinguished prior decisions, which upheld the statute in question by reasoning that the prior decisions did not address the separation of powers doctrine. *Id.* at ¶ 132. Similarly, neither *Columbus Southern Power* nor *City of Columbus* examined whether Appx. at 000274, R.C. 4903.16 violated the separation of powers doctrine. In *Columbus Southern Power,* the Court addressed whether to grant a refund. In *City of Columbus,* the Court addressed the bond requirement, but did not consider the constitutional issue of whether Appx. at 000274, R.C. 4903.16 usurps judicial powers.

Consequently, neither case supports the constitutionality of Appx. at 000274, R.C. 4903.16. Finally, *Columbus Southern Power* illustrates the need for judicial discretion in granting stays. As in *City of Norwood*, the Court should consider the rights and risks implicated by the PUCO's orders. *Id.* at ¶ 132. In *Columbus Southern Power,* this Court recognized that the public was irreparably harmed, because the bond requirement prevented the Court from issuing a stay and no other remedy was available to protect residential utility users. *See Columbus Southern Power*, 128 Ohio St.3d at 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 11-21. Before the Court reversed the PUCO's order, customers paid higher rates to the utility under that order. *Id.* at ¶ 15. ("The unlawful rate increase lasted until the end of 2009 and has been fully recovered.") The amount paid to the utility

pursuant to the unlawful rate increase was never returned to consumers. This illustrates the harmful effects of the General Assembly's encroachment on judicial stay power.

The Court must be allowed to exercise its discretion in issuing a stay with -- or without -- a bond. The Court may find it necessary to grant a stay without a bond to protect the public and the subject matter of the litigation. In *Columbus Southern Power*, the no refund rule, coupled with the absence of a stay, transformed a "win on the merits into a somewhat hollow victory." *See -id.* at ¶ 17. In fact, the end result was that the utility was enriched by hundreds of millions of dollars because the Court could not protect customers even though customers prevailed on the merits.

When the Ohio General Assembly enacted Appx. at 000274, R.C. 4903.16, it unconstitutionally encroached upon the Court's authority. The statute prevents the Court from exercising its judgment and utilizing its inherent stay powers to avert irreparable injury to the public pending the outcome of an appeal. The legislative bond requirement usurps the Court's inherent authority to grant stays, violates the separation of powers doctrine, and is unconstitutional. For these reasons, Joint Movants respectfully request that the Court declare the bond requirement in Appx. at 000274, R.C.4903.16 unconstitutional.

Proposition of Law 5

PUCO Orders May Be Stayed Pending An Appeal By The OCC[6] 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.

Ohio law provides for an exemption that relieves the OCC from having to post a bond -- or "execute an undertaking" as bonding is referred to in Appx. at 000274, R.C. 4903.16, -- in furtherance of a requested stay. A public officer is not required to post a supersedeas bond when acting in a representative capacity for the State.[7] Appx. at 000273, R.C. 2505.12 provides:

> An appellant is *not required to give a supersedeas bond* in connection with any of the following:
>
> (A) An appeal by any of the following:
>
> * * *
>
> (3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer. R.C. 2505.12. Appx. at 000273, (Emphasis added.)

According to R.C. 4911.06 the Consumers' Counsel "shall be considered a state officer * * *." Appx. at 000280, R.C. 4911.06. Furthermore, according to Appx. at 000279, R.C.

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[6] Kroger, OMA and OPAE are not participating in this proposition of law.

[7] It is easy to understand why the Ohio General Assembly has exempted state public officers from having to post a bond to effect a stay pending an appeal. In this case, Duke's collection of $55 million from its customers is the subject of this appeal. If OCC were required to post a $55 million bond in order to obtain a stay, OCC understands that it would have to pay an annual premium for the bond of approximately $832,500 during the first year the appeal is pending plus a pro-rated amount for increments of a year after the first year that the appeal remains pending. In addition to this cost that is not affordable for OCC, in order to get a bond OCC would be subject to an indemnification provision that would put the OCC (or possibly the State) at risk of having to pay up to $55 million in the event the bond was forfeited. R.C. 2505.12 removes that cost and potential liability to the state when a stay is sought during an appeal.

4911.02, the Consumers' Counsel may "institute, intervene in, or otherwise participate in proceedings in both state and federal courts * * * on behalf of the residential consumers." Appx. at 000279, R.C. 4911.02. Thus, in filing a request for a stay of execution, the Consumers' Counsel acts in a representative capacity and, as a public officer, is not required to post a supersedeas bond. In fact, the Supreme Court of Ohio has even granted a stay for an entity other than a public officer without requiring that a bond be posted by the appellant. In *MCI Telecommunications Corp. v. PUCO*, a stay was granted in a utility case by the Court without the posting of a bond despite the fact that the appellant was not a public entity. 31 Ohio St.3d 604, 605, 510 N.E.2d 806 (1987) (Douglas, J., dissenting). Similarly, the PUCO should grant OCC's request for stay of execution in this case.

Appx. at 000273, R.C. 2505.12 should be read in pari materia with Appx. at 000274, R.C. 4903.16 as noted by Justice Herbert in his dissent in *Columbus v. Pub. Util. Comm. of Ohio,* 170 Ohio St. 105, 111, 163 N.E.2d 167 (1959) (Herbert, J., dissenting). There, Justice Herbert concluded that the City of Columbus, as a political subdivision of the state of Ohio, should not be required to post a bond to obtain a stay, or that a nominal bond should be sufficient. *Id.* Thus, the PUCO should stay the operation of its Order and Entries pending final decision, without regard to the bond requirement on the OCC. *Id.* Justice Herbert wrote, "It is the view of the writer * * * that the Legislature never intended to handicap in this manner a municipality seeking to protect its citizens who are consumers of public utility products." *Id.* at 112.

For the reasons stated above, OCC respectfully requests that the Court hold that Appx. at 000273, R.C. 2505.12 exempts the OCC from posting a bond to effect a stay of a PUCO order pending appeal.

V. CONCLUSION

The PUCO has strayed far outside the regulatory framework provided by Appx. at 000275 – 000278, R.C. 4909.15. This regulatory framework has balanced the interests of utilities and customers for over 100 years. But Duke was granted authority to collect $55.5 million from its customers for the cleanup of defunct MGP plants that have not provided public utility service to Duke's customers for 50 years and longer. The PUCO has disregarded the used and useful standard (Appx. at 000275 – 000276, R.C. 4909.15(A)(1)), and allowed the collection of costs that could under no circumstances be considered normal and recurring costs incurred for the provision of current distribution utility service (Appx. at 000276, R.C. 4909.15(A)(4)). Because the PUCO is a creature of statute, this Court must remedy the PUCO's unlawful actions by reversing, vacating or modifying the PUCO's Order in the instant proceeding to protect Duke's natural gas utility customers, and to preserve the long-standing Ohio ratemaking law.

Respectfully submitted,

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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.	)))	

APPENDIX OF
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NOTICES OF APPEAL:

Joint Fourth Notice of Appeal to the Supreme Court of Ohio
In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in Gas Rates, et al.,
OSC Case No. 2014-0328 (May 27, 2014) Appx.000001

Third Notice of Appeal by The Kroger Company to the Supreme Court of Ohio
In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in Gas Rates, et al.,
OSC Case No. 2014-0328 (March 10, 2014) Appx.000013

Joint Second Notice of Appeal by the
Office of the Ohio Consumers' Counsel and
Ohio Manufactures' Association to the Supreme Court of Ohio,
In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in Gas Rates, et al.,
OSC Case No. 2014-0328 (March 10, 2014) Appx.000021

Notice of Appeal of Ohio Partners for Affordable Energy
to the Supreme Court of Ohio,
In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in Gas Rates, et al.,
OSC Case No. 2014-0328 (March 5, 2014) Appx.000030

DECISIONS OF 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
PUCO Case No. 12-1685-GA-AIR et al.
Entry (February 19, 2014) 000037 ..... Appx.000037

In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in its Natural Gas Distribution Rates
PUCO Case No. 12-1685-GA-AIR et al.
Entry on Rehearing (January 8, 2014) Appx.000045

In the Matter of the Application of Duke Energy Ohio, Inc.,
for an Increase in its Natural Gas Distribution Rates,
PUCO Case No. 12-1685-GA-AIR et al.
Opinion and Order (November 13, 2013) Appx.000072

In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service,
PUCO Case No. 89-1001-EL-AIR
Opinion and Order (August 16, 1990) Appx.000152

In the Matter of the Application of Ohio Edison Company, The Cleveland electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals,
PUCO Case No. 07-551-EL-AIR et al.
Opinion and Order (January 21, 2009) Appx.000219

OHIO REVISED CODE:

R.C. 2505.12 ..... Appx. 000273
R.C. 4903.13 ..... Appx. 000273A
R.C. 4903.16 ..... Appx. 000274
R.C. 4909.15 ..... Appx. 000275
R.C. 4909.15(A) ..... Appx. 000275
R.C. 4909.15(A)(1) ..... Appx. 000275
R.C. 4909.15(A)(4) ..... Appx. 000276
R.C. 4909.15(C)(1) ..... Appx. 000277
R.C. 4911.02 ..... Appx. 000279
R.C. 4911.06 ..... Appx. 000280

APPELLANTS' APPLICATIONS FOR REHEARING:

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates, et al.
Second Joint Application for Rehearing by
Office of the Ohio Consumers' Counsel,
Kroger Company, Ohio Manufacturers' Association, and
Ohio Partners for Affordable Energy,
PUCO Case Nos. 12-1685-GA-AIR et al.,
(March 21, 2013) Appx.000282

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates, et al.
Application for Rehearing by Office of the Ohio Consumers' Counsel,
Kroger Company, Ohio Manufacturers' Association, and
Ohio Partners for Affordable Energy,
PUCO Case Nos. 12-1685-GA-AIR et al.,
(December 13, 2013) Appx.000307

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IN THE SUPREME COURT OF OHIO

2014 MAY 27 PM 12: 55

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Its Natural Gas Distribution Rates.	)))	Case No. 2014-0328
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In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	12-1688-GA-AAM

PUCO

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

FILED
MAY 27 2014
CLERK OF COURT
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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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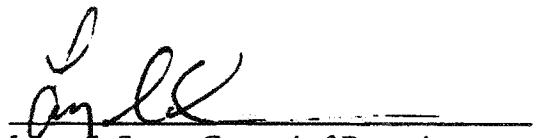
CERTIFICATE OF FILING

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.



Larry S. Sauer, Counsel of Record
Counsel for Appellant
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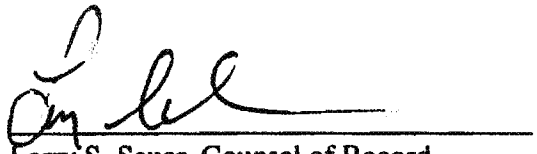
CERTIFICATE OF SERVICE

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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ORIGINAL

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PUCO

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.	)))	

THIRD NOTICE OF APPEAL
BY
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FILED
MAR 10 2014
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THIRD NOTICE OF APPEAL

Consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(A)(2), 3.11(C)(2), and 10.02, The Kroger Co. ("Kroger") hereby gives 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 and the PUCO's Entry on Rehearing entered in its Journal on January 8, 2014.[1]

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 Energy Ohio, Inc. ("Duke" or "Utility") on firm and interruptible transportation schedules. Kroger uses Duke's natural gas service for food storage, lighting, heating, cooling, and distribution. Kroger was a party of record in the above-referenced PUCO cases that are the subject of this appeal.

On December 13, 2013, Kroger, together with other customer advocates, 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 in regard to the issues raised in this appeal. See January 8, 2014 Entry on Rehearing.

On March 5, 2014, Ohio Partners for Affordable Energy filed a Notice of Appeal complaining that the PUCO's November 13, 2013 Opinion and Order and the January 8,

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

2014 Entry on Rehearing are unlawful and unreasonable. On March 10, 2014, The Office of the Ohio Consumers' Counsel ("OCC") and Ohio Manufacturers' Association ("OMA") filed a Joint Second Notice of Appeal also complaining that the PUCO's November 13, 2013 Opinion and Order and January 8, 2014 Entry on Rehearing are unlawful and unreasonable. Kroger files this Third Notice of Appeal complaining and alleging that the PUCO's November 13, 2013 Opinion and Order and January 8, 2014 Entry on Rehearing 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 Application for Rehearing:

A. The PUCO Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants That Are Not Used And Useful, In Violation Of Ohio Law Including, But Not Limited, To R.C. 4909.15.

   1. The PUCO erred when it disregarded Ohio law that mandates only costs incurred from plant that is used and useful in rendering utility service may be collected from customers.

   2. The PUCO erred when it 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 to Duke's customers as of the date certain, March 31, 2012.

B. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are 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).

C. 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).

D. 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.

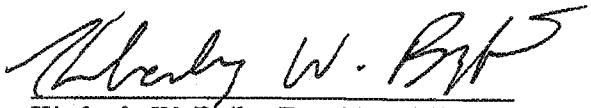
E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because The Order Fails To Provide Findings Of Fact And

Written Opinions Setting Forth The Reasons Prompting The Decisions Arrived At Based Upon Said Findings Of Fact.

Kroger respectfully requests that this Honorable Court designate Kroger as an Appellant for purposes of this proceeding. Such designation is appropriate and coincides with the intent of this Third Notice of Appeal.

WHEREFORE, Kroger respectfully submits that the PUCO's November 13, 2013 Opinion and Order and January 8, 2014 Entry on Rehearing 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.

Respectfully submitted,



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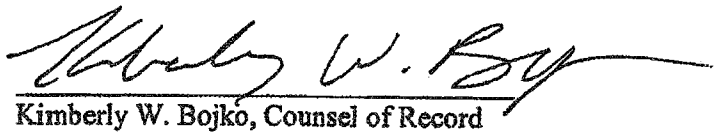
CERTIFICATE OF FILING

I certify that this Third 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.



Kimberly W. Bojko, Counsel of Record

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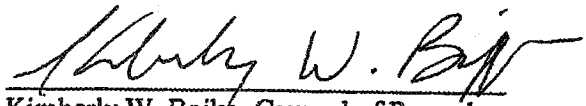
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Third Notice of Appeal of the Kroger Company 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 10th day of March 2014.



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ORIGINAL

IN THE SUPREME COURT OF OHIO

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2014 MAR 10 PM 2:03
PUCO

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 SECOND NOTICE OF APPEAL BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO MANUFACTURERS' ASSOCIATION

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JOINT SECOND NOTICE OF APPEAL

The Office of the Ohio Consumers' Counsel ("OCC") and Ohio Manufacturers' Association ("OMA"),[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 and the PUCO's Entry on Rehearing entered in its Journal on January 8, 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] OCC and OMA were parties of record in the above-referenced PUCO cases that are the subject of this appeal.

On December 13, 2013, OCC and OMA, together with other customer advocates, 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

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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.

denied that Joint Application for Rehearing in regard to the issues raised in this appeal. *See* January 8, 2014 Entry on Rehearing.

On March 5, 2014, Ohio Partners for Affordable Energy filed a Notice of Appeal complaining of the PUCO's November 13, 2013 Opinion and Order and the January 8, 2014 Entry on Rehearing. Joint Appellants file this Second Notice of Appeal complaining and alleging that the PUCO's November 13, 2013 Opinion and Order and January 8, 2014 Entry on Rehearing 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 Application for Rehearing:

A. The PUCO Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants That Are Not Used And Useful, In Violation Of Ohio Law Including, But Not Limited, To R.C. 4909.15.

   1. The PUCO erred when it disregarded Ohio law that mandates only costs incurred from plant that is used and useful in rendering utility service may be collected from customers.

   2. The PUCO erred when it 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 to Duke's customers as of the date certain, March 31, 2012.

B. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are 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).

C. 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).

D. 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.

E. 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.

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 and OMA, respectively, as Appellants, for purposes of this proceeding. Such designation is appropriate and coincides with the intent of this Joint Second Notice of Appeal.

WHEREFORE, Joint Appellants respectfully submit that the PUCO's November 13, 2013 Opinion and Order and January 8, 2014 Entry on Rehearing 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.

Respectfully submitted,

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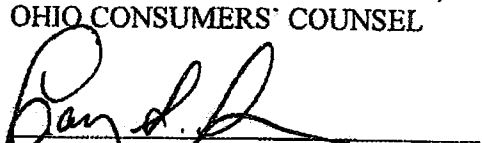

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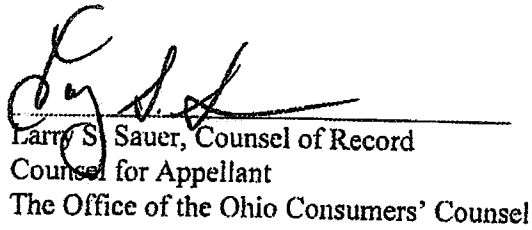
CERTIFICATE OF FILING

I certify that this Joint Second 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.



Larry S. Sauer, Counsel of Record
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Second 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 10th day of March 2014.

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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. 14-0328
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.	)	

NOTICE OF APPEAL OF OHIO PARTNERS FOR AFFORDABLE ENERGY

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FILED
MAR 05 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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PUCO

NOTICE OF APPEAL OF APPELLANT OHIO PARTNERS FOR AFFORDABLE ENERGY

In accordance with R.C. 4903.11, R.C. 4903.13, Ohio Adm. Code 4901-1-02(A), Ohio Adm. Code 4901-1-36, and Supreme Court Rule of Practice 10.02, appellant, Ohio Partners for Affordable Energy ("OPAE"), hereby gives notice of its appeal to this Court and to the Appellee, the Public Utilities Commission of Ohio ("PUCO"), of an appeal from the PUCO's Opinion and Order dated November 13, 2013 and Entry on Rehearing dated January 8, 2014 (respectively, Attachments A and B). The case involved consideration of an application of Duke Energy Ohio, Inc., ("Duke") for an increase in its natural gas distribution rates.

OPAE was a party of record to the proceedings before the PUCO, Case Nos. 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT and 12-1688-GA-AAM. On December 13, 2013, OPAE, together with other consumer advocates, timely filed a joint application for rehearing of the November 13, 2013 Opinion and Order, in which OPAE and the other consumer advocates set forth all of the grounds that OPAE now urges and relies on for reversal, vacation, or modification of the order on appeal. OPAE's application for rehearing was denied with respect to the issues raised in this appeal by the PUCO's Entry on Rehearing dated January 8, 2014.

OPAE complains and alleges that the PUCO's November 13, 2013 Opinion and Order and January 8, 2014 Entry on Rehearing in the proceedings below are unlawful, unjust, and unreasonable in the following respects, as set forth in OPAE's and the other consumer advocates' Application for Rehearing.

A. In Violation Of Ohio Law Including But Not Limited To Ohio Revised Code ("O.R.C.") 4909.15, The Public Utilities Commission Of Ohio ("PUCO") Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants ("MGP") That Have Not Operated in More Than Forty Years And Are Not Used And Useful In Rendering Current Utility Service.

B. In Violation Of O.R.C. 4909.15(A)(4) And (C)(1), The PUCO Erred By Authorizing Duke To Charge Customers For MGP Investigation And Remediation Expenses That Were Not A Cost To Duke Of Rendering Public Utility Service During The Test Year.

C. The PUCO Erred By Failing To Comply With The Requirements Of O.R.C. 4903.09, For Providing Specific Findings Of Fact And Written Opinions That Are Supported By Record Evidence Because The Record Evidence Did Not Support the PUCO's Order That The Used And Useful Standard Under O.R.C. 4909.15(A)(1) Is Not Applicable And Did Not Support The PUCO's Order That The MGP-Related Investigation And Remediation Costs Were Costs Of Rendering Public Utility Service Under O.R.C. 4909.15(A)(4).

D. The PUCO Erred By Failing To Comply With The Requirements Of O.R.C. 4903.09, For Providing Specific Findings Of Fact And Written Opinions That Are Supported By Record Evidence Because The PUCO Made The Costs For Duke's MGP Sites The Financial Responsibility Of Duke's Customers Instead Of Duke's.

E. The PUCO Erred In Finding That Duke Met Its Burden Of Proof To Show That $55.5 Million In MGP Remediation Costs Were Prudent, A Finding That Was Unreasonable And Against The Manifest Weight Of The Evidence, Which Showed A $7.1 Million MGP Remediation Alternative Would Meet Applicable Standards.

F. The 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.

G. The PUCO Erred By Failing To Comply With O.R.C. 4909.19, Which Requires The PUCO To Investigate The Prudence Of Duke's MGP-Related Investigation And Remediation Costs.

WHEREFORE, OPAE respectfully submits that the PUCO's November 13, 2013 Opinion and Order and January 8, 2014 Entry on Rehearing in the proceedings below are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to the PUCO with instructions to correct the errors complained of herein.

Dated: March 5, 2014

Respectfully submitted,

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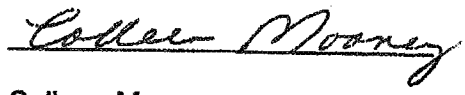
CERTIFICATE OF FILING

I certify that in accordance with S.Ct.Prac.R. 3.11(C)(2), the foregoing Notice of Appeal of Appellant, Ohio Partners for Affordable Energy, has been filed with the Docketing Division of the Public Utilities Commission of Ohio by leaving a copy at the office of the Commission in Columbus, Ohio in accordance with Ohio Adm. Code 4901-1-02(A) and 4901-1-36 on the 5th day of March 2014.



Colleen Mooney
Attorney for Appellant
Ohio Partners for Affordable Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Appellant, Ohio Partners for Affordable Energy, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all of the parties to the proceeding before the Commission by electronic mail, hand delivery, or first class U.S. mail this 5th day of March 2014.

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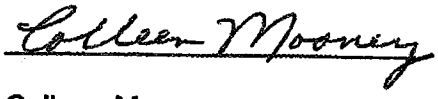

Colleen Mooney
Attorney for Appellant
Ohio Partners for Affordable Energy

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

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

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

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

Entered in the Journal
FEB 19 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
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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

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

Entered in the Journal
JAN 08 2014

Barcy F. McNeal

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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

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.

APPEARANCES:

Amy B. Spiller, Elizabeth H. Watts, Rocco D'Ascenzo, and Jeanne W. Kingery, 139 East Fourth Street, Cincinnati, Ohio 45202, Ice Miller LLP, by Christopher L. Miller, 250 West Street, Columbus, Ohio 43215 and Kay Pashos, One American Square, Suite 2900, Indianapolis, Indiana 46282, and Frost Brown Todd LLC, by Kevin N. McMurray, 3300 Great American Tower, 301 East Fourth Street, Cincinnati, Ohio 45202, on behalf of Duke Energy Ohio, Inc.

Mike DeWine, Ohio Attorney General, by John H. Jones, Assistant Section Chief, Thomas W. McNamee and Devin D. Parram, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Commission.

Bruce J. Weston, Ohio Consumers' Counsel, by Joseph P. Serio, Larry S. Sauer, and Edmund J. Berger, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential utility customers of Duke Energy Ohio, Inc.

Colleen L. Mooney, 231 West Lima Street, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

Carpenter Lipps & Leland LLP, by Kimberly W. Bojko and Mallory M. Mohler, 280 North High Street, Suite 1300, Columbus, Ohio 43215, on behalf of The Kroger Company.

Douglas E. Hart, 441 Vine Street, Suite 4192, Cincinnati, Ohio 45202, on behalf of The Greater Cincinnati Health Council.

Bricker & Eckler, LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of the city of Cincinnati.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff, Stephen M. Howard, and Gretchen Petrucci, 52 East Gay Street, Columbus, Ohio 43216, and Vincent Parisi and Matthew White, Interstate Gas Supply, 6100 Emerald Parkway, Dublin, Ohio 43016, on behalf of Interstate Gas Supply, Inc.

Douglas E. Hart, 441 Vine Street, Suite 4192, Cincinnati, Ohio 45202, on behalf of Cincinnati Bell Telephone Company LLC.

Robert A. Brundrett, 33 North High Street, Columbus, Ohio 43215, on behalf of Ohio Manufacturers' Association.

Kegler, Brown, Hill & Ritter, LPA, by Andrew J. Sonderman, Capitol Square, Suite 1800, 65 East State Street, Columbus, Ohio 43215, on behalf of People Working Cooperatively, Inc.

Joseph M. Clark, 21 East State Street, Suite 1900, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC, and Direct Energy Business, LLC.

McIntosh & McIntosh, by A. Brian McIntosh, 1136 Saint Gregory Street, Suite 100, Cincinnati, Ohio 45202, on behalf of Stand Energy Corporation.

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. <u>OCC's Motion for Administrative Notice</u>

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
Secretary

Lexis Advance

1990 Ohio PUC Lexis 912

1990 Ohio PUC LEXIS 912 (Copy citation)

Public Utilities Commission of Ohio
August 16, 1990; August 16, 1990
89-1001-EL-AIR

Reporter: 1990 Ohio PUC LEXIS 912

In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service

Core Terms

staff, customer, recommend, load, defer, calculate, plant, beaver, valley, electric, test-year, nuclear, rate base, tariff, fuel, estimate, working capital, interruptible, inventory, margin, residential, annualize, stock, amortize, rate case, revise, general services, depreciate, ratepayer, lag

Counsel

APPEARANCES:

Michael R. Beiting, Leila L. Vespoli, and Kathy J. Kolich, 76 South Main Street, Akron, Ohio 44308, and Porter, Wright, Morris & Arthur, by Samuel H. Porter, Daniel R. Conway, and Kathleen McManus Trafford, 41 South High Street, Columbus, Ohio 43215, on behalf of Ohio Edison Company.

Anthony J. Celebrezze, Jr., Attorney General of Ohio, by Robert S. Tongren, Section Chief, and James B. Gainer, Ralph D. Clark, William L. Wright, Thomas W. McNamee, and Michael C. Regulinski, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43266-0573, on behalf of the staff of the Public Utilities Commission of Ohio.

William A. Spratley, Consumers' Counsel, by Maureen R. Grady, Colleen L. Mooney, James A. Pepper, Richard W. Pace, and Thomas W. Atzberger, Associate Consumers' Counsel, 77 South High Street, Columbus, Ohio 43266-0550, on behalf of the residential customers of Ohio Edison Company.

Bricker & Eckler, by Kirk N. Guy and Mary R. Brandt, 100 South Third Street, Columbus, Ohio 43215, on behalf of RMI Company and Ohio Cable Television Association.

Ritts, **[2]** Brickfield & Kaufman, by Jill M. Barker and Elizabeth L. Taylor, Watergate 600 Building, Suite 915, Washington, D. C. 20037-2474, on behalf of North Star Steel Ohio.

Bell & Bentine Co., LPA, by Langdon D. Bell, Judith B. Sanders, and Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215, on behalf of the Industrial Energy Consumers.

Panel: Jolynn Barry Butler, Chair; J. Michael Biddison; Ashley C. Brown; Richard M. Fanelly; Lenworth Smith, Jr.

Opinion

OPINION AND ORDER

The Commission, coming now to consider the above-entitled matter, specifically the application of Ohio Edison Company filed pursuant to Section 4909.18, Revised Code; the Staff Report of Investigation

issued pursuant to Section 4909.19, Revised Code; having appointed its attorney examiners, Ann K. Reinhard and Dwight D. Nodes, pursuant to Section 4901.18, Revised Code, to conduct the public hearings and to certify the record directly to the Commission; having reviewed the testimony and exhibits introduced into evidence at the public hearings; and being otherwise fully advised of the facts and issues in this case, hereby issues its opinion and order.

HISTORY OF THE PROCEEDINGS:

Ohio Edison Company (Ohio Edison, the applicant, or the company) is an Ohio corporation engaged in the business of supplying electric service in **[3]** this state. Applicant is a public utility and an electric light company within the definitions of Sections 4905.02 and 4905.03(A)(4), Revised Code, and, as such, is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code. The company provides retail electric service to approximately 859,000 customers. Its service territory covers approximately 7,500 square miles and encompasses all or part of 35 Ohio counties. This service territory ranges generally from the Pennsylvania border on the east through north-central Ohio, and also includes a non-contiguous area in the west-central portion of the state. The company also provides service to approximately 128,000 customers in western Pennsylvania through its wholly-owned subsidiary, the Pennsylvania Power Company. Applicant's present rates and charges for electric service were established by order of this Commission in Ohio Edison Company, Case No. 87-689-EL-AIR (January 26, 1988).

On June 30, 1989, Ohio Edison served and filed a notice of its intent to submit a permanent electric rate increase application pursuant to Section 4909.18, Revised Code, as required by Section 4909.43 (B), Revised Code, and Rule 4901-7-01, Ohio Administrative Code (O.A.C.). As a part of this prefiling notification, the company requested that June 30, 1989, be fixed as the date certain for the valuation of property and that the 12 months ending December 31, 1989, be established as the test period for the analysis of accounts. By entry dated August 1, 1989, the Commission approved the date certain and test year proposed by the company. Ohio Edison's application was submitted on August 1, 1989, and was accepted for filing as of that date by entry of October 31, 1989. The form of legal notice proposed by the company was also approved by this entry. Updated information for the test year was provided by Ohio Edison on September 29, 1989.

In accordance with the provisions of Section 4909.19, Revised Code, the staff of the Commission conducted an investigation of the matters set forth in the application and the related filings. A written report of the results of the staff investigation was filed on February 9, 1990, and was served as provided by law. Objections to the Staff Report of Investigation (S.R.) were timely filed by the applicant and by intervenors Office of Consumers' Counsel **[5]** (OCC), the Industrial Energy Consumers (IEC), North Star Steel Ohio (North Star), RMI Company, and Ohio Cable Television Association. Intervenor city of Massillon filed no objections and did not participate in the hearings.

Pursuant to entry dated February 15, 1990, the public hearing in this matter commenced on April 3, 1990, at the offices of the Commission, 180 East Broad Street, Columbus, Ohio. The Columbus hearing concluded on May 14, 1990. Pursuant to entry dated April 17, 1990, local sessions of the hearing were conducted on May 14, 1990, in Akron, Ohio; May 15, 1990, in Massillon and Salem, Ohio; May 17, 1990, in Marion, Ohio; May 21, 1990, in Sandusky and Elyria, Ohio; May 24, 1990, in Mansfield, Ohio; May 25, 1990, in Springfield, Ohio; and May 29, 1990, in Warren and Youngstown, Ohio, to afford members of the public affected by this application the opportunity to present statements concerning the proposed rate increase. Notice of the application and of the local public hearings was published by the company in accordance with Sections 4903.083 and 4909.19, Revised Code, and the April 17, 1990 entry (Company Exs. 3A and 3B). Post-hearing briefs and replies were submitted **[6]** on May 25, June 4, June 8, and June 18, 1990. In the February 15, 1990 entry, the parties were instructed to address their objections to the Staff Report in their initial briefs. Any objection which was not discussed was to be deemed withdrawn. The examiners have certified the recorded transcript of the proceeding and the exhibits admitted into evidence to the Commission for its consideration.

COMMISSION REVIEW AND DISCUSSION:

Case No. 89-1001-EL-AIR comes before the Commission upon the application of Ohio Edison Company, pursuant to Section 4909.18, Revised Code, for authority to increase its rates and charges for electric service to jurisdictional customers. The applicant alleges that its existing base rates are insufficient to

provide it reasonable compensation for the service it renders, and seeks Commission approval of base rate schedules which would yield $ 216,346,022, as indicated in the company's two-month update, in additional gross annual base rate revenues based on the company's analysis of test-year operations (Co. Ex. 5A, Sched. A-1). This is an increase of approximately 13.07 percent over staff's adjusted total current revenues. The company proposes to reduce **[7]** the first year's increase by a credit of $ 93,687,164 (Co. Ex. 5A, Sched. A-1). Thus, the base rate increase in the first year would be $ 122,658,858, or approximately 7.41 percent over staff's adjusted total current revenues. It now falls to the Commission to determine if the existing rates are inadequate and, in the event of such a finding, to establish rates which will afford the company a reasonable earnings opportunity.

Three stipulations were offered at the hearing for the Commission's consideration in this case. The first stipulation (Jt. Ex. 1), entered into between Ohio Edison, the Ohio Cable Television Association, and the staff, concerns pole attachment matters and will be discussed in the rates and tariffs section of this opinion and order. The second stipulation (Jt. Ex. 2), entered into between Ohio Edison and the staff, deals with the staff's management and operations review and the consumer services review and will be addressed in those sections of this opinion and order. The third stipulation (Jt. Ex. 3), entered into between Ohio Edison and the staff, concerns an alternative phase-in plan for the Commission's consideration. This stipulation will be discussed **[8]** in the section of this opinion and order regarding the authorized rate increase. Rule 4901-1-30, O.A.C., provides for stipulations of the type presented in these cases. Although not binding upon the Commission, such stipulations are entitled to careful consideration. See Cincinnati Gas & Electric Company, Case No. 76-302-EL-AIR (May 4, 1977).

Before turning to the substance of applicant's rate proposal, an evidentiary matter will be addressed. At the commencement of the hearing, the attorney examiner granted Ohio Edison's motion to strike IEC's objections to the Staff Report on the traffic and street lighting tariff, the partial service tariff, and certain portions of IEC witness Knobloch's testimony concerning rate comparisons. IEC filed a motion to certify an interlocutory appeal from the examiner's ruling. By entry dated April 25, 1990, the examiner denied the motion to certify on the grounds that the appeal did not present a new or novel question of interpretation, law, or policy. On brief, IEC requested that the Commission consider this matter and reverse the attorney examiner's ruling.

In the company's application, costs attributable to the traffic and street lighting **[9]** customers were excluded in the jurisdictional allocations, and the company proposed no change in rates for these customers. These allocations are not disputed. Further, the company did not propose any changes to its partial service tariff. IEC objected that the staff unreasonably failed to attribute responsibility for any of the proposed increase in revenue requirements to the traffic and street lighting class. IEC's objection on the partial service tariff was that the staff failed to recommend that Ohio Edison be required to offer a partial service tariff similar to the tariff offerings of The Cleveland Electric Illuminating Company and The Toledo Edison Company. The examiner struck the objections on the grounds that these were matters not put in issue by the applicant and not related to the rates which are the subject of the application.

IEC argued that revenues generated by the traffic and street lighting tariff and the partial service tariff affect Ohio Edison's financial condition and are at issue in this case. According to IEC, Ohio Edison's decision not to change the rates under these tariffs affects the rates under consideration and are properly considered by the Commission. **[10]**

The Commission is of the opinion that it has considerable discretion in determining which matters are proper for consideration in rate proceedings. In this instance, the Commission believes that the examiner's ruling was proper. The staff's investigation in this case was comprehensive and included all of the company's services and revenues. The staff concluded that it was reasonable for the company to exclude the street and traffic lighting service from the application. According to the staff, the exclusion of street and traffic lighting does not adversely affect the process of establishing rates for those services subject to this application (S.R. at 13). Under these circumstances, the Commission believes that the examiner properly ruled that these matters, which were not put in issue by the application, were not related to the rates which are the subject of this application. Accordingly, the examiner's ruling shall be affirmed.

IEC's final allegation of error goes to the examiner's preclusion of IEC evidence on comparative rate analysis. IEC witness Knobloch presented prefiled testimony regarding the rates of electric companies

throughout the United States. He also presented **[11]** the results of a comparison of the rates for typical industrial loads based on several midwestern utilities' rates. These studies show Ohio Edison to be one of the highest priced electric utilities in the nation. The examiner found this evidence to be irrelevant. IEC argues that this testimony is relevant to show the effect of Ohio Edison's proposed rates on its industrial sales and to the evaluation of competitive forces at work in the company's service territory.

Again, the Commission agrees with the examiner's ruling. Rate comparisons are not a part of the formula by which the Commission is obliged to set rates under Section 4909.15, Revised Code. Further, while the Commission is concerned about the impact of utility rates on the company's customers, the proposed comparative rate analysis does not assist the Commission in addressing this concern. The rate comparisons do not give any indication of the impact of Ohio Edison's proposed rates on its customers; nor do they address competitive forces in the company's service territory. The Commission finds the comparative rate information to be irrelevant.

RATE BASE

The following table compares the original company (Co. Ex. **[12]** 5A, Sched. B-1) and staff (S.R., Sched. 7) estimates of the value of applicant's property used and useful in rendering electric service to jurisdictional customers as of the date certain of June 30, 1989. Objections to the staff's rate base valuation are discussed below.

Jurisdictional Rate Base
(000's Omitted)

		Applicant	Staff
Plant in Service		$ 5,213,179	$ 5,196,252
Less:	Depreciation Reserve	1,308,808	1,308,044
Net Plant in Service		$ 3,904,371	$ 3,888,208
Plus:	CWIP	0	0
	Working Capital	537,979	325,525
Less:	Other Items	275,975	215,512
	Mirrored CWIP Allowance	26,837	26,837
Jurisdictional Rate Base		$ 4,139,538	$ 3,971,384

Plant in Service:

In this case, Ohio Edison seeks for the first time recognition of its share of Beaver Valley 2 in plant in service. The date certain amount requested is $ 964,132,493 (Co. Ex. 5A, Sched. B-3.2). Beaver Valley 2 has been generating electricity to serve Ohio Edison's load since November 1987. During its first full year of operation in 1988, it had a capacity factor of approximately 88 percent. Further, Beaver Valley 2 is one of the first units dispatched **[13]** in an economic dispatch order of operations (Co. Ex. 8A, at 23). Thus, there is no question that Beaver Valley 2 was providing service to customers at the date certain of June 30, 1989, and should be included in rate base.

Perry and Beaver Valley 2 Lease Payments

The staff adjusted plant in service and excluded from the plant accounts $ 16,941,431 representing the Perry and Beaver Valley 2 lease payments capitalized prior to the respective unit's in-service date (S.R. at 16-17). The company objected to the staff's adjustment contending that the lease payments represent preoperational operation and maintenance expenses properly capitalized and included in the plant in service accounts. As an alternative to inclusion in plant in service, the company recommended that the sale/leaseback payments prior to the in-service date of the units be added to the deferred operation and maintenance costs and amortized over the appropriate period. In addition, under the

company's alternative, these costs would also be included in the working capital allowance (Co. Ex. 9C, at 13). The staff accepts the company's alternative (Staff Ex. 12, at 9-10).

The company argues that the staff's adjustment **[14]** is contrary to normal utility accounting procedures provided for in the FERC uniform system of accounts. The uniform system of accounts does not specifically address lease payments made under sale/leaseback arrangements; however, it does establish criteria that determine what costs should be capitalized in connection with a project before it is placed in service (Co. Ex. 9C, at 8-9). The company points to an electric plant instruction of the uniform system of accounts as support for including the lease payments in the plant accounts. Electric plant instruction 3A(18)(b) provides as follows:

(18) Earnings and expenses during construction. The earnings and expenses during construction shall constitute a component of construction costs.

. . .

(b) The expenses shall consist of the cost of operating the power plant, and other costs incident to the production and delivery of the power for which construction is credited under paragraph (a), above, including the costs of repairs and other expenses of operating and maintaining lands, buildings, and other property, and other miscellaneous and like expenses not properly includable in other accounts.

(Co. Ex. 9C, Ex. B). The company **[15]** contends that the lease payments are "incident to" the generation or delivery of power because without making the lease payments, the company would not have been entitled to the power associated with its respective leasehold interest (Co. Ex. 9C, at 9).

The answer to the question presented is not at all clear cut. However, the Commission in inclined to agree with its staff on this issue. The lease payments are not a cost of operating the power plant, and they are not costs incident to the production and delivery of power. They have nothing to do with the production and delivery of power. The sale/leaseback payments were incurred as a result of a financing technique, and they would have been payable even if the generating stations in question had never generated any power prior to their in-service date (Staff Ex. 12, at 9). The Commission finds the company's alternative treatment, with which the staff concurs, is appropriate in this instance. The amount of the lease payments in question should be included in working capital and amortized over the same period as other deferred operating and maintenance expenses for each of the plants.

Land Costs

The staff recommended an adjustment **[16]** of $ 6,512 to plant in service associated with the cost of certain excess acreage associated with five substations that the staff believes is not used and useful in providing service (S.R., Sched. 8.2a). This exclusion was based on the staff's investigation which included on-site physical inspections of the land parcels to determine their used and useful status as of the date certain. In valuing the land to be excluded, the staff took an average price per acre for an entire lot and applied the average to the amount excluded (Staff Ex. 5, at 3; S.R., Sched. 8.2a).

Company witness Daniels objected to the staff's exclusion of these costs because the portions of the parcels identified by the staff represent unmarketable segments. When the parcels were purchased, a portion of the parcels were not able to be used for anything; they were merely part of the whole. Because the marketable portions of the parcels are being used for utility service, Mr. Daniels believes that the full price paid by the company should be included in rate base. The fair market value would not have been inflated due to the additional land which is unmarketable. Accordingly, the inclusion of the full price represents **[17]** what had to be paid to provide service to customers (Co. Ex. 9C, at 14).

The company's argument is two-fold. First, the company argues that the entire parcels had to be purchased in order to obtain the portions which are used and useful. Thus, the necessary portion of the properties could not have been acquired without also purchasing the portions excluded by the staff. This argument has been rejected by the Commission on numerous occasions. The Commission has held that land purchased by a utility, which is not used and useful in the provision of utility service, must be excluded from rate base even though the utility had no choice but to purchase a larger parcel than required for utility purposes. Cleveland Electric Illuminating Company, Case No. 81-146-EL-AIR (March 17, 1982) at 7; Cleveland Electric Illuminating Company, Case No. 86-2025-EL-AIR (December 15, 1987) at 8.

The second part of the company's argument goes to the value of the land excluded. Essentially, the company contends that since the land is unmarketable, it has no value. In Case No. 81-146-EL-AIR, the Commission indicated that perhaps the unused land should not be valued on an average price basis; **[18]** however, in that case there was no evidence to substantiate a different basis of valuing the land. Here, the company contends that it has provided sufficient evidence to show that the price of the land was not inflated by the unmarketable portions and that the entire purchase price of the parcels should be included in rate base.

The company raises a valid argument; however, the Commission would require additional evidence on this point before finding it persuasive. There are five separate portions of land involved in the staff's exclusion. The company has simply said that they are all unmarketable. However, no evidence was presented to show how each land portion is unmarketable. Without sufficient facts to support the company's conclusion of marketability, the Commission has no way of determining whether the land is marketable or not. The company's objection is overruled. The Commission concludes that the staff's exclusion is proper.

Completed Construction Projects

The company objected to the staff's failure to include in rate base $ 8,003,841 of completed construction projects which were used and useful in providing service at date certain. According to company witness **[19]** Daniels, the projects had not been cleared from construction work in progress to utility plant in service accounts as of the date certain because of the time it takes to receive and process completion reports from the various divisions and generating plants (Co. Ex. 9C, at 15-16).

The staff did not include these projects in plant in service because they were not a part of the company's application. Further, they were not included in the company's two-month update filing. The staff opposes the inclusion of any of the projects. Staff witness Kotting testified that the purpose of the staff's audit is to determine whether the figures contained in the applicant's filings represent plant used and useful in providing service to customers. It is not the staff's mission to seek out any and all plant which might conceivably be used and useful to ratepayers (Staff Ex. 12, at 12). The company made no mention of the projects until its post-staff report testimony filed on March 12, 1990.

The crux of the company's argument is that the staff should have discovered the company's error and included the projects which the company overlooked in its application and its update filing. The failure **[20]** of the company to advise the staff of these projects before the filing of its testimony, however, effectively precluded the staff from conducting an investigation on the status of these projects. The company contends that in Columbia Gas of Ohio, et al., Case No. 88-716-GA-AIR, et al. (October 17, 1989) (Columbia Gas I), the Commission found that a staff audit is not required, and that reliable property records and the representation that the property is used and useful are sufficient. The Commission did make this finding, but went on to state that while the lack of a subsequent inspection of the additional plant does not prevent its inclusion in rate base, it is the better practice for staff to make such supplemental investigations and that the staff should do so in future cases involving similar circumstances. In the subsequent Columbia rate cases, a situation arose similar to the one presented by this Ohio Edison case. However, in the Columbia cases, the company provided its information to the staff in time for the staff to conduct the requisite supplemental investigation. Columbia Gas of Ohio, et al., Case No. 89-616-GA-AIR, et al. (April 5, 1990) (Columbia **[21]** Gas II) at 10. In this case, there was no time for the staff to conduct a supplemental investigation.

After due consideration of this matter, the Commission does not believe that OHio Edison should be able to sit back and wait to provide information in its post-staff report testimony and then complain that the staff did not do its job. The staff cannot be expected to be responsible for detecting omissions to the company's application. The company was certainly aware that certain construction work had been completed but not yet transferred to the plant accounts. There is no reason why the company could not have provided an estimate in its application and supplemented this with updated information in testimony. The company's awareness is demonstrated by Mr. Daniels' testimony that even though a completed project remains in the construction work in progress account, AFUDC does not continue to be capitalized. Mr. Daniels stated that "[w]e are usually notified that a project is ready for service before the actual completion report is prepared; therefore, we do not capitalize AFUDC even though the project is still included in account 107" (Co. Ex. 9C, at 16). Thus, it is clear to **[22]** the Commission that the company could have provided estimates on this completed construction well in advance of its

post-staff report testimony. The company's objection is overruled. The company may consider the Commission's determination to be harsh. Nevertheless, the Commission believes that it is required so that rate applicants do not wait until the last minute to raise an issue thereby precluding staff review.

Before leaving this subject, one final matter needs to be discussed. At the hearing, the examiners denied OCC's motion to strike Mr. Daniels' post-staff report testimony on this subject on the grounds that the information should have been presented sooner. On brief, OCC requests that the Commission reverse the examiners' ruling. The Commission declines to do so. The Commission believes, as did the examiners, that the company should at least have the opportunity to explain its position and provide an explanation on why the information was not presented sooner. The company was appropriately provided with this opportunity.

Other Items

OCC objected that the staff erred in including costs for post-in-service accrual of AFUDC for Perry and Beaver Valley 2 in that **[23]** AFUDC accrual should cease as of the plants' in-service dates. However, OCC did not pursue this objection either in testimony or on brief, and it is deemed withdrawn.

The staff excluded $ 2,798,049 from plant in service related to Perry prudence audit costs incurred in connection with Case No. 85-521-EL-COI. Instead, the staff recommended that these costs be amortized and recovered in a manner similar to rate case expense (S.R. at 16). The company objected to this exclusion from plant in service, but withdrew its objection on brief.

Depreciation Reserve:

The company objected that the staff adjusted plant in service to exclude the cost of utility poles and certain communication equipment without making an offsetting adjustment to the depreciation reserve. At the hearing, the staff agreed and presented revised figures that incorporate the appropriate adjustment to depreciation reserve (Staff Ex. 12, at 11).

Generating Capacity:

Considerable time and effort were spent in this proceeding on the questions of whether excess generating capacity exists on Ohio Edison's system and, if so, what is the appropriate regulatory response. In Excess Electrical Generating Capacity **[24]** , Case No. 87-941-EL-UNC (November 24, 1987), the Commission considered these matters on a generic basis and issued a policy statement on the subject. The Commission's stated policy is that an appropriate generic benchmark for an electric utility's reserve margin is 20 percent. Where a reserve margin does not exceed 20 percent, there is a presumption of no excess capacity. Where a reserve margin exceeds 20 percent, there is a presumption of excess capacity. A reserve margin greater than 20 percent may be appropriate if it confers a positive net present benefit to the ratepayer or is justified by unique system characteristics. If excess capacity is found to exist, the Commission will determine the appropriate regulatory treatment on a case-by-case basis. Excess Electrical Generating Capacity, at Appendix A.

The staff evaluated the current and projected reserve margins of the applicant, and determined that the reserve margins significantly exceed the 20 percent benchmark. The staff then evaluated the nature and causes of these margins and recommended that the Commission make no reduction to authorized revenue on the basis of excess capacity (S.R. at 27). This finding and **[25]** recommendation drew a number of objections. The company objected to the staff's conclusion that the reserve margins exceed the 20 percent benchmark as well as the staff's application of the 20 percent benchmark to Ohio Edison. OCC, IEC, North Star, and RMI all objected to the staff's failure to reduce the authorized revenue due to the existence of excess capacity.

Applicability of the 20 Percent Benchmark

The company's first argument is that the benchmark should not be applied to Ohio Edison because the company's load growth since 1980 has exceeded its net capacity additions during the same time frame. According to the company, the fact that Ohio Edison's capacity additions have not kept pace with load growth since 1980 is significant because none of the company's rate cases decided since the beginning of 1980 has resulted in a finding of excess capacity. Thus, in light of the net reduction in relative load carrying capability since 1980 and the series of decisions over that same period finding no excess

capacity, there can be no excess capacity now (Co. Ex. 8A, at 11-14). Second, the company contends that the benchmark should not be applied because the company has acted prudently **[26]** in its capacity planning. However, these arguments ignore the existence of the guidelines set in Case No. 87-941-EL-UNC. By establishing its reserve capacity policy, the Commission set new guidelines to be used in making determinations on appropriate generating reserves. Thus, past Commission decisions do not prevent the Commission from applying the 20 percent benchmark. Further, the issues of excess capacity and prudence are separate questions. Excess Electrical Generating Capacity, at 2. In Case No. 87-941-EL-UNC, the Commission found that the question of excess capacity is an engineering and economic question. Once the reserve margin is established, then the question of prudence may be one factor to consider in determining the reasonableness of that reserve margin. Thus, Ohio Edison's arguments are without merit.

Ohio Edison also argues that the intervenors have presented no credible evidence that a 20 percent reserve margin is appropriate for Ohio Edison and, therefore, the 20 percent benchmark should not be applied to the company. However, both IEC witness Falkenberg (IEC Ex. 5, at 12-43) and OCC witness Bernow (OCC Ex. 10, at 21-41) testified that from a reliability **[27]** standpoint, the 20 percent reserve margin is appropriate for Ohio Edison. Although, Ohio Edison presents various arguments attacking Mr. Falkenberg's and Dr. Bernow's conclusions, Ohio Edison provided no testimony to the contrary. Ohio Edison provided no testimony indicating what an adequate reserve margin for Ohio Edison should be. Thus, the Commission's conclusion is that Ohio Edison has not demonstrated why the 20 percent benchmark is not appropriate for Ohio Edison, and we will use this benchmark in evaluating Ohio Edison's reserve margin.

Calculation of the Reserve Margin

The staff's reserve margin calculation for the test year is as follows:

5074 MW	Net Seasonal Capability
+ 40 MW	Firm Purchase
- 3911 MW	Peak Load
1203 MW	Reserve Margin
30.8%	Reserve Margin

(Staff Ex. 13, at 10). The staff projects that the reserve margin for 1990 will be 38.5 percent; for 1991, 35.0 percent; for 1992, 33.5 percent; for 1993, 34.5 percent; and for 1994, 31.9 percent (S.R., Sched. 8.3a). In contrast to the staff, the company's calculation of the test-year reserve margin is 16.5 percent. The company projects that the reserve margin for 1990 will be 16.1 **[28]** percent; for 1991, 17.1 percent; for 1992, 14.2 percent; for 1993, 15.7 percent, and for 1994, 13.7 percent (Co. Ex. 8C, Ex. BLC-1). The major differences between the company's and the staff's calculations can be accounted for by the differing treatment of Ohio coal research and development capacity, the West Lorain generating plant capacity, interruptible load, and the load attributable to the sale of power to the Potomac Electric Power Company (PEPCO).

In determining the generating capability, the staff included 108 MW of capacity associated with Ohio Edison's coal research and development projects. OCC and IEC both agreed that this capacity should be included in the calculation. The company contends that this capacity must be excluded from the calculation in accordance with Section 4905.70, Revised Code. Section 4905.70, Revised Code, provides that the Commission shall establish criteria for the investigation, identification, and remedy of the existence of excess capacity, exclusive of capacity used primarily for Ohio coal research and development. Thus, it is the company's position that its generating plants associated with Ohio coal research and development must be excluded **[29]** from the calculation.

The company provided information on its coal research and development projects in supplemental testimony filed with the two-month update on September 29, 1989. At that time OCC and IEC filed a joint motion to strike the testimony on the grounds that it should have been filed with the application. The attorney examiner denied the motion to strike. On brief, OCC seeks the reconsideration of its motion to strike. The Commission agrees with the examiner for the reasons given in the November 15, 1989 entry. The statute requires that consideration be given to capacity associated with Ohio coal

research and development projects. Further, the testimony was presented sufficiently early so that no party could be prejudiced by the timing of the filing of this testimony. The examiner's ruling is affirmed.

Ohio Edison's coal research and development projects include the limestone injection multi-state burner project at Edgewater 4, the E-SOx project at the Burger plant, and the NOXSO pilot project at the Toronto plant (Co. Ex. 8B, at 2-3). The reason that the staff included these projects in the generating capability is because the units are not used "primarily" for **[30]** coal research and development. Staff witness Tucker testified that each of the company coal research projects was added to an old, existing boiler. The units were selected because of some characteristic which made them suitable for the projects. However, these units were in service long before the projects were initiated and will likely be in service long after the projects are concluded. Further, the coal research projects add no capacity to the system. Thus, the staff believes that the projects constitute incidental rather than primary use of the units (Staff Ex. 13, at 8).

The Commission must agree with the staff and the intervenors. The statute provides that capacity used primarily for Ohio coal research and development be excluded from the calculation. However, the capacity in question was available to customers before the coal research projects began, and it will be available once the projects are complete. Under these circumstances, the Commission cannot find that the capacity is related primarily to coal research and development. Ohio Edison's objection is overruled.

OCC and IEC objected to the staff's generating capability determination because it did not include **[31]** 141 MW of capacity associated with the West Lorain generating plant. West Lorain was removed from service in 1983, and is presently maintained in a cold standby status (Tr. XIII, 10-11). It was taken out of service because of the high cost of fuel oil. The company anticipates that it will take approximately 30 months to bring West Lorain back on line, and presently expects to return West Lorain to service in 1993 (Tr. XIII, 13). On this basis, staff witness Tucker included the West Lorain generating capacity in the company's total capability beginning in 1993.

The Commission is of the opinion that West Lorain should not be considered as part of the company's generating capability at this time. This plant was not used and useful during the test year and is not part of plant in service for purposes of this case. There are a number of matters that must be addressed and resolved prior to the company's return of West Lorain back into service (Id.). Further, it is anticipated that it will be at least 30 months before West Lorain can returned to service. Clearly, West Lorain cannot be considered part of the company's existing capacity. The staff has appropriately accounted for **[32]** West Lorain capacity in its projections for 1993. OCC's and IEC's objections are overruled.

In the staff's peak load calculation, it excluded load associated with interruptible customers. The intervenors all agree with this exclusion. In Case No. 87-941-EL-UNC, the Commission determined that because generating reserve is not necessary to cover interruptible load, the reserve margin calculation should exclude interruptible load. In that case, however, the Commission found that the peak load shall be calculated as the utility's native load. Native load is defined as the internal load minus interruptible loads (as defined in ECAR Document No. 2). The issue in this case arises because ECAR Document No. 2 defines interruptible load as that which can be fully realized in ten minutes (OCC Ex. 33).

Ohio Edison contends that under its interruptible contracts, the company cannot interrupt the load without less than 15 minutes notice for an emergency interruption and at least 90 minutes in the event of an economic interruption. Because the company's interruptible load cannot be realized in the time provided by ECAR Document No. 2, it did not subtract any of its interruptible contract **[33]** customers' load from peak load (Co. Ex. 11, at 11).

The staff and the intervenors argue that the ten minute standard of ECAR Document No. 2 is a consideration only for daily operating reserve purposes, and it should not be applied to the reserve capacity margin analysis here. They argue that the Commission's use of ECAR Document No. 2 must have been an oversight or an inadvertent error. The Commission's intent in Case No. 87-941-EL-UNC was that in calculating the reserve margin, interruptible load should be excluded. The Commission pointed out that some utilities now have interruptible load which approaches the size of a base load generating unit. The Commission concluded that reserve is not necessary to cover interruptible load and, therefore, the reserve calculation should be based on native load which excludes interruptible load. Excess Electrical Generating Capacity, at 2. In describing the method by which to compute the

reserve margin in Appendix B, the Commission referred to the definitions of native load and internal load used in ECAR Document No. 2. However, the Commission never intended to define interruptible load by ECAR Document No. 2. Obviously, when making **[34]** the determination of how much capacity is required to serve Ohio Edison's load, it makes no difference whether the load is interruptible within 10 or 15 minutes. Under either circumstance, the company does not need installed capacity to serve this load. Clearly, the ECAR Document No. 2 definition of interruptible load should not be applicable to the determination of the reserve margin. Accordingly, the peak load calculation should exclude interruptible load. Ohio Edison's objection should be overruled.

In light of the confusion in this case on the matter of interruptible load, the Commission believes that the method of calculating the reserve margin as described in Case No. 87-941-EL-UNC, Appendix B, should be clarified to conform with the Commission's intent. The Commission directs its staff to take the appropriate steps to accomplish this task.

The final area of major controversy in calculating the peak load is related to the Potomac Electric Power Company (PEPCO) firm power sales agreement. This agreement became effective on June 1, 1987, and continues for an 18-year period until December 31, 2005. The amount of the firm sale began at 200 MW. On January 1, 1989, it was **[35]** stepped up to 300 MW, and in June of 1989, it was stepped up to 450 MW, where it will remain until 2005. Ohio Edison's share of the 450 MW sale is 387 MW, with Pennsylvania Power being responsible for the remainder (Co. Ex. 11, at 5). The contract requires that PEPCO shall have parity with Ohio Edison's native load, in the event curtailment becomes necessary. If a shortage occurs and requires Ohio Edison to curtail a percentage of service to its native load, Ohio Edison may not curtail service to PEPCO by more than the same percentage (Id.).

The staff excluded the PEPCO sale in its reserve margin calculation of the peak contending that it is non-jurisdictional (Staff Ex. 13, at 4). The company objected to the exclusion. It is true that the PEPCO load is non-jurisdictional. The costs associated with this sale, including a reserve margin, have been excluded from the cost of service for ratemaking purposes (Co. Ex. 10A, at 8-9). However, that this sale is non-jurisdictional for ratemaking purposes is not necessarily relevant to the determination of the company's reserve margin. In calculating the reserve margin, the Commission is interested in determing how much capacity the **[36]** company has to serve its customers. The 387 MW PEPCO sale is an ongoing daily firm load requirement of the company. PEPCO has been taking energy deliveries at an average load factor of over 85 percent, and these deliveries are routinely made, even during peak conditions (Co. Ex. 8A, at 5-6). The Commission is of the opinion that the megawatts associated with this firm sale should be recognized in calculating the peak load requirements of the company. Exclusion of the PEPCO sale from the peak load calculation would imply that the megawatts associated with the sale are available to the company for service to customers. However, this is not the case. Ohio Edison is obligated to serve PEPCO on parity with native load, and 387 MW are not available to serve customers. Thus, the PEPCO load must be included in the reserve margin calculation.

The intervenors have raised other arguments to exclude the PEPCO sale from the reserve margin calculation. Essentially, the arguments are as follows. With the addition of Perry 1 and Beaver Valley 2, excess capacity now exists on Ohio Edison's system. The PEPCO sale was a response to excess capacity, not a remedy for it. Further, the PEPCO **[37]** contract does not recover the costs associated with the excess capacity, which intervenors would value as the cost of Beaver Valley 2. The PEPCO contract is based on average costs. Thus, they contend that the PEPCO sale must be excluded from the peak load used to compute excess capacity because ratepayers should not be required to pay for any of the excess capacity assigned to PEPCO (IEC Ex. 5, at 48-50; North Star Ex. 14, at 5; OCC Ex. 10, at 52-53).

The Commission agrees that ratepayers should not be required to pay for any costs associated with the PEPCO sale. It is for this precise reason that the costs associated with the 387 MW firm PEPCO load plus an amount for reserves have been allocated away from the jurisdictional customers in this case. The costs which Ohio Edison recovers from PEPCO are irrelevant. It is the allocations process, not the pricing of the contract, that affects retail customers' revenue requirements. The intervenors would have the Commission eliminate the cost of serving the PEPCO load once through the allocations process and a second time by counting the capacity used to serve that load as excess and making an excess capacity adjustment to the revenue **[38]** requirement. This result is unreasonable. The cost of serving the PEPCO load is not included in the revenue requirements in this case. Further, the 387 MW PEPCO load is not available to serve jurisdictional customers. The Commission finds that under these

circumstances, it would be inappropriate to exclude the PEPCO load in the generating reserve calculation. The company's objection will be sustained. However, because we are allocating out a slice-of-system cost to reflect the PEPCO sale rather than the cost of the most recent capacity addition, we recognize that jurisdictional customers are bearing a cost associated with the most recent capacity addition. In exchange for the costs borne by the jurisdictional customers, as the contract expires or in the event that Ohio Edison reduces its commitment under the contract, absent prior Commission approval, the company should not enter into further long-term, firm offsystem sales of amounts representing the PEPCO capacity.

One further matter concerning the reserve margin calculation needs to be addressed. While actual peak load data is used to calculate the 1989 test-year reserve margin, forecasted data must be used to estimate **[39]** the reserve margins for the five-year projected period 1990-1994. At the time this case was filed, the 1989 load forecast was the most recent forecast available, and the parties used this data in their analyses. However, in January of 1990, the company released its 1990 forecast. Company witness Byrd testified that the 1990 forecast reflects Ohio Edison's most recent experience and contains the latest and best estimates of the peak demands that the company expects to supply in the future (Co. Ex. 7B, at 10). The company recommends that the Commission use the 1990 forecast data in making its peak load calculations. The staff and OCC oppose this recommendation.

The staff believes that the 1989 forecast should be used because it represents the company's published estimate as of the test year. OCC contends that had the 1990 forecast been made available to OCC earlier, OCC would have used it. However, it was not made available until the beginning of 1990. Accordingly, OCC used the 1989 forecast in its analysis. OCC urges the Commission to do the same.

Forecasting is an estimate of what can be expected in the future. It is not a precise analysis of exactly what will occur. However, **[40]** a forecast that considers the latest information available is likely to be more reliable than one that uses outdated information. For this reason, the Commission believes that the 1990 forecast data should be used in the projected load calculation. No party has presented any valid reason why the 1990 forecast should not be used. The company's objection is sustained.

For purposes of calculating the test-year peak load in this case, the Commission has used the actual single highest peak because it is representative of the company's normal peak load. The use of the actual peak load in this case does not, however, preclude the use of a different method of calculating the peak in the future if it is determined that the actual peak represents an aberration from normal conditions.

The calculation of the reserve margin for the test year in a manner consistent with the foregoing discussion is as follows:

5,074 MW	Net Seasonal Capacity
+40 MW	Firm Purchase
-4,163 MW	Peak Load
951 MW	Reserve Margin
22.84%	Reserve Margin

For 1990, the reserve margin is projected to be 22.34 percent; for 1991, 20.98 percent; for 1992, 17.75 percent; for 1993, 19.24 percent; and for 1994, **[41]** 17.14 percent. These reserve margins are slightly above the Commission's 20 percent benchmark through 1991. After 1991, they fall below the benchmark. The intervenors urge the Commission to make an adjustment for excess capacity. The preferred remedy would be to disallow a return on equity for capacity deemed to be above the 20 percent benchmark. However, under the circumstances presented in this case, the Commission believes that no adjustment is warranted.

The primary reason for the Commission's conclusion that no adjustment should be made is that the deviation above the benchmark is extremely small. Further, the reserve margin falls to below the benchmark after 1991. The Commission does not consider Ohio Edison's reserve margin to be excessive. Further, even at the staff's higher reserve margin calculations, it recommended that no adjustment be made in this case. In making its recommendation, the staff considered a number of factors. First, the staff believes that capacity used for state and federal experimental programs confers a benefit to the ratepayer in the long run. Second, system planning is necessarily done on a corporate

basis, which includes Penn Power. The **[42]** total system reserves are lower and are projected to fall in the 1990s. Third, "acid rain" legislation is very likely to reduce available physical and economic generating capacity in the near future. Finally, the capacity sold to PEPCO has reduced the reserve margin and also confers a benefit to the ratepayer (S.R. at 27). The Commission agrees with its staff, that under the circumstances presented by this case, no adjustment should be made.

Working Capital :

Working capital has been generally defined as the average amount of capital provided by investors in the company, over and above the investments in plant and other specifically identified rate base items, to bridge the gap between the time expenditures are required to provide service and the time collections are received for that service. The objective of including a working capital allowance in rate base is to produce a total rate base that will result in allowing investors the opportunity to earn a fair return on all capital invested by them in utility operations (S.R. at 19-20).

The staff recommended that a $ 325,525,000 allowance for working capital be included in the rate base valuation (S.R., Sched. 11). The company **[43]** raised several objections to the staff's allowance and proposed a working capital allowance of $ 537,979,302 (Co. Ex. 5A, Sched. B-5). OCC also raised several objections to the staff's recommendation. IEC raised two objections concerning the working capital allowance, however, these objections were withdrawn at hearing. The matters in dispute are discussed below.

Cash Component

One component of the working capital allowance is cash working capital. Historically, the staff determined this component based upon a formula approach which used one-eighth of operation and maintenance expense, less fuel and purchased power, plus a fuel expense lag allowance, less one-fourth of operating taxes exclusive of FICA, the .75 percent excise tax, and deferred income taxes. However, in Ohio Edison Company, Case No. 84-1359-EL-AIR (October 29, 1985), the Commission approved a new formula. The new formula was based upon the company's lead/lag study and used a revenue lag ratio and an expense lag ratio to derive revenue lag dollars and expense lag dollars, the net of which was the applicant's cash working capital allowance (S.R. at 20). In this case, the staff updated the ratios developed **[44]** in the prior case to account for changes in accounting or in payment schedules which affect the leads or lags of individual items (Staff Ex. 8, at 7).

In determining the cash working capital component, the staff applied the expense and revenue lag ratios to adjusted test-year operating revenues and expenses (Staff Ex. 8, at 2). The company objected to the staff's method contending that the revenue lag ratio should be applied to proforma revenues and expenses. The Commission has on a number of occasions determined that the staff's method is appropriate and results in a more representative working capital allowance which reasonably represents the shareholders' investment in addition to their investment in plant in service. Ohio Edison Company, Case No. 84-1359-EL-AIR (October 29, 1985); Cleveland Electric Illuminating Co., Case No. 86-2025-EL-AIR (December 16, 1987; Toledo Edison Co., Case No. 86-2026-EL-AIR (December 16, 1987; Columbia Gas of Ohio Inc., Case No. 89-616-GA-AIR, et al. (April 5, 1990). Ohio Edison has presented nothing new on this point for the Commission's consideration, and its objection should be overruled.

The company further objected to the staff's **[45]** application and adjustment of the formula in a manner in which the company contends is selective and arbitrary and which systematically understates cash working capital. Specifically, the company objected to the staff's failure to adjust the expense lag ratio to reflect known changes in expense lags due to changes in payment schedules for FICA taxes, and OCC and PUCO assessments. Other alleged selective adjustments to which the company objects are staff adjustments related to OES Fuel, Inc., Perry and Beaver Valley sale/leasebacks, vacation pay, and federal and state unemployment taxes.

Company witness Flower testified that his objection does not go to the calculation of expense lag days calculated by the staff, but to its selective alteration of a few items which has the effect of reducing working capital, without attempting in an evenhanded and comprehensive manner, to update all areas where lag days may have changed. For instance, he indicated that the staff revised the FICA tax rate but failed to accelerate the date of payment of the FICA tax by two days. Further, the staff used a three-year average for PUCO and OCC assessments in its lead/lag analysis, even though the lag **[46]**

days for these items decreased during each year. He recommended that the selective adjustments be rejected until a comprehensive update to the lead/lag analysis has been performed (Co. Ex. 10B, at 13).

The record reflects that the staff did not reflect a change in the FICA tax payment schedule because the new federal requirement will not become effective until July 31, 1990 (Tr. XVI, 171). Further, the staff used a three-year average for PUCO and OCC assessments because the payments fluctuated every year. It was impossible to determine if any one year was more reasonable than the other. To eliminate this fluctuation, the staff used a three-year average of the payment dates to determine an average payment date. The staff used this average payment date to calculate the lead/lag days for the PUCO and OCC assessments (Staff Ex. 8, at 6). The staff's approach to the FICA tax payment schedule and the PUCO and OCC assessments is reasonable, and the Commission will accept it.

Concerning the staff's other adjustments, the record reflects that the staff's revisions to the lead/lag study for uncollectible accounts expense, nuclear fuel disposal costs, vacation pay, and investment tax credit **[47]** were due to recent Commission opinion and orders issued since Ohio Edison's last rate case. The staff's adjustments were consistent with the prior precedent. The staff's revision to nuclear fuel and the Perry and Beaver Valley sale/leasebacks were due to changes in the payment patterns of these items. The revision to the federal and state unemployment taxes were made in accordance with items discovered in other recent cases before the Commission. In addition to the items adjusted, the staff reviewed other items in the lead/lag study. These items included non-associated company sales revenues, CAPCO transmission, fuel expense coal, fuel expense oil, purchased and interchange power, and CAPCO expenses. After reviewing these items, the staff did not change any lead/lag days because there were no significant changes in the payment patterns (Staff Ex. 8, at 7-8). The Commission finds the staff's adjustments to be acceptable and will adopt them. The staff's recommendations are based on prior Commission-approved adjustments as well as real changes in payment patterns. The company has complained about the staff's adjustments which only reduced working capital. If there were significant **[48]** changes in payment patterns which would have increased working capital, the company should have presented them. In light of the Commission's inclination to adjust the ratios of the new formula, the Commission suggests that in the next base rate proceeding, Ohio Edison should feel free to make its own proposals concerning this matter.

On November 30, 1989, the applicant sold its accounts receivable to Ohio Edison Capital. As a result of the transaction, the applicant will collect revenues more quickly which reduces the need for working capital collection lag days (S.R. at 11). The company objected that the staff failed to accurately calculate the impact of OES Capital on cash working capital and net operating income by using incorrect balances for accounts receivable sold to OES Capital and by understating the billing lag associated with accounts receivable sold. Company witness Flower testified that the primary impact of the sale of accounts receivable to OES Capital under the staff's lead/lag approach is the reduction of the revenue days lag due to the fact that the previous days lag between billing for electric service and receipt of cash is almost entirely eliminated. However, **[49]** the staff incorrectly assumed that the billing lag is entirely eliminated (Co. Ex. 10B, at 8). Staff witness Garcia agreed with the company that 1.44 lag days should be added to the retail revenue from sales lag days and that the revenue lag days for non-associated sales revenue should be changed to 24.13 days. There is generally a one-day period between the billing of accounts receivable and their sale to OES Capital. The effect of intervening weekends and holidays results in a small billing lag of 1.4 days for retail revenue and also for the non-associated sales. The one day of revenue in receivables lag for the non-associated sales is similarly impacted by weekends and holidays as is the retail revenue (Staff Ex. 8, at 9). The company's objection is sustained and the cash working capital allowance should be adjusted accordingly.

OCC alleged that the staff erred in its calculation of the lead day values associated with Pennsylvania foreign corporation franchise tax, as it assumed these taxes were paid in advance of the service period instead of in arrears. Staff witness Garcia, however, indicated that the applicant's lead/lag study shows that the taxes for Pennsylvania foreign **[50]** corporation franchise tax were paid in advance of the service period (Id.). OCC presented no evidence to support its view; neither did it address this matter on brief. The staff's treatment of the Pennsylvania foreign corporation franchise tax will be adopted.

OCC objected to the staff's calculation of the lag associated with sale/leaseback expense. OCC witness Hixon testified that an adjustment was necessary to reflect the fact that lease payments for Beaver Valley 2 are made in arrears, not in advance of the service period as originally assumed by the staff.

Ms. Hixon testified that the lag of 91.17 days should be applied to Beaver Valley 2 lease payments instead of the 60.3 days lag initially calculated by the staff (OCC Ex. 2, at 5-7). Staff witness Garcia agreed with OCC (Staff Ex. 8, at 10). No evidence to the contrary was presented. OCC's objection should be sustained. The cash working capital allowance should be calculated in accordance with OCC's recommendation.

Coal Inventory

The applicant requested a fossil fuel inventory working capital allowance of $ 42,960,305, which includes $ 41,733,883 attributable to coal inventory (Co. Ex. 5A, Sched. B-5 and B-5.1). **[51]** The staff reviewed the applicant's request and recommends that the Commission adopt this allowance. To review the reasonableness of the applicant's proposed fuel inventory for ratemaking purposes, the staff compared the applicant's test-year 13-month average to a calculation based on an average 60-day supply. The staff calculated an average day's burn at each generating station. This average day's burn was multiplied by an estimate of an appropriate number of days' supply. In this case, the staff used 60 days. The staff's inventory balance, priced at the date certain cost per ton for coal, yielded a coal inventory allowance which exceeded the applicant's proposed allowance. Further, the applicant's proposed coal inventory allowance was less than the allowance granted in Ohio Edison's last rate case. Because the applicant's request fell below what the staff calculated to be reasonable and below what had been determined in the past by the Commission to be reasonable, the staff concluded that the applicant's request in this case was reasonable (Staff Ex. 12, at 23-24).

OCC posed a number of objections to the working capital allowance associated with coal inventory. All of OCC's **[52]** objections are based upon the staff's use of a target 60-day coal supply for Ohio Edison. OCC recommends a working capital allowance for coal inventory in the amount of $ 30,768,018 based upon 40 days of supply (OCC Ex. 5, at 15).

Ohio Edison has a target inventory level of 60 days (OCC Ex. 5, at 2). The parties have directed their arguments toward the reasonableness of this target. The Commission will, to the extent necessary, address these arguments. However, it must be kept in mind that Ohio Edison currently is operating with approximately a 50-day fuel inventory at each plant (Id. at 12). Presumably it is this 50-day level which is the basis of the company's requested coal inventory allowance, and not the 60-day target level upon which the parties focus.

OCC argues that the staff failed to evaluate the company's present policy of maintaining a 60-burn-day supply at each of its generating plants. However, the staff based its opinion on its own experience, on a comparison of the applicant's inventory levels to the inventory levels of other companies, on prior Commission determinations in rate cases, and on the findings of the company's electric fuel component (EFC) proceedings **[53]** (Tr. XXII, 177-180). In all recent EFC proceedings, the present 60-day policy has been found to be reasonable. Ohio Edison Company, Case No. 88-104-EL-EFC (December 28, 1988); Ohio Edison Company, Case No. 89-104-EL-EFC (November 21, 1989). OCC's objection on this point is without merit. The staff has evaluated the company's present policy and found it to be reasonable.

Next OCC asserts that the staff failed to consider the impact of generation from Perry 1 and Beaver Valley 2 on the required coal inventories. This allegation is incorrect. To review the reasonableness of the applicant's proposed fuel inventory for ratemaking purposes, the staff compared the test-year 13-month average to a calculation based on an average 60-day supply. The test-year coal consumption used by the staff reflects the generation from applicant's share of Perry 1 and Beaver Valley 2. Both units were generating power during the test year, and the availability of the nuclear units would have affected the order in which the company dispatched its generating units, thereby impacting upon the average day's burn at each coal-fired generating station (Staff Ex. 12, at 22-23). The effect of nuclear **[54]** generation is thus already reflected in test-year coal consumption.

OCC further objects that the staff did not analyze the company's use of the utility fuel inventory model (UFIM). However, the staff did not perform such a review because the company did not base its coal inventory allowance on the results of the UFIM model. The applicant used the model to help determine whether the current policy regarding the number of day's supply is adequate (Id. at 25-26). The model confirmed that it was. However, the staff believes that one should not base a wide reaching policy such as appropriate inventory levels solely on the basis of a computer model (Id.).

In support of the contention that a 60-day target inventory level is unreasonable, OCC witness Hiliger ran the UFIM model correcting for certain errors which he perceived were made by the company. The result of Mr. Hiliger's run of the UFIM model showed that a target inventory level of 22 days is appropriate for Ohio Edison (OCC Ex. 5, at 11). Based upon this analysis, Mr. Hiliger recommended that Ohio Edison reduce its coal inventory at each plant to 30 days. His reduction would take place in two steps. He recommended **[55]** that the company should achieve 40 days as of October 1, 1990, and 30 days by October 1, 1991 (Id. at 12).

Mr. Hiliger's recommendation is inappropriate. If Ohio Edison were to maintain its inventory at the recommended levels, it would have to impose its emergency electrical procedures. Under the company's Commission-approved emergency electrical procedures, when system fuel supplies reach 40 normal burn days, the company must make appeals to all customers for voluntary conservation to effect a reduction of at least 25 percent of all nonpriority use of electricity. At 30 days supply the company will implement mandatory curtailment procedures for all customers (Co. Ex. 29). Mr. Hiliger's recommendation is rejected.

Despite the volume of evidence on this subject, no credible evidence has been presented from which the Commission can conclude that the company's 60-day target inventory level is not reasonable. Accordingly, all of OCC's objections are overruled, and the Commission will adopt the company's proposed coal inventory for working capital purposes.

Materials and Supplies

The staff recommended a materials and supplies working capital allowance of $ 49,404,000 (S.R., **[56]** Sched. 11). The applicant's proposed materials and supplies component of working capital is based upon a test-year 13-month average of month-end balances held for normal operation and repair purposes and which excludes three percent held for construction. The staff's recommended allowance excludes 3.23 percent held for construction and half of the Perry inventory (Id. at 20). The company objected to the staff's exclusion related to Perry inventory.

In the course of the staff's investigation in Cleveland Electric Illuminating Company, Case No. 88-170-EL-AIR (January 31, 1989), the staff noted that the materials and supplies balance for Perry was substantially larger than the materials and supplies balance for either Beaver Valley 2 or Davis Besse. In fact, it was larger than the materials and supplies balance for Beaver Valley 2 and Davis Besse combined. In that proceeding, the staff recommended that Perry materials and supplies be reduced by 50 percent. The Commission, noting that the company presented no justification for its Perry materials and supplies amount, accepted the staff's recommendation (Staff Ex. 12, at 13-14). The staff found no significant reduction **[57]** of Perry inventory in this case and makes the same recommendation here (S.R. at 20).

The company contends that the staff's recommendation is inappropriate because it did not compare inventory at comparable units. First, Beaver Valley and Davis Besse are pressurized water reactors, while Perry is a boiling water reactor (Tr. XXIII, 95-96). In addition, they are much smaller units. Company witness Daniels testified that the Perry inventory maintains nuclear safety-related equipment and a host of other supplies necessary to operate and maintain the plant. Mr. Daniels indicated that there are five one-unit boiling water nuclear reactors in the United States similar in size to Perry. Of those five, he received permission from the operating companies of two of the units to compare inventory levels at those units with the Perry inventory level. His comparison shows that Perry's inventory level is considerably less than one unit and comparable to the other unit. Mr. Daniels stated that when inventory levels at comparable units are compared, there is no basis for an adjustment (Co. Ex. 9C, at 27-28).

Based upon this record, the Commission is of the opinion that the staff's adjustment **[58]** to Perry materials and supplies inventory level should be rejected. First, the staff made no independent analysis of the inventory at Perry. The staff merely compared Perry's inventory with the non-comparable Beaver Valley and Davis Besse units and observed that Perry's inventory was higher. Based upon this sole observation, the staff adjusted the materials and supply request by one-half. However, in this case, unlike the CEI case, the company presented evidence that the inventory is required to operate and maintain the plant. Further, when inventory levels at comparable plants are reviewed, the Perry

inventory level is not at all unusual. The Commission believes that Ohio Edison has justified the Perry materials and supplies inventory levels; the company's objection is sustained.

OCC presented a number of objections concerning inventory management and control and concluded that the company's materials and supplies inventory is overstated. However, OCC provided no testimony on this subject and did not address the matter on brief. Accordingly, OCC's objections on materials and supplies are overruled.

Deferred Operation and Maintenance Expenses

The Commission has previously **[59]** authorized Ohio Edison to defer on its books and to accrue carrying charges on certain operation and maintenance expenses associated with Perry and Beaver Valley 2. The expenses were incurred by the company from June 1, 1987 through February 1, 1988 for Perry, and subsequent to November 17, 1987, for Beaver Valley 2. Electric rates for the company's customers effective on February 2, 1988, included annual costs attributable to Perry; therefore, deferral of Perry operation and maintenance expenses ended on that date. However, those electric rates did not include recovery of Perry amounts deferred through February 1, 1988. This rate case is the first opportunity which the Commission has had to address the deferred Beaver Valley expenses (Co. Ex. 9A, at 8-9).

The company included as part of working capital in this case the unamortized deferred Perry and Beaver Valley operation and maintenance expenses at end of test-year levels. The staff agreed that these amounts should be included at end of test-year levels. OCC objected, arguing that the balances should be restricted to those accumulated as of the date certain. OCC's recommendation would reduce the company's working capital **[60]** allowance by approximately $ 60 million.

Staff witness Hess testified that staff often relies upon the date certain concept to quantify rate base working capital. However, the staff believes that the circumstances surrounding this item warrant a different treatment. Prior to June 30, 1990, the applicant is compensated for carrying costs on the unamortized balance through the accrual of carrying costs. When the rates in this case are set, the applicant will be compensated for carrying costs on the unamortized balance through inclusion in rate base. If the date certain balance of unamortized deferred costs is used in rate base, the applicant will not be compensated for carrying charges on the difference between the unamortized balance at date certain and the unamortized balance as of June 30, 1990. Due to regulatory lag, even if the end of year balance is used, there will still be a portion of the balance upon which the applicant will not receive carrying costs and which it will be required to carry on its own until the next rate case. The staff's year-end recommendation will minimize the amount the applicant will be required to carry. Under the staff's year-end recommendation, **[61]** the applicant would only be required to carry the difference in deferred expense balances between December 31, 1989, and June 30, 1990, or approximately $ 66 million. If OCC's recommendation to use the date certain balance is adopted, the applicant would be required to carry deferred costs of approximately $ 132 million (Staff Ex. 14, at 6-8).

Section 4909.15(A)(1), Revised Code, requires that rates shall be fixed based upon the date certain value of property used and useful in providing public utility service. However, the statute sets no such specific date for determining working capital. The statute refers only to a reasonable allowance for working capital. Thus, although a reasonable working capital allowance should be representative of the test-year requirement, the mechanical application of a date certain valuation is not required. In determining a reasonable working capital allowance, the Commission has previously used a date certain valuation, a 13-month average, or end of test year, depending upon what is most representative of the company's operations. In this case, the balances grew larger each month, and it is the end of test-year balance amount which investors will **[62]** be required to carry during the period rates set in this case are in effect. These deferred expenses have been carried by the investors for over a two and one-half year period. The investors will continue to supply funds necessary to carry the balances in the future, as these expenses will be amortized over the life of the Perry and Beaver Valley plants. Under the circumstances, the Commission is of the opinion that the end of test-year balances are the most representative and should be used for working capital purposes. Amortization expense should be calculated accordingly.

Beaver Valley 2 Post In-Service Carrying Charges

Ohio Edison has also been authorized to capitalize interest on its investment in Beaver Valley 2 from the in-service date of the unit until rates are made effective that reflect inclusion of such amount in rate base. The company was authorized to accrue carrying charges at a net of tax interest rate of 6.6 percent.

The company included $ 31,192,161 of these carrying charges accrued between the date certain and the end of the test year in its proposed working capital allowance. The company argues that these costs are no different than the other Beaver Valley **[63]** 2 costs being deferred by the company and included in working capital at end of test-period levels. As with other Beaver Valley 2 deferred expenses, the amount of carrying charges has grown throughout the course of the test year and will continue to increase through June 30, 1990. Thus, according to the company, the same reasons which support the inclusion of deferred operation and maintenance balances in working capital also warrant the inclusion in working capital of carrying charges capitalized from the date certain through the end of the test year (Co. Ex. 9C, 3-6). The staff opposes the company's treatment of these costs.

At first blush, the company's contention seems plausible. However, the company has ignored one crucial point. The applicant has included in this case, as part of plant in service, its investment in Beaver Valley 2 valued at date certain. Included in the date certain plant balance for Beaver Valley are the post in-service carrying costs accrued between November 17, 1987, and date certain. Thus, the carrying costs accrued after date certain are in actuality a part of the company's plant. Under Section 4909.15, Revised Code, the company's plant is to be **[64]** valued at date certain. The company's proposal, to include these costs in working capital, reaches the same result as if the post in-service carrying charges had been included in plant in service as of the end of the test year. This result in contrary to the statute. The staff's adjustment shall be accepted. Ohio Edison's objection is overruled.

Beaver Valley 2 Allocation Factors

As discussed above, Ohio Edison has been authorized to defer on its books and accrue carrying charges on certain operation and maintenance expenses associated with Beaver Valley 2. The company has also been authorized to capitalize interest on its investment in Beaver Valley 2 from the in-service date. The company used a 92.4 percent composite allocation factor to defer and accrue on its books the Beaver Valley costs. This allocation factor was developed from the composite ratio of jurisdictional nuclear plant to adjusted total company nuclear plant as of May 31, 1987, the date certain in the company's last rate case (Co. Ex. 10C, at 1).

In this case, the company used the same 92.4 percent allocation factor to compute the working capital allowance associated with these Beaver Valley costs. The **[65]** allocator was also used to calculate associated deferred expenses, plant in service, and depreciation expense. OCC objected to the use of the 92.4 percent allocation factor in this case because this factor does not reflect the increase PEPCO sales which occured during the test year.

OCC witness Effron testified that the firm sale of capacity to PEPCO increased from 172 MW to 258 MW in January of 1989, and to 387 MW in June of 1989. The increases in the firm sales to PEPCO have resulted in decreases to the jurisdictional allocation factors used in developing the company's cost of service in this case (OCC Ex. 1, at 7). Thus, the company has revised its jurisdictional allocation factors to reflect the current test-year data. However, in requesting recovery of the test-year Beaver Valley accruals and deferrals, the company did not apply a jurisdictional allocation factor based upon test-year data. Rather, the company continued to use the 92.4 percent allocator from the prior rate case. Specifically, the company developed its jurisdictional allocation factors, except for the factor applied to Beaver Valley deferred and accrued costs, based upon annualizing the PEPCO sale at 387 **[66]** MW and the AMP-Ohio sale at 125 MW (Tr. XXVIII, 71-72).

In order to reflect the increased PEPCO firm sales, Mr. Effron proposed that incremental reductions to the D-1 demand ratio of 2.20 percent as of January 1989, and 3.11 percent as of June 1989, for an accumulative total reduction of 5.31 percent to the 92.4 percent allocation factor be applied to the deferred costs (Id. at 8-9). The staff agrees with OCC that application of a 92.4 percent allocation factor is not reflective of test-year data; however, the staff disagrees with OCC's methodology used to compute its adjustments. Staff witness McDonald testified that OCC's adjustments constitute a selective adjustment to test-year jurisdictional allocation factors and is inappropriate (Staff Ex. 11, at 11-12). The staff recommends that an allocation of 86.2 percent be used to adjust the Beaver Valley 2

post in-service carrying charges and deferred costs incurred subsequent to January 1, 1989. This allocation factor is calculated on a similar basis as the 92.4 percent allocation factor previously used by the applicant and is based on the composite of the Beaver Valley 2 jurisdictional and total company nuclear production plant **[67]** investment. The staff's factor is based upon the test-year data developed by the company in its nuclear plant and expense allocation factors in this case (Id.).

The company alleges that if the Commission were to accept either the staff's or OCC's proposal, it would be forced to write off approximately $ 16.4 million of deferred costs and post inservice AFUDC through June 30, 1990. The company contends that its 92.4 percent allocator is in accordance with the Commission's orders approving the deferrals and accruals in the first place. Because the company's accounting is in accordance with the accounting entries, the company believes that the 92.4 percent allocator is appropriate for this case. Further, the company argues that the deferral of the Beaver Valley 2 costs at the 92.4 percent level has been an integral part of the company's rate deferral and moderation program. Had the company known when it committed to delay this rate increase until July 1990, that it would not be allowed to recover all deferred expenses, the program, if any, would have been different (Co. Ex. 9D, at 3, 9-10).

In addition, the company argues that OCC and the staff have ignored the impact of changes **[68]** to Ohio Edison's off-system firm sales other than PEPCO. Company witness Flower testified that AMP-Ohio sales fell to approximately 30 MW in 1989 and have been scheduled at that level for the next several years. Mr. Flower developed a test-period allocation factor that reflects the reduction in the AMP-Ohio sales of 89.1 percent. However, Mr. Flower went on to advocate that, not only should the Beaver Valley 2 allocator be changed to reflect the reduction in the level of AMP-Ohio sales, but that all the allocation factors in this case should be changed to reflect the actual test-year sales to AMP-Ohio. Use of revised test-year jurisdictional allocation factors would increase the revenue requirements in this case by $ 30 million (Co. Ex. 10C, at 5-7).

As previously discussed, the Commission has authorized the deferral and accrual accounting for Beaver Valley 2 costs. However, the accounting orders did not set the ratemaking treatment of these costs. In fact, in Ohio Edison Company, Case No. 87-985-EL-AEM (October 20, 1987), the company specifically requested that the Commission address the ratemaking treatment of the deferred costs. The Commission adopted its staff's recommendation **[69]** that any issues as to future recovery and rate base inclusion should be deferred to the company's future rate case proceedings. If the company was not sure of this statement, then it should have become crystal clear when in denying IEC's motion to intervene, the Commission reiterated its conclusion that the accounting entry grants permission for Ohio Edison to defer operating costs past the inservice date for booking purposes only and does not address the ratemaking treatment of these items. The Commission made a similar statement when it addressed post in-service carrying charges in Ohio Edison Company, Case No. 87-984-EL-AAM (October 20, 1987). Thus, the company's argument, that its proposed ratemaking treatment was somehow authorized by prior Commission orders, is clearly wrong.

The Commission is of the opinion that the Beaver Valley 2 deferrals and accruals must be adjusted for ratemaking purposes to account for increased sales to PEPCO. Failure to make such an adjustment would result in jurisdictional customers paying more than their share of the deferrals and accruals. The Commission is also of the opinion that the staff's allocation factor of 86.2 percent is the most **[70]** appropriate method to use in making the adjustment. The staff's allocation factor is based upon the test-year data used by the company to develop its jurisdictional allocation factors. The Commission declines to adjust the test-year data to account for decreased AMP-Ohio sales. The Commission believes that such a selective adjustment to test-year data is inappropriate, especially in light of the company's contention that all the test-year allocation factors should be changed to reflect the present level of AMP-Ohio sales. It must be remembered that it is the company's test-year data upon which the composite 86.2 percent allocation factor is based. It was the company, that provided the test-year information; it was the company that, with the exception of the Beaver Valley accruals and deferrals, based all of its allocations on the PEPCO sale at 387 MW and the AMP-Ohio sale at 125 MW. Thus, in making the adjustment to the amount of deferrals and accruals to be recovered from ratepayers, the Commission has determined that the deferrals and accruals should be based upon test-year allocation factors, just as the company proposed in all other instances. OCC's objection is sustained. **[71]** In addition to an adjustment to the working capital allowance, the appropriate adjustments to deferred annual amortization expense, plant in service, and depreciation expense should be made.

Perry 68 MW Power Purchase

In May of 1989, the company's obligation to purchase 68 MW of Perry capacity from CEI expired. This obligation to purchase the 68 MW of Perry capacity for an 18-month period was the result of reallocating 5.6 percent of the Perry plant from Ohio Edison to CEI. The transaction reduced Ohio Edison's investment in Perry by approximately $ 400 million.

OCC, through its witness Mr. Effron, pointed out that the company's present rates, established in Case No. 87-689-EL-AIR, still reflect the cost associated with the purchase of 68 MW of Perry capacity. Mr. Effron argues that a savings results from the cessation of this purchase, and that the savings to the company resulting from the expiration of the obligation to purchase this capacity should be accrued and offset against the Perry and Beaver Valley 2 deferred costs (OCC Ex. 1, at 10). In support of its contention, OCC relies on the Commission's accounting entries which authorized the deferral of Perry and Beaver **[72]** Valley 2 costs. In those entries, the Commission indicated that the deferral of the operating costs should be net of any and all savings that result from the operation of the plants. According to Mr. Effron, the expiration of the obligation to purchase 68 MW of capacity from CEI is a savings related to the Perry plant and would not have occurred, were the Perry plant not in operation (Id. at 11).

The Commission cannot agree with OCC. The cessation of the Perry 68 MW sale has nothing to do with the operation of either the Perry or the Beaver Valley plants. Obviously, the sale could not have been made in the first place, and, consequently, would not have ceased, had the Perry plant not been operating. However, the operation of the plant had nothing to do with any savings. The savings resulted from the expiration of Ohio Edison's obligation to CEI to purchase Perry capacity. It is because of the transaction between CEI and Ohio Edison that ratepayers are receiving a savings in the amount of a $ 400 million reduction in rate base. Thus, the savings to ratepayers are attributable to the reduction in rate base, not the cessation of the purchase. Finally, OCC would have the **[73]** Commission look back at prior rates and selectively adjust one item. This is inappropriate retroactive ratemaking. OCC's objection is overruled.

Perry Prudence Audit Costs

The staff recommended that the jurisdictional portion of $ 2,798,049, which represents Ohio Edison's share of the audit costs incurred as a result of the Commission-ordered investigation into the construction costs of Perry in Case No. 85-521-EL-COI, be amortized over a three-year period and included as an expense item in this proceeding. The company requests that the unamortized balance of the audit costs be included in working capital. The staff opposes any working capital allowance for the unamortized balance of the Perry audit costs.

The company complains that without a working capital allowance, it will not fully recover these costs, as the company continues to incur carrying costs on the unamortized balance. Failure to include these amounts in working capital, according to the company, would be an injustice.

The Commission has previously addressed this matter for CEI. In that case, the Commission amortized this expense over a three-year period, but declined to include the unamortized balance in rate **[74]** base. Cleveland Electric Illuminating Co., Case No. 86-2025-EL-AIR (December 16, 1987) at 68. Ohio Edison has provided the Commission no reason which persuades us to depart from prior precedent. The Commission considers this expense to be similar to rate case expense. Reasonable rate case expense is usually amortized over a period of time; however, no working capital is authorized. Similarly, no working capital allowance for Perry audit costs will be allowed.

PIP Arrearages

The company alleged that the staff inadvertently failed to include the percentage of income payment plan (PIP) arrearages that are greater than 12 months old. Staff witness Meridith agreed and recommended that the PIP arrearage balance of $ 34,603,647 be used when calculating the working capital requirement (Staff Ex. 6, at 2).

OCC objected that the staff used PIP customer deposits as of November 1989, to offset rate base instead of using the date certain balance to offset rate base. However, OCC provided no testimony on this subject and did not address it on brief. OCC's objection is, therefore, deemed withdrawn.

Working Capital Summary

The following schedule reflects the Commission's determination **[75]** of the allowance for working capital to be included in rate base in this proceeding.

Jurisdictional Working Capital Allowance
(000's Omitted)

Cash Component	$ (139,732)
Material and Supplies	53,656
Fuel Inventory	42,960
PIP Uncollectibles	34,604
PIP Customer Deposits	(1,128)
Perry 1 Lease Financing	15,896
Beaver Valley 2 Lease Financing	28,196
Beaver Valley 2 Book Loss	40,360
Perry 1 Unamortized O&M	48,250
Beaver Valley 2 Unamortized O&M	212,069
Unclaimed Fund	(361)
Perry Unamortized Sale/Leaseback	6,604
Beaver Valley Unamortized Sale/Leaseback	7,868
Jurisdictional Working Capital Allowance	$ 349,242

Other Rate Base Deductions:

Unclaimed Funds

The company's unclaimed funds account is made up of undeliverable accounts payable, petty cash, line extension deposits, security deposits, overpayments on electric and other accounts, dividends, bond interests, claims, and payroll checks (OCC Ex. 6, at 4). OCC witness Chan testified that unclaimed funds are a noninvestor supply source of funds available for use by the company. Further, the company has indicated to OCC that the level of unclaimed funds will not change significantly **[76]** in the near future. Mr. Chan recommended that the unclaimed funds in the amount of $ 360,825 should be subtracted from the company's rate base. The staff would deduct only $ 60,150 from rate base, which is the amount attributable to the security deposits portion of unclaimed customer funds (Staff Ex. 5, at 4).

The company opposes both adjustments; however, it provided no testimony on the subject. The company only argues that it is clear from the names in the account that the funds are not customer-provided. Further, the company contends that it is only customer-provided funds which should be deducted from rate base.

Investors are entitled to earn a return on capital invested by them in utility operations. Clearly, customer-provided security deposits are not provided by investors and must be deducted from rate base. This matter is not subject to debate. Consumers' Counsel v. Pub. Util. Comm., 58 Ohio St. 2d 108 (1979). As to the other components of unclaimed funds, the only evidence of record is that unclaimed funds are a non-investor supply source of funds available for use by the company. The record does not establish from where the funds come. Based upon the record **[77]** presented to the Commission on this subject, the Commission believes that OCC's adjustment should be accepted. The company has not met its burden of demonstrating that it is entitled to a return on these unclaimed funds. Rate base should be reduced by $ 360,825 attributable to unclaimed funds.

Deferred Taxes Associated With Property Taxes

The staff recommended that $ 4,895,924 of accumulated deferred taxes associated with property taxes continue to be used as a rate base deduction (Staff Ex. 9, at 6). The company objected to this deduction.

The company's book-tax timing difference for property taxes arises as a result of the company booking property tax expense for book purposes in the year in which the property is assessed, and for tax purposes in the year in which the lien attaches. This creates a deferred credit that is netted against rate base (Tr. XXII, 30). According to the company, the Internal Revenue Service (IRS) informed the company that its property tax treatment does not meet the economic performance test established by the IRS. Therefore, the IRS has proposed that property taxes be deducted in the year paid, rather than in the year in which the lien attaches. **[78]** This treatment will result in a deferred debit, as opposed to a credit which presently exists (Co. Ex. 15B, at 7-8). The company recommends that the Commission should eliminate the entire book-tax timing difference in this case.

Staff witness Hensel testified that it would be improper to eliminate the tax timing difference at this time because the IRS has not issued final tax regulations. According to Ms. Hensel, there are two IRS proposals related to property taxes. The first one is that property taxes should be deducted in the year paid; the second one is that property taxes should be deducted in the year they are booked as an expense. However, the IRS has not finalized its position on this issue, nor have final regulations been issued. The staff believes that the income tax calculation used for ratemaking purposes should be based on the tax laws and regulations currently in effect, and not on proposed changes (Staff Ex. 9, at 3-4).

The Commission believes that the staff's position is correct. At this point in time, one can only speculate when any final IRS regulations will be issued. Further, the details of any such regulations cannot be known at this time. Accordingly, **[79]** the Commission finds that the tax timing difference related to property tax should continue to be used as a rate base deduction.

Deferred Taxes on Nuclear Fuel Carrying Charges

The company has on its books accumulated deferred income taxes related to nuclear fuel carrying charges. When the nuclear fuel was in process, the carrying charges on that fuel were capitalized for book purposes and added to the cost of the nuclear fuel. For income tax purposes, the carrying charges were deducted as incurred. To recognize the effect of this timing difference, deferred taxes were recorded on the carrying charges at that time. As the fuel is burned, the company amortizes the cost of the nuclear fuel, including the carrying charges. As the carrying charges are amortized, the balance of accumulated deferred income taxes is reversed. The balance of the accumulated deferred income taxes as of the date certain represents the income taxes previously deferred. OCC recommended that $ 16,988,000 of accumulated deferred income taxes related to nuclear fuel carrying charges as of the date certain be included in the deferred taxes deducted from plant in service because they are non-investor supplied **[80]** funds. When the company took the tax deduction for the carrying charges, it realized a benefit from the timing of the tax deduction. Since the tax deduction related to the nuclear fuel carrying charges was not flowed through by the company in the computation of income taxes, the time value of this tax deduction was not passed on to ratepayers (OCC Ex. 1, at 13-16). The staff agrees with OCC.

The company opposes this rate base deduction. The company contends that nuclear fuel has never been included in the company's rate base because it has been procured on behalf of the company through various leasing and trust arrangements. Since the nuclear fuel to which these deferred income taxes relate is not included in rate base, the company reasons that it would be inappropriate to reduce rate base by these accumulated deferred income taxes. However, company witness Daniels testified that if the Commission believes that a deduction should be made, only $ 3,621,363 of the balance relates to nuclear fuel in service. The remainder relates to nuclear fuel which was still in process as of the date certain (Co. Ex. 9D, at 16).

The Commission is of the opinion that a rate base deduction should **[81]** be made in the amount of $ 3, 621,363 in accordance with Cleveland Electric Illuminating Company, Case No 85-675-EL-AIR (June 24, 1986) at 30-31. In that case, the Commission stated that deferred taxes related to nuclear fuel interest associated with in-service fuel cores should clearly be deducted. Customers being served by the nuclear fuel in service are the ones who are required to bear the interest costs through their rates

and who should receive a rate base deduction. However, because it is not until the fuel is burned that interest expense is recognized, customers do not pay any carrying charges associated with nuclear fuel which is still in process. Therefore, there should be no deduction for nuclear fuel in process. OCC's objection is sustained to the extent that $ 3,621,363 should be used as a rate base deduction.

Double Deduction for Deferred Taxes

The company objected that the staff accounted for deferred taxes associated with deferred Beaver Valley 2 depreciation expense twice -- once as a working capital deduction, and a second time as a rate base deduction. Staff witness Soliman testified that a double deduction for deferred taxes associated with Beaver **[82]** Valley depreciation may have occurred; however, he needed additional information before making that determination (Staff Ex. 10, at 26-27). Company witness Sitarz provided the additional information required by the staff (Co. Ex. 15C). The information provided confirms that a double deduction has occurred. Accordingly, the amount attributable to deferred taxes associated with deferred Beaver Valley 2 depreciation expense should be excluded from other rate base deductions.

Rate Base Summary:

Consistent with the foregoing discussion, the Commission finds the jurisdictional rate base, as of the date certain of June 30, 1989, to be as follows:

Jurisdictional Rate Base
(000's Omitted)

Plant In Service		$ 5,194,082
Less:	Depreciation Reserve	1,307,986
Net Plant In Service		$ 3,886,096
Plus:	CWIP	$ 0
	Working Capital	349,242
	Mirrored CWIP Allowance	0
Less:	Other Items	189,735
Jurisdictional Rate Base		$ 4,045,603

OPERATING INCOME

Ohio Edison and the staff each submitted an analysis of test-year accounts reflecting the results of operations under the company's present rates. OCC and IEC also presented evidence in support **[83]** of certain adjustments to the staff's findings. Issues raised by the objections filed by the parties are discussed below.

Adder Revenue:

Adder revenue is the mark-up on the company's energy costs for sales to other utilities (OCC Ex. 3, at 3). OCC recommends that $ 4,731,189 be added to the company's jurisdictional operating revenues to account for adder revenues associated with non-firm sales to GPU, and for short or limited term sales to other utilities (Id. at 3 and Att. KH-1). According to OCC witness Hagans, jurisdictional customers should fully share in all revenue derived from the plant investment on which they are paying a return. Ms. Hagans believes that the Commission should treat Ohio Edison's adder revenues in the same manner as CEI'S net-jurisdictional interconnection revenues (NNIR), which have been considered 100 percent jurisdictional revenues in CEI's last two litigated rate cases, Cleveland Electric Illuminating Co., Case No. 85-675-EL-AIR (June 24, 1986) at 32-34, and Cleveland Electric Illuminating Co., Case No. 86-2025-EL-AIR (December 16, 1987) at 39-41 (Id. at 4-6). North Star Steel also contends that adder revenues should be flowed through **[84]** to the jurisdictional customers since retail ratepayers are bearing a significant part of the cost burden of the facilities used to produce the energy sold in the off-system sales (North Star Ex. 14, at 29-30).

The staff and the applicant both believe that adder revenues should be excluded from jurisdictional revenues. Staff witness McDonald testified that adder revenues should be treated as non-jurisdictional for the following reasons: 1) Ohio Edison's adder revenues represent the mark-up on energy charges whereas CEI's NNIR includes both demand and energy revenues for opportunity sales; 2) in this proceeding, the company's ratepayer's are fully compensated for the costs associated with making off-system sales; and 3) there is no assurance that the non-firm sales will continue at the test-year level (Staff Ex. 11, at 14-16). Ohio Edison did not present a witness on this issue but states on brief that, in addition to the arguments raised by the staff, adder revenues provide the company with the incentive to assume risks associated with off-system sales, and in Ohio Edison Co., Case No. 84-1359-EL-AIR (October 29, 1985) at 19-21, the Commission distinguished adder revenues from **[85]** CEI's NNIR and determined that adder revenues should be treated as non-jurisdictional (Co. Initial Br. at 93; Co. Reply Br. at 20-21).

The Commission finds that Ohio Edison's adder revenues should be included in the cost of service in this case. While we recognize that this conclusion is a departure from our decision in Case No. 84-1359-EL-AIR, we believe that no valid distinction exists for treating Ohio Edison's adder revenues differently from CEI's NNIR. In Case No. 84-1359-EL-AIR, the commission rejected the staff's (50/50 split) and OCC's (100 percent to jurisdictional) proposals to include adder revenues in Ohio Edison's cost of service. In that case, however, there were several factors which contributed to the Commission's decision which are not present in this proceeding. At that time, CEI was required to include only 50 percent of NNIR in jurisdictional revenues. Further, there was company testimony in the prior Ohio Edison case that a 50/50 sharing of off-system sales revenues, in a manner similar to CEI's treatment of NNIR, would actually reduce the level of revenues included in the jurisdictional cost of service (See Ohio Edison, supra, at 19-20). Subsequently, **[86]** in CEI, Case Nos. 85-675-EL-AIR and 86-2025-EL-AIR, supra, the Commission included all NNIR in CEI's cost of service. In Case No. 86-2025-EL-AIR, we concluded that, since " . . . all the assets associated with NNIR are included in jurisdictional rate base, aand all of the operation and maintenance expenses related to these assets are included in jurisdictional expenses . . . [including] . . . the administrative and billing expenses . . . . [w] e see no reason why 100% of NNIR should not be included." (CEI, Case No. 86-2025-EL-AIR, supra, at 40-41). In this proceeding, we see no reason why Ohio Edison should receive different treatment than CEI. Indeed, in Ohio Edison, supra, at 20-21, we stated that " . . . the Commission is concerned about the different treatments afforded off-system sales revenues among the electric utilities. Accordingly, the Commission will continue to examine this issue in future rate proceedings." Nor is the Commission persuaded by the company's argument that adder revenues are necessary to provide an incentive to make off-system sales. We rejected a similar argument in CEI, Case No. 86-2025-EL-AIR, supra, at 40, wherein the **[87]** record showed that CEI's NNIR had increased nearly $ 3 million in the year following the date of the Commission's order requiring the inclusion of 100 percent of NNIR in jurisdictional revenues. Therefore, consistent with our prior treatment of CEI NNIR, we will adopt OCC's recommendation that $ 4,731,189 of jurisdictional adder revenues be included in the applicant's cost of service in this case.

Unbilled Revenues:

Unbilled revenues represent revenues for utility service used but not yet billed to the customer because of bimonthly or cycle billing, or for some other reason (IEC Ex. 4, at 5). In the past, many utilities did not book unbilled revenues for financial and ratemaking purposes to be consistent with their claims that unbilled revenues were not taxable income. However, the Tax Reform Act of 1986 (TRA-86) required that unbilled revenues be included in taxable income. While many utilities now recognize unbilled revenues for financial reporting and ratemaking purposes, Ohio Edison recognizes unbilled revenues for taxable income purposes only (Id. at 7-10). The difference between the company's taxable income recognition, compared to book accounting and ratemaking **[88]** recognition, creates a timing difference which generates an asset accumulated deferred tax balance (Id. at 10). While the applicant had originally sought to include this deferred tax balance in rate base, the Staff Report excluded this amount from rate base and the company did not oppose the staff's adjustment (See S.R. at Sched. 12).

IEC recommends that the Commission order Ohio Edison to record unbilled revenues for financial reporting and ratemaking purposes and impute the resulting gain, subject to a three-year amortization, in its pro forma earnings calculation (IEC Ex. 4, at 11-12). IEC's primary concern is that, following the rate order in this case the company may decide to begin recording unbilled revenues for financial

reporting purposes, resulting in a $ 52 million boost in the company's earnings (Id. at 9). IEC witness Kollen claims that if IEC's proposal is adopted, and Ohio Edison begins recording unbilled revenues, the company's revenue requirement in this case would be reduced by $ 64.5 million with a one-year recognition, or by $ 21.5 million on an annual basis, assuming a three-year amortization of the initial balance, as IEC recommends (Id. at **[89]** 12). Under this scenario, Mr. Kollen asserts that the company's earnings would be unaffected and ratepayers would receive the benefit of a lower rate increase (Id.).

The staff rejects IEC's recommendation as unnecessary. According to staff witness Hess, it is unnecessary to recognize the effects of either booked or tax unbilled revenues in a base rate proceeding (Staff Ex. 14, at 10). Mr. Hess testified that the applicant's total sales represent the full level of sales for the 12 months of the test year. The sales are priced at current rates to determine total operating revenues for the test year and, thus, revenues are properly matched with their associated time period, eliminating the need for a revenue adjustment such as IEC's proposed unbilled revenue adjustment (Id. at 11).

The Commission finds that the staff's recommended adjustment should be adopted. As Mr. Hess explained, ignoring the revenue requirement aspects of unbilled revenues properly matches test-year revenues with test-year sales, and eliminates the need for any revenue adjustments. This treatment is also consistent with the Commission's findings in Columbia Gas I and Columbia Gas II wherein **[90]** Columbia (which books unbilled revenues) was prohibited from passing on to ratepayers the expense associated with an adjustment required by TRA-86 without recognizing the corresponding customer benefit of increased revenues. Columbia Gas I, supra, at 49-51; Columbia Gas II, supra, at 44-45. In this case, since Ohio Edison does not currently book unbilled revenues, the staff's exclusion of the deferred tax balance from rate base properly recognized the inconsistency in the company's original proposal. Thus, under the staff's recommendation, ratepayers are protected from the type of inconsistent treatment which the Commission disallowed in the Columbia cases. IEC fears that, at some point in the future, Ohio Edison will begin to book unbilled revenues, thereby generating revenues for the company above the earnings opportunity granted by the Commission in this case. However, as Mr. Hess explained, no such revenue discrepancy would occur because if the company began booking unbilled revenues, the company would catch up to where it should be, since recognizing unbilled revenues assumed recognition of only 11-1/2 months of revenues in the first year of such recognition. **[91]**

Special Arrangements for Economic Development Contracts:

Schedule 3.1 of the Staff Report reflects inclusion in operating revenues of one-half of the "delta revenues" resulting from Ohio Edison's Special Arrangements for Economic Development (SAED) contracts (S.R. at 5, 89-90). Delta revenues represent the difference between revenues which would have been collected under the applicant's tariffs and the lesser revenues collected under the SAED economic incentive contracts which grant price concessions to encourage new and expanded load (Staff Ex. 20, at 3). The staff recommend that the delta revenue deficiency be split evenly between the applicant and its customers as recognition that both the company and customers benefit from the SAED contracts through the retention of load, load growth, increased income, greater efficiency of facilities, retained and increased employment, and increased tax revenues associated with economic recovery initiatives (Id. at 3-4). According to staff witness Fortney, the staff's recommendation is consistent with past Commission precedent that companies and ratepayers should share in the revenue deficiencies associated with economic incentive **[92]** contracts, including Toledo Edison Co., CAse No. 86-2026-EL-AIR (December 15, 1987) at 36 (40 percent attributed to company), and Cleveland Electric Illuminating Co., Case No. 88-170-EL-AIR, et al. (January 31, 1989) at 18-19 (50/50 split of delta revenues) (Id. at 5). addressed the issue of the apportionment of delta revenues, Cleveland Electric Illuminating Co.

Ohio Edison argues that delta revenues are merely hypothetical values since, without the availability of SAED contracts, it is likely that many existing customers would have left the system and much new load or growth would not have occurred (Co. Ex. 14C, at 10). The company cites to the first case in which the Commission addressed the issue of the apportionment of delta revenues, Cleveland Electric Illuminating Co., Case No. 85-675-EL-AIR (June 24, 1986), at 36, to support its position that no "phantom" delta revenues should be imputed to the applicant's cost of service. The company claims that the Commission should follow that CEI decision and reject the staff's 50/50 proposal since, in this proceeding, 100 percent of the SAED revenue is credited to the customer classes and that SAED incremental **[93]** revenue covers the company's variable costs and part of its fixed costs (Tr. XXVII,

37, 41; Co. Ex. 14C, at 9-10). Ohio Edison asserts that the Commission should not penalize the company for making efforts to facilitate economic growth. The applicant argues that taking a portion of SAED revenues, which would not exist at all but for the company's efforts, is inconsistent with Ohio's efforts to attract and promote economic development.

OCC contends that a 75 percent (company) and 25 percent (customer) sharing of delta revenue deficiencies is appropriate for this case (OCC Ex. 9, at 9). OCC witness Yankel testified that there are two reasons which justify OCC's recommendation. First, Mr. Yankel claims that recent declines in Ohio's unemployment rates indicate that the need for economic incentive rates is much less than it was in the early 1980s (Id. at 6). Second, Mr. Yankel states that the company's incremental load which has been stimulated by the SAED program is substantially more on-peak than the existing load of the same customers (Id. at 7-9, AJY-1). As a final matter, Mr. Yankel proposes that in future rate cases Ohio Edison be ordered to break out SAED customers **[94]** as a separate class in the company's costs of service studies (Id. at 10).

The Commission finds that the staff's recommended treatment of the delta revenues in this proceeding is appropriate and should be adopted. We are not persuaded by Ohio Edison's argument that sharing of the delta revenues is inconsistent with the statewide goals of encouraging economic development in Ohio. The Commission believes that a 50/50 split properly recognizes that both the company and its customers benefit from the company's policy of providing economic incentive rates to certain customers to retain load, encourage expansion, or attract new development in the company's service territory. Further, this equal sharing of the SAED delta revenues is consistent with our most recent decision which addressed the issue (See CEI, Case No. 88-170-EL-AIR, supra). We also reject OCC's proposal. One need only have attended the public statements hearings in this case to recognize that residential and business customers alike are deeply concerned with the lack of employment opportunities and the shrinking economic base of the areas in which they live or operate. The Commission believes that its **[95]** policy encourages economic development and that the staff's treatment represents a fair sharing of the benefits and the revenue deficiency attributable to SAED contracts.

Annualization of SAED Revenues:

In addition to its objection to the imputation of any SAED delta revenues, the applicant also disputes the staff's method of annualizing SAED revenues in this proceeding. Staff witness Soliman testified that the staff annualized test-year SAED incremental revenue to reflect the actual level of revenue experienced by the company during the test year and which was expected to continue in the future (Staff Ex. 10, at 4-7). The company claims that annualization should not be applied to SAED revenue because of the lack of stability and certainty of the SAED contracts. If the Commission accepts the staff's annualization of SAED revenues, the applicant argues that a corresponding increase in operating expenses must also be included, to account for the costs needed to generate the additional kWh (Co. Ex. 14C, at 11-13). Mr. Soliman states that the staff agrees, in theory, with the applicant's request for a corresponding increase in O&M expenses but does not recommend an adjustment **[96]** because of the staff's belief that the operating expenses recommended in this case already reflect a normal level of operating expenses for the company (Staff Ex. 10, at 6-7).

The Commission finds that the staff's annualization of the SAED revenues is appropriate in order to reflect a more accurate estimate of the company's actual test-year experience and future SAED revenues. Company witness Burg testified that, as of March 31, 1989, 64 companies had taken advantage of SAED contracts with the potential to add $ 19 million in annual revenues (Co. Ex. 6A, at 17). Mr. Soliman pointed out, however, that the company's application reflected SAED revenue of only $ 15.4 million (Staff Ex. 10, at 5). We believe that the staff's annualization of SAED revenues is reasonable and should be adopted. Consistent with our adjustments regarding short-term sales and the Perry 68 MW purchase power issues, the Commission finds that the company's operating expenses should reflect the increased costs associated with the additional kWh caused by the staff's annualization. Thus, as indicated by company witness Norris (Co. Ex. 14C, at 13), the Commission will add $ 523,767 to the company's operating **[97]** expenses to recognize the corresponding generating expenses associated with the staff's annualization of the SAED revenues.

Allocation of Nonjurisdictional Fuel Revenues:

North Star claims that Ohio Edison's allocation of 88.2 percent of total fuel costs to jurisdictional customers causes those customers to pay a disproportionate share of the company's total energy requirements (North Star Ex. 14, at 27-30). According to North Star witness Drzemiecki, under Ohio Edison's cost-of-service study, jurisdictional customers are responsible for 88.2 percent of fuel costs but only 85 percent of the fuel costs which are included in the energy allocation factor. Staff witness McDonald testified that the staff did not include any nonjurisdictional fuel costs in its determination of the jurisdictional revenue requirement (Staff Ex. 11, at 17). Mr. McDonald claims, therefore, that it would be improper to include nonjurisdictional fuel revenues as suggested by Mr. Drzemiecki (Id.). On brief, the company pointed out that, in computing his claimed mismatch of energy sales and fuel expense allocations, Mr. Drzemiecki had mistakenly compared unadjusted and adjusted figures. The applicant **[98]** argues that the unadjusted energy allocation factor should have been compared to the corresponding 88.2 percent factor cited by Mr. Drzemiecki.

The Commission finds that North Star's objection on this issue should be overruled. As both the staff and the company indicated, Mr. Drzemiecki's analysis apparently was based on incorrect assumptions. North Star made no attempt to refute, through cross-examination or additional testimony, Mr. McDonald's contention that the staff had appropriately excluded nonjurisdictional fuel costs from the jurisdictional revenue requirement. Thus, the Commission will adopt the staff's position on this issue.

Mirror CWIP Revenues:

In the company's last rate case, Case No. 87-689-EL-AIR, the Commission implemented a mirrored CWIP surcredit tariff rider to return to customers revenues collected as a result of the inclusion of two projects (Mansfield-Juniper 345 kv and Sammis generator protection) in the CWIP allowance in the company's prior rate case (84-1359-EL-AIR). This tariff rider was instituted by the Commission to effect the so-called "mirror CWIP" provision of Section 4909.15(A)(1), Revised Code, which is intended to credit ratepayers for **[99]** revenues paid as a return on any property included in rate base, prior to the time the property is used and useful in providing utility service. The CWIP rider expired in May of 1990, some five months after the end of the test year in this proceeding. Since the tariff rider was in effect during the entire test year, the staff followed the proposal set forth in the company's application (Co. Ex. 5A, Sched. B-9; Co. Ex. 5A, Sched. E-4.1A) and deducted from rate base $ 26,837,306 associated with the two prior CWIP projects (S.R. at Sched. 10.1) and reflected the revenue reduction resulting from the application of the surcredit rider in the staff's base revenue annualization (S.R. at 14-15, Sched. 3.1). Staff witness Hess testified that the effects of the mirror CWIP surcredit rider should not be removed from the revenue requirement calculation in this case because, to do so, would represent a post-test year adjustment (Staff Ex. 14, at 11).

IEC objected to the staff's treatment of the CWIP surcredit tariff rider on the basis that the rider will never be applied to the base rates established in this proceeding and that the rider is not tied in any way to the base rate valuation determined **[100]** in this case. According to IEC witness Barber, the appropriate treatment in this proceeding is to determine the jurisdictional revenue requirement for this case without regard to the surcredit rider (IEC Ex. 2, at 14). Mr. Barber contends that the effect of returning the mirror CWIP to rate base, and increasing operating revenues by eliminating the effect of the surcredit, is to lower the jurisdictional revenue requirement by more than $ 1 million (Id.). IEC claims that the post-test year adjustment argument posited by the staff and the company is incorrect since IEC's recommendation does not attempt to adjust test-year operating income based on a change in costs occurring after the test year. According to IEC, the fact that the mirror CWIP surcredit rider was in place during the test year has nothing to do with establishing the appropriate level of rates to be charged after the rider expires. Rather, IEC argues that the level of the surcredit turned on the deduction of mirror CWIP from rate base in Case No. 87-689-EL-AIR, and the Commission's order in that case satisfied the requirements of Section 4909.15(A)(1), Revised Code.

The Commission finds that IEC's proposal should **[101]** be adopted. We are not persuaded by the arguments that this recommendation violates the test-year concept since the CWIP surcredit rider will not be in effect for any part of the period for which rates are in effect. Further, the elimination of the rider was a known and measurable event during the test year and at the time the company filed its application. Thus, although the CWIP rider was in effect during the entire test year, its expiration prior to the issuance of this order creates the type of "anomaly" which makes the test year unrepresentative for ratemaking purposes. See Board of Commissioners v. Pub. Util. Comm., 1 Ohio St. 3d 125, at 127 (1982); Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St. 2d 153, at 166 (1981). As IEC points out

on brief, this mirror CWIP adjustment is comparable to the Commission's consistent use in rate cases of the latest-known fuel component portion of the EFC rate, even if the new fuel component is established after the test year. See Ohio Power Co., Case No. 85-726-EL-AIR (July 10, 1986). The Commission believes that IEC witness Barber's recommendation represents the appropriate treatment of the mirror CWIP tariff **[102]** rider revenues in this proceeding and, accordingly, it shall be adopted. Further, the appropriate mirror CWIP amount should be added to rate base.

Perry Depreciation Expense:

Ohio Edison objected to the staff's calculation of nuclear fuel disposal costs and the staff's use of units-of-production depreciation for the Perry plant. Specifically, the company claimed that the staff had incorrectly calculated the Perry depreciation factor and the plant's capacity factor (thereby causing an incorrect calculation of the nuclear fuel disposal cost), and that straight-line depreciation should be used to eliminate the types of errors inherent in the units-of-production method (Co. Ex. 9C, at 21-26; Co. Ex. 12C, at 10-12).

Staff witness Kotting agreed with the company that the Staff Report had incorrectly included the effects of a refueling outage in calculating Perry generation and, accordingly, updated the available operating hours from 7,080 to 8,760 and the capacity factor from 71.7 percent to 72.7 percent (Staff Ex. 12, at CK-6; Tr. XXII, 142, 146). Mr. Kotting indicated that, consistent with these changes, Perry generation would increase from 1,837,536 MWh to 2,273,562 MWh (Tr. **[103]** XXII, 142). According to Mr. Kotting, these changes would result in Perry depreciation expense of $ 26,926,601 and a nuclear fuel disposal adjustment cost of $ 1,045,531 (Staff Ex. 12, at CK-3, CK-4; Tr. XXII, 143). These changes are consistent with Ohio Edison's testimony, assuming the use of the units-of-production method for Perry depreciation.

The staff does not agree, however, with the company's proposal to use straight-line depreciation. Mr. Kotting indicated that the mathematical errors contained in the Staff Report are not evidence of any inherent deficiencies with the units-of-production method, as claimed by the company (Staff Ex. 12, at 16-17). Mr. Kotting also claims that the company's concerns about different depreciation factors being used for the different owners of the Perry plant are unfounded since, the next time the Centerior companies file a rate case, their depreciation factor will also be subject to recalculation (Id. at 18). Mr. Kotting notes that Ohio Edison should be more concerned with the inconsistency which would occur if its depreciation rate was calculated using the straight-line method while the other owners were using units-of-production (**[104]** Id.).

OCC does not dispute the staff's use of units-of-production depreciation for Perry but contends that the 72.7 percent capacity factor used by the company and the staff is unrepresentative, considering Perry's generating history. OCC asserts that the appropriate capacity factor for calculating Perry depreciation should be 62.2 percent, based on the most recent 18-month period of actual data (including the test year) from July 1988 through December 1989 (OCC Ex. 20). OCC claims that the use of historical, rather than forecasted, data is consistent with the staff's position in prior cases and more accurately represents the performance of the Perry plant.

The Commission finds that the staff's position should be adopted for purposes of determining the proper depreciation rate for Perry, as well as for the calculation of nuclear fuel disposal cost. We are not persuaded by the company's arguments that straight-line depreciation should be used for the Perry plant. As staff witness Kotting pointed out, an equal number of assumptions must be employed with the straight-line method as with units-of-production and the errors contained in the Staff Report were simply minor miscalculations, **[105]** rather than indications of flaws with the units-of-production method (Staff Ex. 12, at 16-18). Indeed, company witness Byrd agreed that, to the extent the underlying assumptions used for either method were incorrect, the resulting depreciation result would also be incorrect (Tr. VII, 197-198). Further, the Commission believes that it would be inappropriate for Ohio Edison to use straight-line depreciation while the other owners of Perry are required to use the unit-of-production method. Finally, the Commission notes that there is no evidence in the record upon which an appropriate straight-line depreciation calculation could be made. For all of these reasons, the Commission finds that the units-of-production method should be used in this proceeding for determining Perry depreciation.

Regarding OCC's contention that a 62.6 percent capacity factor should be used, the Commission believes that the 18-month period chosen by OCC is less representative of Perry generating capability than the factor proposed by the staff and the company. OCC fails to consider that the refueling outage contained in its historical period was more than twice as long as refueling outages scheduled for subsequent **[106]** years (See OCC Ex. 65). Additionally, if the refueling outage contained in OCC's historical sample is removed, only two months of the remaining 13 months show capacity factors less than 72.7 percent, and the last five months of the test year show that Perry operated at an average capacity factor of 96.6 percent (See OCC Ex. 20). Clearly, a forward looking analysis of the Perry plant's expected future operating performance, based on recent historical data, supports the use of the 72.7 percent capacity factor. We find, therefore, that the Perry depreciation expense and nuclear fuel disposal costs calculated by the staff in Revised Schedules 9.3a and 3.18 should be adopted in this proceeding.

Perry Budget Expense Adjustment:

The staff has recommended that the test-year expenses budgeted by the company for operating costs at the Perry plant be reduced by a jurisdictional amount of $ 3,576,782 (S.R. at 10, Sched. 3.28). The staff's adjustment reflects the difference between the preliminary six months estimated budget, which was used by the company, and the final Perry budget from the plant operators (Id.). Staff witness Hess testified that the staff prefers **[107]** to use final budgets over preliminary budgets because the staff "does not believe that preliminary budgets reflect an expected level of operating and maintenance costs" (Staff Ex. 14, at 5).

The applicant submits that it rejected using the final budget in its updated filing in this case because the preliminary budget "reflected a more realistic level of operating expenditures for the July through December period" (Co. Ex. 12C, at 19). According to company witness Hall, the actual year-end expenditures for Perry O&M were $ 5,305,566 over the preliminary budget and $ 14,048,937 over the final budget (Id.). Thus, Ohio Edison claims that the preliminary budget should be adopted because it is more reflective of the company's actual level of expenditures than the final Perry budget, which the staff recommends be used.

Normally, the Commission would agree with the staff's position that a final budget is preferable to a preliminary budget since the final budget would tend to be more accurate and reliable than a preliminary budget. In this case, however, the applicant has shown that, in preparing its updated filing, the preliminary budget was chosen because expenditures during the first **[108]** six months of the test year were much closer to the preliminary budget than the final budget submitted by the plant operators. Indeed, when actual figures became available for Perry O&M during the test year, they reflected a level of expenditures nearly $ 9 million closer to the preliminary budget, compared to the final budget. Under these circumstances, the Commission agrees with the applicant that the staff's recommendation to use the final Perry budget was inappropriate. Accordingly, the company's objection on this issue will be sustained.

Nuclear Decommissioning Expense:

At the hearing in this proceeding, the attorney examiner granted OCC's motion to strike (joined by the staff) a portion of company witness Byrd's prefiled testimony regarding an alleged miscalculation in the Staff Report on nuclear decommissioning costs, on the basis that the applicant had failed to pose an objection to the Staff Report on this issue (Tr. VII, 56-58). Following the attorney examiner's ruling, company counsel made an offer of proof of the stricken testimony and, on brief, the applicant urges the Commission to consider Mr. Byrd's testimony on this issue (Co. Initial Br. at 80-82). On **[109]** June 5, 1990, the staff filed a motion to strike the section of the company's brief dealing with the stricken testimony.

While the Commission does not consider it necessary to strike the portion of the company's brief cited by the staff, we do find that the examiner's ruling was correct pursuant to Rule 4901-1-28, O.A.C., and Commission precedent. The Commission is not persuaded by the company's argument that the staff and the other parties were put on notice of the applicant's position through its pre-filed post-Staff Report testimony. Were the Commission to accept the company's logic, it would render Rule 4901-1-28, O.A.C., essentially meaningless. As we noted in Columbia Gas II, supra, at 50, "Rule 4901-1-28,

O.A.C., states that the objections to the Staff Report by the parties frame the issues in the proceeding". Accordingly, the Commission will not reconsider or reinstate the stricken testimony.

Centerior Audit Savings:

IEC objected to the staff's failure to consider savings related to the Perry plant, which may be identified in the management audit of the Centerior Energy Corporation pursuant to the stipulation adopted in Cleveland Electric Illuminating Co. **[110]** , Case No. 88-170-EL-AIR, et al. (January 31, 1989). Under the terms of the stipulation in the CEI case, the management auditor, Cresap, was to identify targeted levels of annual savings for Centerior's operations. On May 7, 1990, the Audit Advisory Panel for the Centerior audit filed, in Case No. 89-498-EL-COI (In the Matter of the Commission's Consideration of Matters Related to the Stipulation Approved in Recent Cases Involving Cleveland Electric Illuminating Co. and Toledo Edison Co.), the Cresap preliminary report and an agreement, dated April 26, 1990, between Centerior, OCC, and IEC which, among other things, identifies certain O&M cost savings for the Centerior companies. On the final day of hearing, the attorney examiner took administrative notice of the entries and orders issued in Case No. 89-498-EL-COI, as well as the April 26, 1990 agreement filed in that docket (Tr. XXIX, 64-66).

IEC argues that since Cresap identified specific cost savings which can be achieved by the owners of the Perry plant, since Cresap reviewed a time period which incorporates the test year in this case as the basis of the audit recommendations, and since Centerior, IEC, and OCC have **[111]** reached an agreement that a certain level of cost savings will, in fact, be achieved, the Commission should consider these savings in setting the level of Perry O&M expenses in this proceeding (IEC Ex. 4, at 13; Tr. XVII, 41). On cross-examination by IEC, staff witness DeVore testified that Cresap had estimated the non-Centerior owners' (Ohio Edison, Pennsylvania Power, and Duquesne Light) share of the Perry O&M savings to be $ 10.3 million (Tr. XXVII, 78). The staff disagrees, however, with IEC's claim that test-year expenses in this case should be adjusted to reflect any cost savings identified by the Cresap audit. According to Mr. Hess and Mr. DeVore, IEC's proposal represents an out of test-year adjustment because any savings associated with the audit will not occur until 1990 and 1991 (Staff Ex. 14, at 5; Tr. XXIII, 142-143; Tr. XXVII, 74).

Ohio Edison also opposes any adjustment to Perry operating expenses based on the Centerior management audit. The applicant argues there is no evidence in the record which would identify savings related to the test year or, in fact, what level of savings would be attributable to Ohio Edison. The company claims that there is no certainty **[112]** that the savings will occur as the auditor estimates and whatever savings do occur will take effect after the test year (Tr. XXVII, 83-84, 86-87).

The Commission agrees with the staff and the company that no adjustment should be made to Perry O&M in this proceeding based on the preliminary findings of the Cresap audit. Even if Cresap based its findings on Perry expenses during the test year (which is not at all clear from the record - See Tr. XXVII, 76), any savings which may be realized will not occur until well after the test year and adjustments based on those savings would clearly be violative of the test-year concept since, at this point, the savings are too speculative to quantify accurately. See Ohio Water Service Co. v. Pub. Util. Comm., 3 Ohio St. 3d 1 (1983); Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St. 2d 372 (1981). Assuming that the Commission could make adjustments based on the Cresap audit without violating the test-year concept, the record is devoid of any evidence upon which to make such an adjustment. IEC did not produce a witness who could identify savings attributable to Ohio Edison and the only witness with specific knowledge of the **[113]** Centerior audit, staff witness DeVore, was unable to state what level of the targeted savings would be specifically associated with Ohio Edison. Thus, the Cresap audit provides no basis for the Commission to adjust Perry O&M in this proceeding.

Beaver Valley Administrative and General (A&G) Rebilling:

Original billings to Ohio Edison from Duquesne Light for Beaver Valley Units 1 and 2 A&G expenses were incorrect. In September 1989, Duquesne Light issued revised billings to Ohio Edison for the period of July 1983 through December 1988 (OCC Ex. 2, at 15). This underbilling was due to Duquesne's use of an incorrect expense ratio for bills rendered to the company (Tr. IV, 115). OCC witness Hixon recommends that a jurisdictional exclusion of $ 4,999,908 be made to the company's cost of service because the rebillings, although paid by the company in the test year, represent an attempt by Ohio Edison to retroactively recover expenses associated with periods prior to the test year (OCC Ex. 2, at

16-17). In the alternative, Ms. Hixon stated that, if the Commission adopts the staff's three-year amortization proposal, certain adjustments should be made to the staff's calculations contained **[114]** in the Staff Report (Id. at 17-18).

The staff proposes to amortize the Beaver Valley A&G rebilling expenses over a three-year period (S.R. at 10 and Sched. 3.27). Staff witness Meridith testified that the staff agreed with the adjustments to the staff's Schedule 3.27 proposed by Ms. Hixon (Staff Ex. 6, at 6-7). The staff disagrees, however, with OCC's recommendation that the A&G rebilling expenses be totally excluded from the applicant's cost of service. Mr. Meridith stated that the expenses should not be excluded because discovery and notification of the error occurred during the test year, rateayers have benefited from not having previously paid for these underbillings, and the applicant would likely have recovered these expenses in prior rate cases if it had been aware of the correct level of expenses (Id.) at 7-8).

Ohio Edison did not present a witness on this issue but agrees with the adjustment to Schedule 3.27, proposed by Ms. Hixon, and agrees with the staff's recommendation to amortize the rebillings over three years (Co. Reply Br. at 60). Like the staff, the company opposes OCC's proposal to completely exclude the rebilling costs. The company argues that the **[115]** relevant time period to consider, for ratemaking purposes, is the year in which the expenses were incurred.

The Commission finds that the Beaver Valley A&G expenses should be excluded from the applicant's cost of service in this proceeding. We are not persuaded by the arguments set forth by the company and the staff that, because the rebilling expense was incurred during the test year, the Commission must necessarily pass those costs through to ratepayers. While the test year is the period examined by the Commission to determine an appropriate level of the applicant's revenues and expenses, if the test year is found to be unrepresentative, the Commission will make adjustments to reflect a more representative level. The Commission believes that the A&G rebilling expenses, while incurred during the test year, represent a one-time event since, presumably, Ohio Edison does not expect to incur expenses related to Beaver Valley A&G underbillings in future years. Given the fact that these rebilling expenses reflect a one-time adjustment, not reflective of a normal test-year level of expense, the Commission must deny inclusion of those expenses in the applicant's cost of service. Our **[116]** decision is consistent with Toledo Edison Co., Case No. 79-143-EL-AIR (February 29, 1980). In that case, the applicant utility sought to amortize, over two years, costs related to a property tax surcharge which had not been included in its prior rate case. The Commission denied inclusion of the expenses in Toledo Edison's cost of service finding: ". . . this item represents a one-time charge which cannot properly be reflected in future rates. Ohio Edison Co., Case No. 78-1567-EL-AIR (January 30, 1980). Just as the Commission will not order the refund of anticipated expenses which are not actually incurred, it will not increase future rates to reflect unanticipated expenses which have been incurred in the past." Toledo Edison, supra, at 29. Although the applicant has sought to distinguish Toledo Edison, supra, on the basis that the A&G rebilling represents an adjustment to costs that will be incurred in the future, there has been no allegation that the Toledo Edison decision was erroneous. Further, we do not find the company's distinction to be relevant. While some level of Beaver Valley A&G expenses will certainly be incurred by Ohio Edison in future **[117]** years, the lump-sum rebilled expenses for underbilled amounts between 1983 and 1988 clearly reflect the "one-time" type of expense which we excluded in Toledo Edison. Nor are we persuaded by the arguments raised by the staff on this issue. Despite the staff's contention to the contrary, the Commission must consider the period when the services were rendered, not just when the costs related to those services were incurred. See Section 4909.15(A)(4), Revised Code. The Commission finds that the company has failed to sustain its burden of proof on this issue and, thus, the Beaver Valley A&G rebilled expenses must be excluded from cost of service.

Company Use and Line Losses:

A portion of the electricity generated by Ohio Edison's system is accounted for as company use and line loss. The company use and line loss estimate represents the difference between electricity generated and electricity sold. This estimate is used in the calculation of test-year fuel expense. The applicant has reflected 1,693,772 MWh for company use and line loss and has estimated a loss factor of 11.47 percent for the secondary service level for 1989 (OCC Ex. 1, at 23-24). For off-system **[118]** sales, the company has assumed a zero percent loss factor (Id.). The staff reviewed these loss factor estimates and found them to be reasonable (Staff Ex. 13, at 12-13).

OCC contends that the company's line loss estimate is over-stated. According to OCC witness Effron, the company's actual experience for the 12 months ended June 30, 1989, resulted in a secondary service loss factor of 10.49 percent (OCC Ex. 1, at 24). Mr. Effron also claims that Ohio Edison has improperly allocated losses between jurisdictional and off-system sales by assuming a zero percent loss factor for off-system sales (Id. at 25). OCC recommends that the off-system sales loss factor be assumed to be three percent, consistent with the company's transmission service loss factor.

The Commission concludes that the company has failed to meet its burden of proof that the line loss factors of 11.47 percent for the secondary service level and zero for off-system sales are reasonable. OCC presented evidence that the most recent actual line losses for secondary service, for the 12 months ended June 30, 1989 (which includes the first six months of the test year), averaged 10.49 percent. Not only did the company **[119]** not present any evidence to rebut OCC, it did no cross-examination of Mr. Effron on this issue. Staff witness Tucker testified that the staff found the company's 11.47 percent line loss figure to be "reasonable" and recommends that it be adopted (Staff Ex. 13, at 12). Mr. Tucker admitted, however, that OCC's proposed 10.49 percent line loss figure is representative of the actual line loss figures for the first six months of the test year and that, if the loss factors continued for the remainder of the test year at a comparable level, the actual loss factor for 1989 would be closer to 10.49 percent than 11.47 percent (Tr. XXII, 85, 91). Mr. Tucker also conceded that he did no investigation to determine the reasonableness of the 11.47 percent loss factor or whether the actual loss factor had increased during the last six months of the test year (Id. at 90-91). The Commission addressed virtually the same issue in Ohio Power Co., Case No. 85-726-EL-AIR (July 10, 1986). In that case, the applicant proposed an estimated test-year line loss factor of 9.44 percent. OCC recommended that the loss factor be reduced to reflect the company's actual experience of 8.4 percent. The **[120]** Commission found that the company had failed to rebut OCC's evidence and that the company's estimate was overstated. The Commission concluded that the latest known actual loss factor for the preceding 12 months should be used to set the appropriate line loss factor. Ohio Power, supra, at 37-38. We agree with OCC that the secondary service level line loss factor should reflect the most representative level for the test year. The company, having failed to rebut OCC's evidence or offer any explanation why the 11.47 percent loss factor is more representative of test-year experience, has clearly not met its burden of proof on this issue. Accordingly, we will adopt the 10.49 percent loss factor proposed by Mr. Effron.

The applicant has also failed to rebut Mr. Effron's recommendation that the loss factor for off-system sales should be calculated at three percent, rather than zero. The basis of the staff's and the company's contention that the zero line loss factor is reasonable is that "losses are less on off-system sales because interconnections are generally closer than load centers to generation" (Staff Ex. 13, at 13; See OCC Ex. 1, at 25). Although Mr. Tucker testified **[121]** that he did not believe the off-system line losses were anywhere near three percent, he also stated that he did not believe the loss factor was zero and that the company had not supported the zero loss factor (Staff Ex. 13, at 13; Tr. XXII, 76, 94). Despite Mr. Tucker's admission that the line losses are not zero, the staff still recommends that the Commission adopt the company's position of zero line loss for off-system sales. The Commission declines to do so. Mr. Effron based his three percent line loss factor on the same loss factor which the company uses for transmission service and the company failed to offer any testimony on the inappropriateness of Mr. Effron's proposal. While Mr. Effron's proposal to adopt a three percent line loss factor is somewhat speculative, there is no support in the record for the Commission to accept a zero loss factor. Mr. Tucker believes that the off-system losses are "much closer" to zero than three percent, but he has offered no evidence to support an alternative loss factor in this proceeding. As with the secondary service line loss factor, the Commission finds that the applicant has failed to sustain its burden of proof that its proposed **[122]** zero loss factor is reasonable. The Commission will, therefore, adopt OCC's recommendation to adjust jurisdictional line losses.

Advertising Expense:

The recovery of advertising costs by an Ohio public utility is governed by the standards set forth in Cleveland v. Pub. Util. Comm., 63 Ohio St. 2d 62 (1980). In that case, the Ohio Supreme Court found that utilities engage in four basic types of advertising: institutional, promotional, consumer informational, and conservational. Institutional advertising is "designed to enhance or preserve the corporate image of the utility, and to present it in a favorable light . . . " . Promotional advertising is "designed to obtain new utility customers, to increase usage by present customers, or to encourage . . . one form of energy in preference to another . . . " . Consumer or informational advertising is

"designed to inform the consumer of rates, charges and conditions of service, of benefits and savings available to the consumer; [and] of proper safety precautions and emergency procedures and similar matters . . . " . Conservational advertising is "designed to inform the consumer of the means whereby he can conserve energy and **[123]** reduce his usage, and seeks to encourage him to adopt those means". Cleveland, supra, at 70-71. The court held that costs associated with informational or conservational advertising were recoverable because those advertisements provide "obvious" direct, primary benefits to consumers. Id. at 71. With regard to promotional and institutional advertising, however, the court stated that similar benefits were not readily apparent and that such advertising expenses must be disallowed, "unless the utility can clearly demonstrate a direct, primary benefit to its customers from such ads". Id. at 72-73.

Ohio Edison objects to the staff's exclusion of $ 1,713,373 in advertising costs which the staff claims are associated with advertisements which are promotional or institutional in nature (Co. Obj. 21; Staff Ex. 7, at 4-8). As an example, the company claims that its ads referring to The Electric Decision Maker and its "Gatekeeper" and "Crime Watch" programs are primarily designed to provide information or promote conservation.

OCC argues that the staff's advertising exclusions do not go far enough and recommends an additional exclusion of $ 1,228,061 for a total disallowance **[124]** of $ 2,941,434. According to OCC, ads such as "Six Points" (OCC Ex. 4A, at 408) and "Kosar Quality #2" (OCC Ex. 4A, at 461) should also have been excluded by the staff because they are intended to promote the purchase of electric heat pumps and furnaces, as well as promoting the increased usage of electricity.

Staff witness Habib testified that the staff reviewed each of the ads proposed by the company and used the "dominant message of the advertisement" test to determine which ads met the standards set forth in Cleveland v. Pub. Util. Comm., supra (Staff Ex. 7, at 5-6). Mr Habib indicated that, while the ads cited by OCC may have been partially promotional or institutional, the predominant message were of an informational or conservational nature and, therefore, should not be excluded from the company's cost of service in this case (Id. at 8). Staff witness Hess testified that line 21 of Mr. Habib's Exhibit MH-1a should be deleted to remedy a duplication of EEI media dues (Tr. XXIII, 115-116). The Commission agrees with Mr. Hess and finds that line 21 should be deleted from Mr. Habib's Exhibit MH-1a.

The Commission finds that the company's and staff's positions should **[125]** be rejected and OCC's recommended exclusion should be adopted, subject to slight modification. As noted in Columbia Gas II at 37, the "dominant message of the advertisement" test has been adopted by the Commission to determine which ads comply with the court's standard in Cleveland, supra. Under this test, if the dominant message of the advertisement is informational or conservational, the dollars associated with the advertisement are fully includable. In all other instances, however, nothing is included as an allowable expense. We believe that the dominant message of only two of the advertisements contained in OCC Exhibit 4A may be considered informational or conservational. These two advertisements, on pages 428 and 703 of OCC Exhibit 4A, are directed towards enhancing economic development in Ohio Edison's service territory. The Commission has previously found that such ads are beneficial to ratepayers because their purpose is to attract new industry to locate in the company's service territory and to encourage existing businesses to remain in the area. See Ohio Edison Co., Case No. 84-1359-EL-AIR (October 29, 1985) at 28-29. Thus, the cost of those two **[126]** advertisements should be removed from the exclusion recommended by OCC. None of the other advertisements contained in OCC Exhibit 4A exhibit a direct, primary benefit to Ohio Edison's customers. While a few customers may derive some benefit from the programs or products advertised by the company, we do not believe that fact alone is sufficient to allow inclusion of those advertising costs pursuant to the court's standard in the Cleveland case. Accordingly, the Commission will grant OCC's Objections 34 and 35, to the extent described above.

Demonstration and Selling Expense:

The staff excluded from test-year operating expenses demonstration and selling expenses charged to Account 912 (S.R. at 9). Staff witness Habib testified that these expenses were excluded because they were related to promotional activities (Staff Ex. 7, at 8-9). Although Ohio Edison filed an objection to the staff's exclusion of these expenses, the company did not cross-examine Mr. Habib on this issue or address it on brief. Thus, the Commission finds that the demonstration and selling expenses exclusion recommended by the staff should be adopted and the company's objection overruled.

Rate Case [127] Expense:

Ohio Edison originally estimated rate case expense of $ 46,770 for this proceeding which the staff recommended be amortized over a three-year period (S.R. at 212, Sched. 3.17). The company objected to the staff's understatement of rate case expense as not reflecting the costs incurred by Ohio Edison for outside legal counsel and retained experts (Co. Obj. 23). In his post-staff report testimony, company witness Flower updated the estimated rate case expense to $ 1,115,000 ($ 525,000 for outside legal fees $ 520,000 for consultants, and $ 70,000 for other expenses) (Co. Ex. 10B, Att. E). Mr. Flower explained that the substantial increase was due to the fact that the company retained outside legal counsel and an outside consulting firm in December 1989 to assist in preparing and presenting this case (Id.; Tr. V, 160-161). Mr. Flower indicated that outside counsel and consultants were necessary primarily because of the extensiveness of the depositions and interrogatories involved (Tr. V, 102).

OCC made its usual objection to the staff's failure to exclude all rate case expense (OCC Obj. 36), and IEC objected to the staff's recommendation that the Commission review the [128] company's late-filed rate case expense exhibit before establishing a reasonable allowance for rate case expense in this case (IEC Obj. 17). Staff witness Hess testified that Ohio Edison's updated rate case expense of $ 1,115,000 was "the largest estimate of a rate case expense in recent history" and "seems to be a little high" (Staff Ex. 14, at 3).

On May 24, 1990, the company submitted its late-filed Exhibit 21, which quantifies Ohio Edison's most recent estimate of rate case expenses in this proceeding. According to this exhibit, the company now seeks to recover a total of $ 1,446,850 for rate case expense, including $ 647,084 for outside legal services and $ 591,429 for outside consultants. On brief, the staff argues that the company's rate case expense request is "patently unreasonable" and that the Commission should reduce the company's request by half (to $ 723,425) and amortize that amount over three years (Staff Br. at 27).

The Commission has consistently found that the preparation, filing, and prosecution of a rate case is an ordinary and necessary feature of utility operation and, as such, must be recognized in the expenses allowed. See Ohio Power Co., Case No. [129] 81-782-EL-AIR (July 14, 1982) at 27. Consistent with that principle, the Commission has traditionally permitted the inclusion of a reasonable amount for this expense. Columbia Gas II, supra, at 39. In Cleveland Electric Illuminating Co., Case No. 86-2025-EL-AIR (December 16, 1987) at 74-75, the Commission allowed CEI to recover $ 519,000 in rate case expense for a proceeding in which the hearing spanned nearly two months. In that case, however, we noted our "continuing concern over the magnitude of the rate case expense incurred by CEI . . . " . Id. at 75. Having reviewed the applicant's request in this proceeding, the Commission agrees with the staff that the amount of requested rate case expense is unreasonable. We believe that the CEI case provides a measure of comparison for this case and, accordingly, we will limit Ohio Edison's recovery of rate case expense to $ 520,000, amortized over three years. While the Commission recognizes the complexity and volume of issues and discovery matters in this case, we are also aware that the principal components of the claimed rate case expenditures are related to fees for outside counsel and consultants; neither [130] of which were retained until December 1989. We believe that $ 520,000 more accurately reflects the level of rate case expense permitted in past cases, while still recognized the complexity and length of this proceeding. The Commission is concerned with the magnitude of Ohio Edison's requested rate case expense in this proceeding and, accordingly, directs the company, in its next rate case, to provide an explanation of the efforts of its management to control those costs and to assure that such costs are reasonable.

EEI Expenses:

In the Staff Report, the staff recommended that a portion of the assessments paid by Ohio Edison to the Edison Electric Institute (EEI) during the test year be excluded (S.R. at 214, Sched. 3.19). Ohio Edison objected to the staff's exclusion of expenses for EEI dues ($ 105,512) and expenses related to the Three Mile Island clean-up project ($ 325,197) while OCC objected to the staff's failure to exclude an appropriate percentage of the company's Media Communication Fund expenses.

OCC witness Chan testified that the staff's adjustment for EEI expenses related to the Media Communication Fund should have been based upon the 1988 NARUC Report of the [131] Committee on EEI Oversight, rather than the 1986 version of the report which the staff used in the Staff Report

(OCC Ex. 6, at 6-7). Staff witness Carr agreed that the 1988 report should have been used and adopted Mr. Chan's recommendation (Staff Ex. 3, at 3-4). In adopting the 1988 NARUC report, Mr. Carr increased the percentage exclusion from 7.05 percent to 77.88 percent for the Media Communication Fund expense, as recommended by Mr. Chan, but also made downward adjustments in the exclusion for EEI Dues, Solid Waste Activities, and Air Regulatory Group (Staff Ex. 3, at Ex. DPC-1). Thus, Mr. Carr's total recommended adjustment amounts to a $ 394,738 exclusion as opposed to the $ 393,387 originally recommended in the Staff Report.

The Commission finds the staff's position to be reasonable and will exclude $ 394,738 from the company's proposed cost of service. This amount includes the $ 325,197 expense for the Three Mile Island clean-up which the Commission is excluding consistent with prior decisions. See Cleveland Electric Illuminating Co., Case No. 86-2025-EL-AIR (December 16, 1987) at 79-80).

Akron Area Corporate Challenge Expenses:

OCC witness Chan testified **[132]** that $ 14,000 in expenses related to the Akron Area Corporate Challenge program should have been excluded from Ohio Edison's cost of service (OCC Ex. 7, at 8, RKC-3). Staff witness Carr agreed with OCC that the company's contribution to this program is not related to necessary utility functions and customers received no direct, primary benefit (Staff Ex. 3, at 4). The company claims that these costs should be included because the program contributes to employee health, morale, and performance and, thus, is beneficial to the company and its customers.

The Commission agrees with OCC and the staff that the expenses associated with the Akron Area Corporate Challenge should be excluded from the company's test-year operating expenses since they are not related to providing utility service and customers derive no direct, primary benefit from Ohio Edison's participation in the program. Accordingly, the jurisdictional amount of $ 12,238 should be excluded from the company's operating expenses.

Employee Membership and Employee Club Expenses:

OCC witness Chan submitted testimony indicating that $ 1,526 for employee membership dues (Account 930.2) and $ 37,000 for employee club benefits **[133]** (Account 926.50) should be excluded from the company's test-year expenses because the costs are not related to the provision of utility service (OCC Ex. 7, at 9-11, RKC-4). Staff witness Zieg testified that the staff agreed in principle with OCC that membership fees which do not result in direct benefits to ratepayers should be eliminated (Staff Ex. 5, at 5). Mr. Zieg stated, however, that the staff did not discover the inclusion of any such expenses and, therefore, the staff disagreed with OCC's proposal to exclude the amount contained in Account 926.50. The staff did not address OCC's recommendation regarding Account 930.2 and Ohio Edison did not submit testimony on this issue. On cross-examination, Mr. Zieg testified that the staff did not do an "in-depth review" of the expenses related to employee memberships or club expenses and, thus, he could not recommend an exclusion without such an analysis (Tr. XXIII, 147).

On brief, both the company and the staff attack the credibility of Mr. Chan's analysis, arguing that his recommendation should be accorded no weight because his review of these expenses was limited to looking at the names of the associations Mr. Chan claims should **[134]** be excluded. Staff argues that "OCC has failed to prove that the expenses charged to company Accounts 930.2 and 926.50 do not primarily and directly benefit ratepayers" (Staff Br. at 33). The Commission notes, first, that it is the applicant which bears the burden of proving the reasonableness of its expenditures and the company presented no testimony on this issue. Next, while the staff is critical of Mr. Chan's analysis, the staff's review was apparently even less comprehensive than Mr. Chan's (See Tr. XXIII, 141-151). Accordingly, the Commission finds that the expenses identified by Mr. Chan should be excluded from Ohio Edison's test-year operating expenses, as adjusted on a jurisdictional basis.

Research and Development Expense:

Ohio Edison seeks to recover in this case $ 5,607,230 for total company research and development (R&D) expense. OCC does not dispute the company's entitlement to recover $ 4,405,220 for the company's EPRI research subscription. OCC does recommend, however, that the balance of Ohio Edison's claimed expense for other R&D, $ 1,202,010, should be reduced to $ 703,518 to reflect the company's actual experience for R&D expense during the test **[135]** year, rather than six months

actual and six months budgeted data used by the company (OCC Ex. 2, at 8-11). The staff has not recommended any adjustments to the amount proposed by the company. Staff witness Zieg stated that, as a policy, staff "does not recommend selective adjustments to whole budgets when actual experience has later been discovered to vary" (Staff Ex. 5, at 4). Ohio Edison presented no testimony on this issue but, on brief, argues that OCC's position is a selective adjustment of a budgeted expense to actual experience which is inconsistent with OCC's position for other operating costs (Co. Initial Br. at 94).

In Columbia Gas I, at 42-43, the Commission addressed a similar set of circumstances related to the applicant's claim for corporate insurance expenses. In that case, the Commission adopted OCC's recommendation that actual, rather than forecasted expenses, should be used since Columbia had failed to "respond to the issue by providing an explanation for the higher than normal estimated July payments and for the 24% difference between estimated and actual test period expenses" (Id. at 43).

The Commission finds that the company has failed to sustain its **[136]** burden of proof on this issue. While OCC's claim that the test-period estimate is excessive in comparison to the actual expenses incurred may not, in and of itself, be sufficient to prevail on this issue, Ohio Edison has not provided any evidence to explain this difference. Thus, consistent with Columbia Gas I, the Commission will adopt OCC's recommendation on this issue.

The Commission would note that a substantial amount of funds are being included in operating expenses to allow the applicant to recover the cost of its membership in EPRI. The Commission expects the company to use the funds to continue its membership.

Injuries and Damages Expense:

Ohio Edison proposes to include $ 5,346,493 for injuries and damages (I&D) expense based on six months actual and six months budgeted data. OCC witness Hixon recommends adjusting the company's six and six proposal to reflect Ohio Edison's actual operating experience during the test year of $ 4,098,668 (OCC Ex. 2, at 12-14). Ms. Hixon claims that the company's actual I&D expense was less than anticipated during the test year due to the settlement of court cases for less than previously estimated and because of a refund of **[137]** paid premiums from the company's insurer (Id. at 13). As with the prior issue, staff witness Habib claims that OCC's recommendation should be rejected because it represents a selective adjustment to the overall budget (Staff Ex. 7, at 11). The company, while presenting no testimony on this issue, agrees with the staff that OCC's proposal to adjust to actual expenses is an inconsistent selective adjustment (Co. Initial Br. at 94).

The Commission again notes that the company has the burden of proof in this case. The Commission finds that Ohio Edison has a responsibility to provide an explanation for the difference between the estimated and actual test period expenses. OCC has raised a question regarding the reasonableness of a forecasted expense and it is not sufficient for the company to sustain its burden by simply claiming that OCC has made a selective adjustment. The Commission will, therefore, adopt OCC's recommendation on this issue.

FERC Account 908 - Customer Assistance Costs:

Ohio Edison charges to FERC Account 908, Customer Assistance Expense, costs for activities which provide instruction or assistance to customers with the objective being to educate and encourage **[138]** the safe, efficient, and economical use of electrical services and equipment (Co. Ex. 12C, at 39-40). The company has included a jurisdictional amount of $ 11,469,494 for recovery in this case (Id. at 39). The staff proposes to exclude $ 1,561,849 (jurisdictional) from this account which it believes to be promotional or institutional (Staff Ex. 1, Sched. 3.16; Staff Ex. 3, at 2).

The company argues that: 1) the promotional/institutional test used in Cleveland v. Pub. Util. Comm., supra, is applicable only to advertising expenses and the proper test should be only whether the expenses were reasonably incurred; 2) a review of the specific programs charged to Account 908 reveals that their primary intent is to promote the efficient use of electricity; and 3) the staff's review of Account 908 was only superficial. According to company witness Hall, Ohio Edison works closely with customers and appliance dealers to encourage the purchase of appliances which are safe, efficient, and economical and which will, in the long run, improve system load factor (Co. Ex. 12C, at 38-42). Staff

witness Carr stated that the programs which were excluded by the staff were intended primarily **[139]** to achieve growth in sales by the company and were, therefore, "not reasonably related to providing electric utility service" (Staff Ex. 3, at 2).

The Commission has reviewed the description of the programs set forth in Attachment C of Mr. Hall's testimony and concludes that certain aspects of the company's programs excluded by the staff promote the sale and use of electric appliances and energy while other aspects of these programs provide beneficial information to home builders, appliance dealers, and the company's customers. Considering the testimony regarding the benefits derived from these programs, the Commission finds that 50 percent of the test-year expenses excluded by the staff in Schedule 3.16 of the Staff Report, which amounts to $ 780,925, should be recognized in the company's test-year operating expenses. We believe that this treatment provides an appropriate resolution of this issue and is consistent with our treatment of customer assistance expenses in Ohio Edison Co., Case No. 84-1359-EL-AIR et al. (October 29, 1985), at 29-30.

Reorganization Expense Adjustment:

The company proposes to recover $ 1,351,819 for test-year reorganization expenses related to a **[140]** work force reduction plan implemented in 1989 (Co. Ex. 12C, at 27). The components of the company's reorganization expense include costs for severance pay, retraining, outplacement, health care, annuities, and outside consultant and contractor fees. Ohio Edison objected to the staff's exclusion of outside consultant fees for the firm of Temple, Barker, & Sloan (TB&S), the staff's amortization of the reorganization costs over three years, and the staff's reduction of outside contractor fees related to the reorganization.

Staff witness DeVore testified that the costs associated with TB&S's work on the reorganization project were excluded because the staff was unable to verify the firm's role in the project due to the fact that a number of workpapers had been destroyed (Staff Ex. 27, at 5). Regarding the three-year amortization period, staff witness Habib claimed that "some of the reorganization costs will be paid or accrued in more than a one-year period" (Staff Ex. 7, at 10). Mr. Habib also indicated that outside contractor fees should be reduced by using the total company O&M ratio of 73.56 percent, rather than the 32 percent ratio the company identified as applicable to O&M expenditures **[141]** (Staff Ex. 7, at 10; Co. Ex. 12C, at 27).

Regarding the expense associated with the TB&S's consulting fees, the staff apparently does not dispute the fact that the fees were actually paid by Ohio Edison (S.R. at 129). Rather, the staff disputes recovery for those fees because the workpapers discussing TB&S's activities were destroyed and, therefore, not available for the staff's review (Staff Ex. 27, at 5-6). Company employee Gill (called by the staff as if on cross-examination) explained that, at the beginning of Ohio Edison's reorganization study, senior management ordered such documents destroyed to prevent preliminary information from being leaked to employees which might affect morale and productivity (Tr. XXV, 168).

While the Commission certainly does not encourage the destruction of documents which support a rate applicant's claimed expenditures, under the particular facts of this case, we find that the company should be allowed to recover the requested $ 329,470 for TB&S's expenses related to the reorganization study. We also reject the staff's proposal to amortize all reorganization expenses over a three-year period. Despite Mr. Habib's claim that some of the reorganization **[142]** costs would be paid over more than a one-year period, he was unable to cite to any examples where such costs would be spread over a three-year period (Tr. XIV, 192-194). Finally, with regard to the reduction for outside contractor fees, we will accept the company's testimony that only 32 percent of these costs were related to O&M expense while 68 percent were capitalized costs (Co. Ex. 12C, at 27). The staff was unable to refute company witness Hall's testimony on this issue or offer any explanation why the total O&M ratio of 73.56 percent should be applied.

The Commission finds that Ohio Edison should be permitted to recover the full amount requested for reorganization expense. We believe that it is sound policy to encourage utilities to streamline their operations to the extent possible. Reasonable test-year costs associated with performing reorganizations should, therefore, be recoverable in cost of service. We will permit Ohio Edison to recover $ 1,090,622 for jurisdictional reorganization expense.

West Lorain Station Costs:

Ohio Edison has objected to the staff's exclusion of expenses charged to FERC Accounts 548 and 549 which reflect costs associated with maintaining **[143]** the West Lorain generating facilities. The company contends that ratepayers are benefited by expenditures made to maintain the plant in a "cold standby status" since the company plans to return West Lorain to service in the near future and maintaining the plant will reduce the costs of bringing the plant back on-line (Co. Ex. 12C, at 33-34). Staff witness McDonald testified that test-year expenses related to West Lorain are properly excluded for ratemaking purposes because the plant was not in-service on the date certain or at any time during the test year (Staff Ex. 11, at 3-5). Mr. McDonald claims that the staff's exclusion of these costs is consistent with the staff's position in numerous cases because it matches test-year expenses to the rate base exclusion of plant and equipment which is not used and useful (Id.).

The Commission agrees with the staff that the "matching principle" should be employed in this instance to exclude operating expenses associated with a facility that was not in operation during the test year. There is no dispute that the West Lorain plant was not in operation during the test year and the company has indicated that it will not be placed into service **[144]** for at least two to three years (Tr. VIII, 71-73). We also note that, as indicated in the section on Generating Capacity, West Lorain was not included in the Commission's determination of the company's capacity reserve margin. Given these facts, we are not inclined to deviate from the concept of matching test-year expenses to used and useful plant and equipment.

Amortization Period for Deferred Perry and Beaver Valley 2 Expense:

Ohio Edison proposed to use a 30-year amortization period for both Perry and Beaver Valley 2 deferred costs. Company witness Daniels indicated that the 30-year period was based primarily on the recovery period for the company's composite utility plant (nuclear and non-nuclear), as well as upon the company's composite nuclear depreciation rate, and the Perry and Beaver Valley 2 lease periods (Co. Ex. 9C, at 18-19; Tr. II, 57). The staff has recommended amortization periods of 429 months (35 years, 9 months) for Perry and 443 months (36 years, 11 months) for Beaver Valley 2 based on the remaining NRC license periods for each unit (S.R. at 9-10, Scheds. 3.25 and 3.26; Staff Ex. 6, at 3-5). Staff witness Meridith indicated that the staff's adjustments **[145]** were based on accounting entries issued by the Commission which authorized the company to amortize the deferred Perry and Beaver Valley 2 operating costs over the lives of the plants (Staff Ex. 6, at 3-5). See Ohio Edison, Case No. 88-144-EL-AAM (February 2, 1988) at 2; Ohio Edison, Case No. 87-985-EL-AAM (October 20, 1987) at 3.

The Commission finds that the amortization periods recommended by the staff should be adopted in this proceeding. The staff's proposal is consistent with the Commission's entries authorizing the deferrals and more accurately reflects the lives of the Perry and Beaver Valley 2 plants. The company's proposed 30-year amortization period is rather arbitrarily based upon a composite amortization rate for all of the company's plants, including the non-nuclear facilities. Accordingly, the amortization periods for deferred Perry and Beaver Valley 2 expenses of 429 and 443 months, respectively, shall be adopted by the Commission.

Wage Annualization Adjustment:

The staff adjusted the company's claimed labor expense for the test year by using the actual number of employees as of November 1, 1989, the latest figures available at the time the Staff **[146]** Report was prepared (S.R. at 6; Staff Ex. 7, at 3). Staff witness Habib testified that the staff's labor annualization adjustment was employed to reflect the company's work force reduction due to organizational changes and the effects of a hiring freeze during the test year (Staff Ex. 7, at 3). Mr. Habib indicated that the staff would have used the actual number of employees at the end of the test year, December 31, 1989, if that number had been available (Id. at 3-4). Mr. Habib also offered to revise the staff's labor annualization adjustment if the company provided the end-of-test-year number of employees during the hearing (*d.*).

The company objected to the staff's wage annualization adjustment on the basis that the staff had failed to account for budgeted positions not affected by the reorganization. According to company witness Hall, since the reorganization affected only the general office group, the staff's adjustment does not recognize unfilled budgeted positions which have been approved by senior management and were

not eliminated as a result of the work force reduction (Co. Ex. 12C, at 22-25). The company recommends that its budgeted labor expense be reduced only **[147]** *to recognize the effect of the 129 positions eliminated in the work force reduction program, rather than using an actual level of employees which fails to reflect positions which the company intends to fill (Id.). On brief, the company cited Ohio Power Co., Case No. 85-726-EL-AIR (July 10, 1986) and Columbia Gas II, supra, for the proposition that the staff's recommendation in this case is inconsistent with the Commission's normal practice of basing labor expense on the average number of employees during the test year using actual and budgeted employee levels. The applicant does not dispute that the effects of the reorganization should be considered, but it claims that the staff's methodology arbitrarily relies on a single date in the test year without reflecting a true picture of the level of employees needed to provide reliable service.*

The Commission will adopt the staff's recommendation regarding wage annualization. As Mr. Habib noted, the staff used the latest-known employee levels in preparing the Staff Report and agreed to update its recommendation using end-of-test-year numbers if the company provided those figures at the time of the hearing. Despite the **[148]** staff's offer, the record reflects that the company did not provide updated employee numbers but, instead, relied on the position set forth in Mr. Hall's testimony. We do not find the cases cited by the applicant to be inconsistent with the staff's recommendation in this proceeding. In both Ohio Power and Columbia Gas II, supra, the Commission adopted updated actual employee levels as of the end of the test year as the basis for determining labor expense. Indeed, in Columbia Gas II, we stated that using year-end figures was appropriate "[i]n order for the expenses to be realistic and representative . . ." and was consistent with our precedent. Columbia Gas II, supra, at 32. Ohio Edison's failure to provide year-end employee numbers in this proceeding dictates that, consistent with our prior decisions, we will use the latest-known figures in determining labor expense. Since the record provides no number later than the staff's November 1, 1989 date, the Commission will adopt the staff's wage annualization adjustment as of that date.

Annualization of Nuclear Outage Costs:

In this proceeding, the staff annualized the company's test-year incremental **[149]** *operation and maintenance expenses associated with refueling outages for Perry, Beaver Valley Unit 1, and Beaver Valley Unit 2 (S.R. at 9, Sched. 3.20). The staff amortized the total nuclear refueling outage costs for all three units over 18 months based on the assumption that the plants operate on an 18-month refueling cycle (Staff Ex. 10, at 11). In addition to the staff's adjustment in the Staff Report, staff witness Soliman testified that the applicant has not complied with three Commission accounting orders which directed Ohio Edison to book and defer nuclear refueling outage costs for Perry and Beaver Valley Unit 2 and to establish and maintain liability accounts for these costs (Staff Ex. 10, at 11-16). Mr. Soliman indicated that the three Commission entries, Ohio Edison Co., Case No. 87-985-EL-AAM (October 20, 1987); Ohio Edison Co., Case No. 88-506-EL-AAM (April 14, 1988); and Ohio Edison Co., Case No. 88-144-EL-AAM (February 2, 1988), were intended to allow the applicant to recover future costs of refueling outages, prior to the company's incurrence of those costs (Id. at 16). Mr. Soliman stated that the same Commission directives were being followed by* **[150]** *the Centerior companies and that these accounting orders were consistent with generally accepted accounting principles (GAAP) (Id.). Mr. Soliman recommended that the company be ordered to comply with the Commission's prior accounting directives by using the specific journal entries set forth in his testimony (Id. at 17-21, Atts. ISS-2, ISS-3, ISS-4).*

Ohio Edison contends that the staff's 18-month annualization is not reflective of the company's actual nuclear refueling outage expense since only four percent of the total outage costs were directly related to refueling while 96 percent of the costs were attributable to other maintenance activities which were incidentally performed at the time of the refueling outage (Co. Ex. 9D, at 18; Co. Ex. 12C, at 17). Thus, the applicant argues that maintenance costs associated with the nuclear plants during refueling outages should not be annulized because no valid distinction exists for treating nuclear plants differently than non-nuclear plants. Company witness Dainels testified that the company did not implement the Commission's accounting directives because it did not interpret the AAM cases to require the accounting treatments **[151]** *suggested by Mr. Soliman and because the company's auditors considered the Commission's orders to be contrary to GAAP (Co. Ex. 9D, at 23; Tr. II, 69-72; Tr. XXVIII, 21-24). Specifically, Mr. Daniels claims that Statement of Financial Accounting Standards No. 71 (Para. 11b) requires the recovery of expected costs in the current rates and a liability to customers in the event the expected costs do not equal the amount charged (Co. Ex. 9D, at 21-22). Mr. Daniels asserts that the staff's prior recommendations, as contained in the accounting entries, do not meet*

these requirements (Id.). If the Commission adopts the staff's recommendation in this case, Mr. Daniels urges the Commission to use the actual refueling outage costs for the entire test year ($ 42,758,199), rather than the $ 36,731,776 amount used by the staff (Id. at 18).

The Commission agrees with the company that the applicant's nuclear refueling outage expense should not be amortized over the full 18-month refueling cycle since, as indicated by Mr. Daniels, only four percent of the nuclear outage expenses were related directly to refueling the nuclear reactors. The staff's adjustment fails to recognize that the bulk **[152]** *of the expenses incurred, during a so-called nuclear refueling outage, are actually related to routine maintenance on the nuclear units, which cannot be performed during the operating cycles of the units. During the test year, each of the applicant's nuclear units experienced refueling outages. Thus, the company was unable to perform certain maintenance on fossil-fueled units due to the need for capacity while the nuclear units were down for refueling and maintenance. In years where less nuclear refueling outages occur, however, the company would be required to perform more maintenance on its fossil-fueled plants. Depending on which particular year (or other period of time) is examined, therefore, varying amounts of maintenance and refueling costs will be incurred for nuclear and non-nuclear units. If the Commission were to adopt the staff's recommendation to annualize nuclear outage expenses over an 18-month period, based solely on the test-year nuclear outage costs, the company would not be fully compensated for its refueling and maintenance costs since no similar adjustment has been proposed to annualize the company's non-nuclear maintenance expenses. The Commission finds* **[153]** *that the staff's recommendation would result in an unrepresentative recovery of nuclear refueling and maintenance expenses and would undercompensate the company for expenses actually incurred. Accordingly, we reject the staff's recommendation to annualize nuclear refueling outage expenses in this proceeding. Although we are rejecting the 18-month period proposed by the staff, we are doing so based upon facts particular to this case. We are not making a generic finding with precedential effect with regard to the treatment of all nuclear refueling outage costs.*

We are not persuaded, however, by the applicant's contention that the accounting orders in Case Nos. 87-985-EL-AAM, 88-144-EL-AAM, and 88-506-EL-AAM are inconsistent with GAAP. As indicated by Mr. Soliman, the Centerior companies have complied with the Commission's directives to book and defer future refueling outage costs and to establish and maintain liability accounts for these costs. Further, even if the accounting treatments ordered by the Commission could be interpreted as being inconsistent with GAAP, the Commission has full authority pursuant to Section 4905.13, Revised Code, to issue accounting orders without reference **[154]** to GAAP, and the company may not ignore or disobey the Commission's orders. We suggest that if the applicant disputes the applicability of future Commission directives, the company would be wise to seek a waiver from the Commission before deciding not to comply. The Commission directs Ohio Edison to work with the staff to insure that the company's accounting treatment for nuclear refueling outage expenses is consistent with this order and with the Commission's prior accounting entries..

Short-Term Sales Reduction :

Ohio Edison annualized test-year AMP-Ohio sales to reflect an anticipated 125 MW level. This annualization increased the applicant's sales by 339,018,062 kWh. The company also reflected the annualization of sales in the jurisdictional allocation factors, resulting in increased non-jurisdictional loads and lower jurisdictional allocation factors, and reducing the amount of costs to jurisdctional customers (Co. Ex. 10A, at 8-9). The third, and final, part of the company's AMP-Ohio adjustment was to reflect a reduction in other short-term sales as an alternative to increasing power production expenses as a result of the anticipated 339,018,062 kWh increase in sales. **[155]** *The applicant claims that if its proposal to reduce other short-term sales is rejected, the Commission must, at a minimum, increase test-year expenses by $ 1,444,217 to reflect the operating costs necessary to generate the additional kWh sales (Co. Ex. 12C, at 43).*

The staff, while accepting the increased AMP-Ohio sales and the lower jurisdictional allocation factors, rejected the applicant's proposal to reduce other short-term sales (S.R. at 5, Sched. 3.4). Staff witness Soliman testified that the staff's rejection of the short-term sales reduction was based on the staff's belief that an increase in sales to one customer will not necessarily eliminate sales to other customers (Staff Ex. 10, at 7-8). In its reply brief, the staff also argues that, since the staff had annualized test-year operating expenses to reflect a normal level of expenses, no further adjustments were necessary to account for the increased AMP-Ohio sales (Staff Reply Br. at 6).

The Commission will not adopt the company's recommendation to offset increased production expenses by reducing short-term sales since the record does not clearly indicate how the proposed reduction in short-term sales would simulate **[156]** the increased nonfuel O&M expenses associated with increased AMP-Ohio sales. The Commission agrees with the applicant, however, that the recognition of increased sales and the corresponding reduction in the jurisdictional allocation factor must also recognize the additional nonfuel production costs needed to generate the additional capacity for the increased sales. Accordingly, the Commission finds that the applicant's test-year operating expenses should be increased by a jurisdictional amount of $ 1,230,481.

Perry 68 MW Purchase Power Adjustment:

Both the applicant and the staff adjusted the company's test-year operating expense to remove demand charges resulting from the June 1, 1989 termination of Ohio Edison's 68 MW power purchase agreement with CEI (S.R. at 6, Sched. 3.7). The staff's further removal of energy charges was the basis of the company's objection that the staff's adjustment understated operating expenses because the applicant would be required to produce or purchase power to replace the 68 MW of capacity no longer received under the contract with CEI (Co. Ex. 12C, at 20-22). Company witness Hall stated that the necessary replacement power would be generated **[157]** *or purchased at an estimated additional cost of $ 380,558, on a jurisdictional basis (Co. Ex. 12C, at 22). This replacement cost estimate is based on 73,737 MWhs, which is the amount of power the applicant actually received in early 1989 while the purchase power agreement was still in effect (Tr. IV, 174).*

The staff disputes the company's contention that the proposed replacement power adjustment is not already part of the overall revenue requirement recommendation. Staff witness Soliman explained that if the applicant incurs higher costs for replacement power, it will recover the additional fuel costs through EFC proceedings (Staff Ex. 10, at 10). To the extent that the company incurred additional O&M costs during the test year, Mr. Soliman stated that those costs have been accounted for as part of the staff's calculation of test-year O&M expenses (Id.). The staff argues that the applicant's proposed adjustment is based entirely on hypothetical costs of replacement power and that the company has not produced any evidence to show that it actually incurred any such additional costs during the test year.

The Commission finds that the staff's exclusion of the energy charge associated **[158]** with the 68 MW Perry purchase agreement, for the entire test year, had the effect of understating the applicant's cost of replacing that power for the first five months of the test year, when the agreement was in effect. As Mr. Soliman conceded, the company's allowance in its budget to cover the cost of replacement power applied only to June through December of 1989 (Tr. XX, 44). Thus, the staff's adjustment fails to account for the fact that, during the first five months of the test year, Ohio Edison incurred nonfuel costs related to power received under the agreement, but which the staff excluded in Schedule 3.7 of the Staff Report. The Commission believes that these excluded costs have not been recognized as part of the staff's overall revenue requirement recommendation and, accordingly, the applicant's request to recognize $ 380,558 in additional O&M expenses will be granted.

Sale of Accounts Receivable:

On November 30, 1989, the applicant sold its accounts receivable, except PIP receivables and locally billed accounts, to OES Capital, a subsidiary of Ohio Edison (S.R. at 11; OCC EX. 1, at 17). The staff adjusted test-year operating expenses to recognize the discount **[159]** *and the administrative expenses of this transaction on Schedule 3.30 of the Staff Report and reduced working capital requirements on Schedule 11.2 (see discussion in Rate Base section). When the accounts receivable are sold to OES Capital, the company does not receive the full amount of the receivable. Rather, the amount received by the company is less a financing discount and any administrative expenses incurred by the subsidiary (Co. Ex. 10B, at 11). The staff adopted company witness Flower's recommendation that a 13-month average of the accounts receivable (October 1988 through October 1989), which were subject to sale to OES Capital, should be used to calculate the discount expense (Staff Ex. 10, at 21). The staff also agreed with the company that each type of account receivable should have a different discount period (Id. at 23).*

OCC witness Effron recommended four modifications to the staff's calculation of expenses related to the sale of the accounts receivable. First, Mr. Effron proposes that the discount rate be applied directly to the amount of the reduction in revenue lag dollars, rather than being applied to the 13-month average

of accounts receivable. Mr. Effron **[160]** *claims that such treatment provides a better matching of costs and benefits because, unlike the 13-month average approach, it is synchronized with the proposed rate base treatment adopted by the staff. Mr. Effron's second recommendation is that the authorized return on equity in this case be used to the calculate the discount rate for the accounts receivable. Both the staff and the company have agreed with this proposal (Staff Ex. 10, at 23; Tr. V, 153). Third, OCC proposes that the calculation of the discount expense should recognize that customer deposits transferred to OES Capital represent a low-cost source of capital which are not affected by uncollectible consideratons associated with accounts receivable. OCC's fourth recommendation is that the discount rate should be applied only to the net amount advanced by OES Capital, rather than on the gross balance of the receivables transferred by the applicant. Mr. Effron claims that the investment made by OES Capital is equal to the amount which it advances, not the amount which it ultimately receives in payment for the receivables which it has purchased. Thus, according to Mr. Effron, allowing OES Capital to earn a return on* **[161]** *the total accounts receivable would permit OES Capital to earn a return on an investment which it has not made (OCC Ex. 1, at 17-22).*

The Commission will reject OCC's first recommendation and adopt the staff's use of the 13-month average of the balances of accounts receivable for the calculation of the discount expense. The Commission is not persuaded by OCC's contention that the discount expense should be calculated based on the reduction in the revenue lag dollars. As noted by Mr. Soliman, use of the average balances more accurately reflects the actual accounts that are subject to sale to OES Capital. Mr. Effron's second recommendation will be accepted. Both the staff and the company have agreed that the discount rate applied to the accounts receivable should be based on the return on equity determined in this proceeding. OCC's third proposed adjustment will also be adopted. As Mr. Effron explained, customer deposits have become a low-cost source of funds to OES Capital which should be recognized in calculating the discount rate. These deposits represent funds which are not subject to the same uncollectible problems as accounts receivable and, in addition, the value of the **[162]** funds related to customer deposits is enhanced by the fact that a portion of the deposits go unclaimed each year. OCC's final recommendation will also be accepted by the Commission. We are not convinced by the staff's claim that the face value of the accounts receivable transferred from the company represents the investment upon which OES Capital should earn a return. The Commission believes that the calculation of the discount rate should be based only on the amount advanced by OES Capital, as calculated by Mr. Effron. This treatment will avoid a windfall to OES Capital by precluding it from earning a return on an investment which it has not actually made.

Federal Income Taxes:

Beaver Valley 2 Deferred Depreciation

OCC witness Hixon testified that the staff had incorrectly adopted the company's 30-year amortization period for Beaver Valley Unit 2 deferred expenses, on Schedule 4.1 of the Staff Report (OCC Ex. 2, at 19). As recognized on Schedule 3.26, the deferred depreciation should be amortized over 443 months, the remaining life of the plant. Staff witness Soliman agreed with Ms. Hixon that the amortization amount of Beaver Valley 2 deferred depreciation expense **[163]** *on Schedule 3.26 should be used as a reconciling item on Schedule 4.1, line 6 (Staff Ex. 10, at 27). The applicant presented no testimony on this issue and did not address it on brief. The Commission finds OCC's recommendation to be reasonable and it shall be adopted.*

Deferred Taxes Related to the Excess of Perry Tax Accelerated Depreciation Over Straight-Line

Company witness Sitarz testified that the staff had failed to carry its adjusted units-of-production depreciation (Sched. 9.3a) to the calculation of deferred taxes on excess accelerated over straight-line tax depreciation for Perry (Co. Ex. 15B, at 15). OCC witness Hixon also pointed out that, on Schedule 4.1, the staff erred in its calculation of deferred taxes related to the excess accelerated over straight-line tax depreciation by not making an adjustment to the deferred taxes to reflect the reduction of Perry depreciation expense (OCC Ex. 2, at 21-22). Staff witness Soliman agreed with both the company and OCC that the same Perry depreciation rate used on Schedule 9.3a of the Staff Report should be used to calculate the deferred taxes on excess accelerated over straight-line tax depreciation for Perry on Schedule **[164]** *4.1 (Staff Ex. 10, at 27-28). Since the parties are in agreement on this issue, the Commission will adopt the staff's revised position.*

Deferred Taxes on Perry and Beaver Valley 2 ITC Pass-Through and Bad Debts

Staff witness Soliman agreed with the applicant's Objection 38, that the staff's calculation, on Schedule 4.1, of deferred taxes on "Perry 1 Investment Tax Credit (ITC) Pass-Thru, Beaver Valley 2 ITC Pass-Thru, and Bad Debts", was incorrect and should be adjusted as proposed by the company (Staff Ex. 10, at 25). No other party addressed this issue. The Commission finds that the staff's adjustment should be adopted.

Deferred Taxes on ITC Lease Expense

Mr. Soliman also agreed with the company's Objection 39, that the staff had used the wrong number to calculate deferred taxes on ITC lease expense on Schedule 4.1 of the Staff Report (Staff Ex. 10, at 25-26). No other party addressed this issue. The Commission finds that the staff's adjustment should be adopted.

Bruce Mansfield A&G Expense:

Staff witness Habib explained that the staff agreed with the company's Objection 35 and, accordingly, adjusted Schedule 3.32 to eliminate the staff's proposed .04 percent **[165]** adjustment to the applicant's portion of the Bruce Mansfield A&G expenses. Mr. Habib agreed that the staff's prior adjustment would be an improper out-of-test-year adjustment since it was based on a change in the A&G rate reduction which was not estimated to occur until July 1, 1993 (Staff Ex. 7, at 10-11). No other party addressed this issue. The Commission will adopt the staff's revised position.

Senate Bill 156 Property Tax Expense:

By its Objection 41, the applicant proposed to base the calculation of property taxes on the end of test-year plant-in-service balances, rather than upon date certain balances. In the alternative, the company proposed that, pursuant to Senate Bill 156, only one-half of the maximum effect of property tax expense be recognized for ratemaking purposes (Co. Obj. 41(a)). Staff witness Hensel disagreed with the company's Objection 41, but accepted the alternative proposal set forth in Objection 41(a). On brief, the applicant essentially withdrew its Objection 41 and recommended that the company's alternative proposal, as accepted by Ms. Hensel, should be adopted by the Commission. No other party addressed this issue. Accordingly, the Commission **[166]** finds that Ms. Hensel's recommendation should be adopted.

Jurisdictional Allocation Factor for Perry and Beaver Valley 2 Deferred O&M Expenses:

Ohio Edison indicated in its Objections 30 and 31 that the Staff Report, in Schedules 3.25 and 3.26, had applied an incorrect jurisdictional allocation factor in the staff's calculation of amortization expenses associated with deferred Perry and Beaver Valley 2 operation and maintenance expense. After reviewing the testimony of company witnesses Daniels and Flower, staff witness McDonald agreed with the company (Staff Ex. 11, at 5-7). Thus, Mr. McDonald recommended the use of an allocation factor of 99.42604128 percent on Schedules 3.25 and 3.26, as proposed by the applicant. The Commission finds that the staff's recommendation to accept the company's proposal is appropriate and should be adopted.

PIP Customer Deposit Balance:

By its Objection 30, OCC alleged that the staff had inappropriately used the PIP customer deposit balance as of November 30, 1989, instead of the date certain, in calculating interest expense on Schedule 3.21 of the Staff Report. As staff witness Meridith explained, the staff used the November 1989 PIP **[167]** deposit balance because Ohio Edison sold its accounts receivable, except for PIP receivables (including PIP customer deposits), to OES Capital during the test year (Staff Ex. 6, at 6, 8). Thus, prior to the November 30, 1989 transfer of the receivables to OES Capital, there had been no separation of PIP receivables from the total amount. OCC presented no witnesses on this issue and did not address it on brief. Accordingly, OCC's objection is overruled and the Commission will adopt the calculation contained on Schedule 3.21 of the Staff Report.

1989 Amortization of Excess Deferred Taxes and ITCs:

In Case No. 88-506-EL-AAM, the Commission granted the applicant's request to institute certain accounting changes including the "[a]doption of an amortization period not to exceed twelve months for the deferred investment tax credit taken under section 46(f)(3) of the Internal Revenue Code which is not restricted, and the excess deferred taxes arising because of the reduction in the corporate income tax rate from 46% to 34%." Ohio Edison Co., Case No. 88-506-EL-AAM (April 14, 1988) Entry at 2. The purpose of Ohio Edison's requested accounting changes in that proceeding was to **[168]** *allow the company to delay an increase in base rates to reflect the company's ownership and leasehold interest in Beaver Valley Unit 2. In 1989, pursuant to the authority granted by Case No. 88-506-EL-AAM, Ohio Edison flowed back into book income $ 14,990,999 of unrestricted excess deferred taxes and $ 33,150,000 of unrestricted investment tax credits (ITCs) (Occ Ex. 1, at 28). This flowback of deferred taxes and ITC increased the company's 1989 net income by $ 48.1 Million (Id.). Neither the company nor the staff reflected this income in the applicant's test-year operating income or in the determination of the company's revenue deficiency. OCC recommends that, in determining the applicant's rate base and adjusted operating income in this case, the flow back of the excess deferred taxes and ITCs in 1989 should not be recognized. OCC witness Effron claims that these items represent non-investor supplied funds which should be returned to rate-payers. According to Mr. Effron, the Commission did not intend to make the accounting changes approved in Case No. 88-506-EL-AAM binding for ratemaking purposes, as evidenced by the specific language to that effect in the entry. OCC* **[169]** *also disputes the contention that ratepayers have benefited from Ohio Edison's delay in seeking a rate increase. Mr. Effron asserts that, in the long run, any benefits associated with such a delay inure to the benefit of the company because the applicant is presently recording net income and deferring for future recovery net costs of $ 176 million at a time when its annual income deficiency is no more than $ 73 million. Thus, OCC proposes to flow back into income the excess deferred taxes and ITCs over three years and reinstate the deferrals for rate base purposes (OCC Ex. 1, at 28-39). Both the company and the staff contend that the rate deferral achieved by the approved accounting changes benefited ratepayers by delaying the filing of a rate case from 1988 to 1990. Company witness Daniels and staff witness Hess claim that, since customers have already benefited from the rate deferral program, adoption of OCC's recommended treatment would allow ratepayers to benefit twice from Ohio Edison's 1989 amortization of the excess deferred taxes and ITCs (Co. Ex. 9D, at 6; Staff Ex. 14, at 9-10).*

The Commission finds that OCC's recommendation should be rejected. While the Commission agrees **[170]** *with OCC that the accounting treatments approved in Case No. 88-506-EL-AAM are not binding in this proceeding for ratemaking purposes, we find that there is sufficient evidence in this record to show that ratepayers have benefited from the applicant's delay in filing for rate relief so as not to warrant the adjustments proposed by OCC. On cross-examination, Mr. Hess testified that, at the time the company filed its application in Case No. 88-506-EL-AAM, the staff conducted an analysis of the requested accounting treatments and determined that customers recieved a benefit from the deferrals and the rate case delay (Tr. XXIV, 110-112). The staff's position is consistent with Mr. Daniels' testimony that ratepayers have received a benefit by avoiding any rate increases over the past two years (Co. Ex. 9D, at 6). Although Mr. Effron indicated in his prefiled testimony that customers did not benefit from the company's rate case delay, he conceded at the hearing that, at least for 1989 and 1990, ratepayers saved money by the company's delay in filing a rate case (Tr. XIV, 38). Further, OCC's position that ratepayers have not benefited from such delays is inconsistent with its own 1990* **[171]** *Annual Report wherein OCC claims that its March 1989 agreement with Ohio Edison to delay seeking a rate increase could save ratepayers up to $ 100 million (Co. Ex. 36). In its brief, OCC argues that the flow-back of excess deferred taxes and ITCs is mandated by the Fifth and Fourteenth Amendments of the United States Constitution and by Section 4909.15(A)(4), Revised Code. While OCC does not explain the basis of its constitutional argument, apparently it believes that failure to refund excess deferred taxes and ITCs constitutes a taking of property without due process of law. The Commission does not believe that any such "taking" has occurred but, even if we assume that the lack of an explicit flow-through could be considered a taking of property, constitutional due process requires only that the Commission afford notice and a hearing. Clearly, the lengthy hearing process in this proceeding has afforded all parties ample opportunity to address the issues and has satisfied the due process requirement.*

Nor is the Commission persuaded by OCC's other assertion, that Section 4909.15(A)(4), Revised Code, requires the Commission to adopt OCC's position. The portion of the statute relied **[172]** *upon by OCC states that the benefits of tax normalizations "may not be retained by the company, used to fund*

a dividend or distribution, or utilized for any purpose other than the defrayal of the operating costs of the utility and the defrayal of the expenses of the utility in connection with construction work". There is no evidence in the record which indicates that these "funds" have been retained for the company's benefit or used to fund a dividend or distribution. Further, the statute requires only a defrayal of operating costs, not a refund as advocated by OCC. Indeed, the evidence of record in this proceeding indicates that the applicant's operating expenses have been "defrayed" by the excess deferred taxes and ITCs during the two-year period in which the company has foregone rate relief (Staff Ex. 14, at 9-10). The record further shows that ratepayers have received a benefit from this rate case delay and that adopting the adjustment proposed by OCC would confer this benefit upon ratepayers a second time. As company witness Daniels pointed out, absent an ability to flow-through the deferred taxes and ITCs, "no rate deferral program could have been possible" (Co. Ex. 9D, **[173]** at 6). The Commission finds that OCC's recommendation should be rejected.

Excess Deferred Taxes Attributable to AFUDC:

By its application in this proceeding, Ohio Edison proposed to effect a $ 216 million rate increase through a two-step process (subject to Commission approval of the applicant's recommended accounting treatment for certain deferred taxes related to AFUDC). The "excess deferred taxes" at issue represent "that portion of accumulated deferred income taxes on AFUDC recorded on the company's books that exceeds the amount that would have been accumulated through the end of the test year in this case had the current federal and state income tax rates been in effect from 1979" (Co. Ex. 9A, at 11). Company witness Daniels explained that, since the federal corporate tax rate had decreased from 46 percent in 1979 to 34 percent in 1988, the amount of taxes the company will have to pay at the time the tax benefit of capitalized interest is passed through to customers is less than anticipated. Mr. Daniels calculated that the company had recorded $ 58,188,997 in jurisdictional AFUDC-related excess deferred taxes which, when multiplied by the gross revenue conversion factor, **[174]** *has a revenue requirement impact of approximately $ 94 million. While this tax differential would usually be credited to customers over the life of the applicable asset, the company requested authorization from the Commission in this case to amortize the full differential in one year in order to reduce first year revenue requirements under the company's two-step proposal (Id. at 11-14). The company's two-step proposal contemplated that, during the first year of the new rates, (using a discount adjustment rider) the $ 216 million rate increase would be reduced by a $ 94 million credit associated with flowing through the excess deferred taxes. In the second year, the discount adjustment rider would expire and the full increase would be reflected in rates (Co. Ex. 13A, at 4-6). The Commission notes that, pursuant to the stipulation between the company and the staff (Jt. Ex. 3), the applicant's recommendation has been amended to reflect a three-step increase, if the Commission authorizes more than a $ 198.5 million increase. Under this stipulation, certain excess deferred taxes would also be amortized by the company to minimize the impact of increased rates (See Jt. Ex. 3,* **[175]** *at para. 2).*

The staff recommends that no step-in of rates using excess deferred taxes as an offset to revenue requirements be authorized in this case unless, as set forth in Joint Exhibit 3, the Commission authorizes a revenue increase greater than $ 198.5 million. According to staff witness Hensel, the term "excess deferred taxes" is a misnomer since, under the accounting method employed by Ohio Edison, "[t]here are no deferred taxes recorded or accrued on the [company's] books . . ." (Staff Ex. 9, at 13). Ms. Hensel stated that Ohio Edison uses the "net-of-tax" AFUDC method which accrues AFUDC at a lower rate than the alternative "gross-of-tax" method. Ms. Hensel explained that under the net-of-tax method, tax savings are built in as a permanent reduction to rate base when the plant goes into service. Thus, Ms. Hensel claims that no deferred tax reserves associated with AFUDC exist on the company's books which can be amortized (Id. at 13-16).

OCC, IEC, and North Star oppose the company's two-step increase proposal, as well as the stipulated three-step plan. OCC and IEC recommend that the excess deferred taxes attributable to AFUDC be amortized over three years, regardless **[176]** *of the revenue requirement determined in this case (OCC Ex. 2, at 23-24; IEC Ex. 2, at 15-17). North Star proposes to amortize the excess deferred taxes (apparently in one year) to offset, to the extent possible, any rate increase granted in this case (North Star Ex. 15, at 21). The intervenors generally allege that the excess deferred taxes should be refunded to ratepayers because they represent funds contributed by customers between 1979 and 1989 to which the company has no entitlement. The intervenors argue that, since the company has recognized the existence of excess deferred taxes associated with AFUDC, and, since those excess deferred taxes are*

unrestricted, there is no reason why ratepayers should not benefit from the availability of the excess deferred taxes regardless of the magnitude of the authorized rate increase in this proceeding. The intervenors also claim that the staff's contention that the excess deferred taxes do not exist is inconsistent with Joint Exhibit 3, wherein the staff has agreed that certain excess deferred taxes attributable to AFUDC should be flowed through in the event of a $ 198.5 million revenue increase.

The Commission agrees with staff witness **[177]** Hensel that, since there are no deferred tax reserves associated with AFUDC on the company's books, there are no excess deferred taxes to amortize. Under the net-of-tax method employed by Ohio Edison, any tax savings which have occurred are built in as a permanent reduction to rate base. Thus, the so-called tax savings have already benefitted ratepayers by reducing rate base when the plant goes into service, and resulting in lower plant-in-service balances and lower depreciation expense. We are not persuaded that the company should be forced to additionally create excess deferred taxes through an accounting entry, in order to flow revenues back to ratepayers. Rather, the Commission is convinced, as pointed out by Ms. Hensel, that the term "excess deferred taxes" is actually a misnomer. Indeed, customers have not paid additional funds for the company's future tax liability because the so-called excess deferred taxes were never normalized for ratemaking purposes. Accordingly, the objections of OCC, IEC, and North Star, related to the issue of excess deferred taxes attributable to AFUDC, shall be overuled.

Operating Income Summary:

Consistent with the foregoing discussion, **[178]** the Commission finds the company's jurisdictional adjusted operating income for the 12 months ending December 31, 1989, the test period in this proceeding, to be as set forth in the following schedule:

***Adjusted Operating Income**
(000's Omitted)

Operating Revenues	$ 1,666,054
Operating Expenses	
Operation and Maintenance	855,447
Depreciation	163,646
Taxes Other Than Income Tax	162,923
Income Taxes	119,187
Total Operating Expenses	$ 1,301,203
Net Operating Income	$ 364,851

PROPOSED INCREASE

A comparison of jurisdictional operating revenues of $ 1,666,054,000 with allowable jurisdictional expenses of $ 1,301,203,000 indicates that under its present rates, the applicant realized net operating income in the amount of $ 364,851,000 based on adjusted test-year operations. Applying this dollar return to the jurisdictional rate base of $ 4,045,603,000, results in a rate of return under present rates of 9.02 percent. This rate of return is below that recommended as reasonable by any of the witnesses testifying on the subject and, accordingly, the Commission must conclude that the company's present rates are insufficient to provide **[179]** *it reasonable compensation for the service rendered customers affected by the application. Rate relief is clearly required at this time.*

Under the rates proposed by the applicant, additional annual revenues of $ 216,420,000 would have been realized based on the analysis of test-year operations accepted herein. On a pro forma basis, which assumes necessary revenues and expense adjustments calculated in a manner consistent with that analysis, the proposed increase would have yielded an increase in jurisdictional net operating income of $ 134,156,000, resulting in net operating income of $ 499,007,000. Applying this dollar return to the jurisdictional rate base results in a rate of return of 12.33 percent. This rate of return exceeds that recommended as reasonable by any of the witnesses testifying on the subject. Thus, the Commission finds that although the existing rates are inadequate, the rates proposed in the application

would produce revenue which exceeds that recommended as reasonable by any of the expert witnesses. Thus, further analysis is required to establish a reasonable earnings opportunity for this company.

RATE OF RETURN

Five witnesses presented cost of capital **[180]** *analyses to be considered by the Commission in determining a fair rate of return for purposes of this proceeding. Company witness Burg recommended that Ohio Edison's authorized rate of return be set at 11.68 percent (Co. Ex. 6C, Att. 3). Staff witness Cahaan testified that an overall range of 10.83 to 11.28 percent would be reasonable (Staff Ex. 17A). IEC witness Kennedy recommended a return of 10.89 percent (IEC Ex. 3, at 40; Tr. XVII, 8-11). OCC witnesses Pultz and Talbot recommended overall rates of return of 10.84 and 10.66 percent, respectively, although Mr. Pultz's proposal represents OCC's recommendation for purposes of this proceeding (OCC Ex. 7A; OCC Ex. 11, at 46). Several other witnesses presented rate of return-related testimony in this proceeding but did not offer independent cost of capital analysis. North Star witness Smith critiqued the applicant's and the staff's rate of return recommendations in this proceeding (North Star Ex. 15) while company witnesses Abrams, Benderly, Addison, and Curley offered testimony on the company's overall revenue requirements and the impact of various recommendations on the company's financial indicators (Co. Exs. 17, 18, 19, 20).* **[181]** Rate of return was discussed in the briefs of the applicant, the staff, IEC, OCC, and North Star.

End-Result Analysis:

Ohio Edison argues that this is a financial integrity case of constitutional dimensions and urges the Commission, in setting the rate of return, to step back and look at the end result to see that the company will be given the opportunity to maintain and support its credit and to raise needed capital. The applicant relies on Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 591 (1949), and Bluefield Water Works Co. v. Pub. Service Comm., 262 U.S. 679 (1923), for the proposition that what really matters is the impact of the rate order on the company's financial integrity, rather than the precision of the calculations. This "end-result" theory of setting rates was the primary tenet of each of the company's rate of return witnesses.

Company witness Burg indicated that, while he had performed a cost of capital analysis, his primary concern was in achieving a reasonable end result (Co. Ex. 6C, at 11, 26, 32). Ohio Edison also presented several additional witnesses who suggested that the Commission should grant the company's entire rate request because **[182]** *of the negative impact on the company's financial condition which would result if such rate relief were not achieved. Company witness Abrams, a vice-president at Duff & Phelps, testified that the revenue levels recommended by the staff would place the company's credit rating in serious jeopardy (Co. Ex. 17, at 8). Mr. Abrams also stated that even with the full rate relief requested, Ohio Edison would just barely be able to maintain its current rating and that the full amount should be authorized, even if the cost of capital analysis does not support such a revenue level (Id.). Company witness Addison, a vice-president at Citibank, testified that the staff's proposed level of increase would detrimentally affect Ohio Edison's ability to obtain future financing (Co. Ex. 18, at 9). Mr. Addison admitted that his testimony was not offered in support of any particular revenue requirement but was "offered in support of whatever the number is that is required to generate the kinds of coverage ratios that we look for" (Tr. III, 224). Company witness Curley, a managing director at Morgan Stanley, indicated that the full rate relief requested would not completely restore Ohio Edison's* **[183]** *financial health and that even the staff's recommended upper range would cause a serious deterioration in the company's financial condition (Co. Ex. 20, at 3-4). Mr. Curley stated that it would be impossible for Ohio Edison to maintain its current dividend level at the staff's proposed revenue level (Id. at 9). Mr. Curley further testified that he believed the Commission should focus on the bottom line to insure a financially healthy company (Tr. VII, 52-53).*

The Commission has rejected similar result-oriented arguments in a number of prior cases. For example, in Columbus & Southern Ohio Electric Co., Case No. 83-314-EL-AIR (December 20, 1983), the Commission rejected the applicant's attempt to attain certain financial goals through a higher rate of return. The Commission stated that it "must rely on market measures of investor return requirements, not the amount of rate relief which will produce certain desired results". Id. at 8. In Cleveland Electric Illuminating Co., Case No. 79-537-EL-AIR (July 10, 1980), the Commission declined to set the rate of return at a level which the applicant deemed necessary to improve its financial

ratings. The Commission found **[184]** *that, while higher ratings may lower a company's future financing costs, the real issue is whether ratepayers should be required to pay a higher rate of return to achieve those financial goals. As the Commission stated, "[w]ere it not for this consideration, we could simply send the rate of return witnesses home and decide the earnings requirement question solely through an analysis of coverage ratios". Id. at 34. The Commission has similarly rejected outcome-oriented rate of return recommendations in Toledo Edison Co., Case No. 81-620-EL-AIR (June 9, 1982) and Columbus & Southern Ohio Electric Co., Case No. 81-1058-EL-AIR (November 5, 1982). In addition, the Ohio Supreme Court has rejected an appellate-utility's "end-result" argument. Dayton Power & Light Co. v. Pub. Util. Comm., 61 Ohio St. 2d 215 (1980). In that case, the appellant contended that the Commission had made several errors which contributed to an unreasonable end result. The court, however, upheld the Commission's decision finding that the Commission's judgment was not unreasonable. Id. at 217-218.*

The Commission finds that Ohio Edison's end-result analysis is inappropriate as a basis for **[185]** *setting the rate of return, or the company's overall revenue requirement. Although the information provided by the applicant's "financial experts" may have some value in providing an insight into the company's overall financial condition, the Commission believes that the rate of return established in this proceeding should be based upon the company's cost of capital. The applicant's concern that the cost of capital recommendations offered in this proceeding may not accurately capture the company's true revenue requirements is without merit. Undoubtedly, investors perceived Ohio Edison stock to be a some-what riskier investment in the March to April 1990 time period, as evidenced by the decline in market price. This increased perception of risk need not, however, be remedied by the application of end-result motivated adjustments. Rather, the financial impact of market declines is adequately recognized in the calculation of the yield requirement under the DCF formula. The DCF methodology also captures investor growth expectations based on information available to the market. Thus, no additional adjustment is necessary to determine the appropriate capital requirement. Clearly,* **[186]** the Hope and Bluefield cases do not require the Commission to set rates based solely on the applicant's alleged financial needs. The Commission must, instead, rely on the evidence presented regarding investor return requirements. Otherwise, no need would exist for rate base or rate of return determinations. See Columbus & Southern Ohio Electric Co., Case No. 83-314-EL-AIR (December 20, 1983) at 8.

Capital Structure:

All of the witnesses presenting testimony on the applicant's cost of capital used the Ohio Edison consolidated capital structure in their analyses (Co. Ex. 6A, at 30; S.R. at 23; IEC Ex. 3, at 40; OCC Ex. 7, at 5; OCC Ex. 11, at 13). The most current data available, as of December 31, 1989, reveals the following capital structure: 48.96 percent long-term debt; 7.51 percent preferred stock; and 43.53 percent common equity (Co. Ex. 6C, at 27-28; Staff Ex. 17, 15-16; Staff Ex. 17A). The Commission finds this 1989 year-end capital structure to be reasonable for purposes of determining the appropriate cost of capital in this case.

Cost of Debt and Preferred Stock:

Each of the cost of capital witnesses also agrees that the current embedded costs **[187]** associated with long-term debt and preferred stock should be employed by the Commission in this proceeding (Co. Ex. 6C, at 28; Staff Ex. 17, at 15-16; Tr. XVII, 11; OCC Ex. 7, at 5-6; OCC Ex. 11, at 14). As indicated by Mr. Burg (Co. Ex. 6C, Att. 2) and Mr. Cahaan (Staff Ex. 17A), the Ohio Edison embedded costs of long-term debt and preferred stock, as of December 31, 1989, were 9.83 and 8.54 percent, respectively. The Commission finds these cost components to be reasonable and they will be adopted in determining the company's overall cost of capital.

Cost of Equity:

While the task of determining the proper cost of debt and preferred stock is largely a mechanical process, as evidenced by the parties' agreement on those issues, analyzing the cost of common equity involves estimations. The process of estimating the appropriate cost of equity may, as the Commission has noted in a number of prior cases, be accomplished through a variety of methods. The Commission must ultimately select a recommendation which, in its best judgment, appears to be the most reasonable considering all of the facts and circumstances of the particular case.

In this proceeding, several different methods **[188]** *and recommendations were presented for the Commission's consideration as to the appropriate cost of common equity for Ohio Edison. Company witness Burg employed a discounted cash flow (DCF) analysis to arrive at his recommended 14.32 percent cost of equity (Co. Ex. 6C, Att. 3). Staff witness Cahaan also used a company-specific DCF analysis in his recommended range of 12.37 to 13.39 percent (Staff Ex. 17A). OCC witness Pultz proposed an 11.70 percent cost of equity based on his DCF analysis (OCC Ex. 7A, Revised Sched. FRP-3). OCC witness Talbot recommended an 11.27 percent equity return based on his comparable company DCF analysis, as well as a company-specific DCF study of Ohio Edison (OCC Ex. 11, at 46). IEC witness Kennedy combined the results of his DCF analysis of Ohio Edison with the results of a comparable company DCF analysis and a risk premium study in reaching a recommended cost of equity of 12.20 percent (IEC Ex. 3, at 37-40). During his oral testimony, Dr. Kennedy suggested that, given the stock price decline in the immediately preceding period, he would recommend increasing the cost of equity to 12.50 percent (Tr. XVII, 10). North Star did not sponsor an independent* **[189]** *rate of return analysis but, on brief, argues that the low end of the staff's cost of equity range should be adopted (North Star Br. at 19).*

The DCF formula estimates the required return on equity by adding the expected dividend yield (dividend divided by a representative stock price) and the expected rate of growth in dividends. Although the Commission has not precluded the use of alternative methods of determining cost of capital, it has traditionally relied upon the DCF method as the most reliable measure of a company's cost of equity.

Dividend Yield

In calculating the dividend yield, each of the witnesses performing DCF analyses, except Mr. Talbot, originally used a 12-month average of Ohio Edison stock prices. The staff and company witness Burg relied on the 12-month average price for the test year of $ 21.31 per share (Co. Ex. 6C, at 29; S.R. at 24). IEC witness Kennedy also employed a 12-month average during the test year in calculating dividend yield (IEC Ex. 3, at 17). OCC witness Pultz used stock prices for the 12 months ending February 1990 in arriving at an average price of $ 21.65 (OCC Ex. 7A, Revised Sched. FRP-3).

In his pre-filed testimony, staff witness Cahaan **[190]** *noted that Ohio Edison's stock price had fallen 18 percent between the end of December 1989 ($ 23.75) and March 8, 1990 ($ 19.50) and then had stabilized between March 8 and April 12, 1990. Accordingly, Mr. Cahaan recommended that an average price between March 8 and April 12, 1990 ($ 19.55) be employed to recognize this "price break" Staff Ex. 17, at 15-19). At the hearing, Mr. Cahaan updated his data to include the period of March 8 through May 4, 1990 and, accordingly, recommends that the average stock price for that period ($ 19.31) be used to calculate the dividend yield (Staff Ex. 17A; 17B). Mr. Cahaan claims that this "break" in the price of Ohio Edison stock warrants a departure from the staff's traditional recommendation to use a 12-month average. Mr. Cahaan contends that the cost of equity for Ohio Edison has clearly risen since the end of 1989 and, thus, the stock price used to calculate the dividend yield should reflect that increased cost. According to Mr. Cahaan, use of a short-term average price is appropriate in this case to account for an increased perception of risk and a decreased expectation of future growth (Staff Ex. 17, at 15-19). In his rebuttal testimony,* **[191]** *company witness Burg identified a second "price break" which he claimed occurred on April 20, 1990. Mr. Burg testified that, from April 20, 1990 to May 14, 1990 (the date when he offered his rebuttal testimony), Ohio Edison stock traded in a range of $ 18.25 to $ 19.75 and averaged $ 18.85. Ohio Edison argues that the stock prices after this second break must be used to accurately calculate the dividend yield (Co. Ex. 6D, Att. A; Tr. XXIX, 5-6).*

The Commission has historically expressed a preference for using a 12-month average stock price in calculating the dividend yield in order to "avoid distortions which may be created by short-term fluctuations in market price". Toledo Edison Co., Case No. 81-620-EL-AIR (June 9, 1982) at 24. In various cases, however, the Commission has adopted dividend yield recommendations based on shorter periods of average stock prices where the 12-month average would have produced a result which was not a valid indicator of the market's ongoing perception of the investment risks associated with the utilities being considered. See, e.g., Ohio Bell Telephone Co., Case No. 84-1435-TP-AIR (December 10, 1985) at 37-38 (three-month average); **[192]** *Ohio Edison Co., Case No. 84-1359-EL-AIR (October 29, 1985) at 34-35 (nine-month average); Cincinnati Gas & Electric Co., Case No. 79-11-EL-AIR (January 7, 1980) at 25-26 (three-month average). In Cleveland Electric Illuminating Co., Case No. 84-188-EL-AIR (March 7, 1985), the Commission adopted the staff's recommendation to use a one-*

month "spot" stock price in calculating the dividend yield due to the extremely volatile price of CEI's stock during the period in question. The Commission agreed with the staff that, given the unique record of CEI's stock prices, it would be inappropriate to use a twelve month average in calculating the dividend yield. Id. at 45-46.

In this proceeding, there is no dispute that, as Mr. Cahaan testified, Ohio Edison stock prices experienced a sharp decline in the March to April 1990 time period. The performance of Ohio Edison stock subsequent to the conclusion of the hearings, however, lends little support to Mr. Burg's contention that a second "price break" occurred on April 20, 1990. The Commission takes administrative notice of the fact that, since mid-May, Ohio Edison stock has fairly consistently traded in the $ 20.00 per share **[193]** *(or slightly under) range. This partial recovery of the stock price suggests that the "second price break" identified by Mr. Burg was more of a short-term fluctuation than a long-term change in investor expectations. The partial recovery tends to support Mr. Cahaan's claim that, while a precipitous decline occurred in March and April, the stock price has stabilized since that time and his recommendation properly captures both the decline and subsequent stabilization.*

On brief, IEC argues that the Commission should not adopt the staff's recommendation because the recent recovery of Ohio Edison's stock price makes Mr. Cahaan's "spot" proposal unrepresentative. IEC claims that this recovery is similar to the facts presented in Cleveland Electric Illuminating Co., Case No. 79-537-EL-AIR (July 10, 1980), wherein the applicant's stock price had dropped significantly in the six months prior to the hearing (due primarily to an announcement by the Federal Reserve Board) and then rebounded to a level comparable to the range at which it had traded prior to the price decline. In that case, the Commission adopted the staff's recommended 12-month average "in order to even out short-term **[194]** *fluctuations". Id. at 40. Unlike the facts presented in that case, however, the Commission notes that Ohio Edison stock has only partially recovered from the March-April 1990 price decline. While the stock has most recently traded in the $ 20.00 range, the price at the end of 1989 was $ 23.75. Thus, we believe that recognition must be given to the fact that the stock price has made only a minimal recovery from the April 1990 level and is still far short of the 12-month average for the test year. Under these circumstances, the Commission finds that the staff's stock price recommendation of $ 19.31 is appropriate and should be adopted.*

While we are somewhat uncomfortable with relying upon an average stock price for less than a two-month period, we do not believe that the intervenors' recommendations give adequate consideration to the severity of the price decline which occurred in March and April of 1990. In his direct oral testimony, IEC witness Kennedy stated that, considering the impact of the March-April price decline would be appropriate if it was averaged with a recent 12-month average price (Tr. XVII, 10-11). Dr. Kennedy explained that this alternative recommendation **[195]** *would enable the Commission to recognize the impact of the decline while not abandoning the 12-month methodology completely, and would avoid jumping around to accommodate short-term fluctuations (Id.). Under Dr. Kennedy's averaging approach, a $ 20.61 per share stock price would be achieved for purposes of calculating the dividend yield. Although IEC's proposed method has some merit, the Commission believes that Dr. Kennedy's recommendation still overestimates a representative stock price for purposes of this proceeding, as evidenced by subsequent stock performance. Nor do OCC witnesses' recommendations accord adequate consideration to the downturn in Ohio Edison's stock price, since they are based upon longer, and less representative periods of time. Rather, the Commission finds that the staff's recommendation reasonably reflects current and future investor expectations.*

Expected Dividend Growth

We turn next to consideration of the appropriate dividend growth component for the DCF methodology. Assessment of the expected level of dividend growth inherently involves a certain amount of judgment, since it requires the estimation of future events. The Commission must, however, **[196]** *determine which of the growth recommendations is best supported by the evidence upon which the various analysts relied. The rate of return witnesses in this proceeding have, for the most part, projected relatively similar growth rates for Ohio Edison's dividend.*

Company witness Burg originally proposed a dividend growth estimate of 2.5 to 3.0 percent (Co. Ex. 6A, at 39). Mr. Burg increased his growth estimate to 3.5 percent in his post-Staff Report testimony to reflect his view of increased investor expectations, based on the relatively higher stock prices between June and December of 1989 (Co. Ex. 6C, at 29). In his rebuttal testimony, however, Mr. Burg returned

to his original 2.5 to 3.0 percent range because of lower market prices in March and April of 1990 (Co. Ex. 6D, at 5; Tr. XXIX, 19). Mr. Burg's 2.5 to 3.0 percent growth estimate is based upon the following five factors: 1) the capital market in which Ohio Edison competes; 2) the estimates of expected growth by research firms; 3) projected dividend increases for the utility industry, in general; 4) five years' earnings growth; and 5) the company's success in selling stock above book value (Co. Ex. 6A, at 39). Mr. Burg **[197]** *also expressed his belief that investors were expecting significant improvements over the dividend levels experienced in the recent past. In determining his growth estimate, Mr. Burg relied primarily on a growth projection average of 2.6 percent by five investor research firms to support his growth recommendation (although IEC and North Star assert that the correct application of an April 1989 Value Line projection would reduce this growth estimate to 2.20 percent). He also looked at a May 23, 1989 publication by Goldman Sachs which indicated average estimated dividend growth of 3.7 percent for the 67 utilities analyzed (Co. Ex. 6A, at 36-39).*

IEC witness Kennedy proposed a growth estimate of 2.10 percent (IEC Ex. 3, at 21). Dr. Kennedy relied on the published estimates of investor analysts to derive his recommended growth rate. Dr. Kennedy averaged estimates from three investor analyst sources to determine his 2.10 percent proposal (IEC Ex. 3, at 21). OCC witnesses Pultz and Talbot recommended dividend growth estimates of 1.7 to 2.54 percent and 2.10 percent, respectively (OCC Ex. 7A, Revised Sched. FRP-3; OCC Ex. 11, at 36). Mr. Pultz calculated his 1.7 to 2.54 percent growth **[198]** *estimate range by performing a "b times r" analysis ("b" is the fraction of earnings retained and "r" is the return on average common equity) for the years 1985 through 1989 (2.54 percent) and by using estimated growth rates projected by Value Line for the years 1992 through 1994 (OCC Ex. 7, at 13-14). Mr. Talbot based his 2.10 percent growth estimate on the projections of the Institutional Brokerage Estimate System (IBES) (OCC Ex. 11, at 35-36).*

The staff initially recommended a dividend growth range of 1.9 to 2.8 percent (S.R. at 24). Mr. Cahaan later adjusted the staff's recommendation downward, to a range of 1.7 to 2.6 percent, to reflect "reduced expectations of growth" (Staff Ex. 17, at 18). The staff's recommendation was based upon b x r calculations under various assumptions (S.R. at 24). Staff witness Cahaan testified that the staff's recommendation was confirmed by its analysis of other data (Tr. XXIV, 145). Mr. Cahaan stated that the staff did not propose a single point within its range but that the Commission's selection of any point within the range would be consistent with the staff's recommendation (Staff Ex. 17, at 10-11; Tr. XXIV, 140-148). According to Mr. **[199]** *Cahaan, a $ 19.31 stock price and a growth range of 1.7 to 2.6 percent results in a baseline cost of equity of 12.02 percent to 13.01 percent.*

The Commission finds that the staff's method of calculating a "growth range" is reasonable and should be adopted in this proceeding. We believe that acceptance of the staff's range recognizes the inherent uncertainty involved in estimating the dividend growth rate. Further, while the company asserted that the new method understates its true cost of capital, there is actually very little difference between the recommended ranges under the staff's new and traditional methods. The Commission also notes that the staff's growth range under the new method encompasses the growth recommendations of each of the other parties. Company witness Burg ultimately agreed that the high end of the staff's range (2.6 percent) was a reasonable growth estimate while IEC witness Kennedy and OCC witness Talbot proposed growth rates near the midpoint of the staff's range (2.1 percent). OCC witness Pultz recommended a growth range nearly identical to the staff's range (1.7 to 2.54 percent). Thus, the Commission believes that the staff's range reasonably and accurately **[200]** *quantifies the range of investor growth expectations, while considering the normal degree of uncertainty which exists in calculating the company's cost of capital. Accordingly, we find that a baseline cost of equity range of 12.02 percent to 13.01 percent is reasonable, based upon the application of the staff's recommended $ 19.31 stock price and 1.7 to 2.6 percent growth range.*

As indicated in the Staff Report, the staff has traditionally recommended the use of a single point estimate of the baseline cost of equity, which would then be adjusted by factors of 1.032 to 1.100 to take into consideration "issuance costs, dilution, and the need for future financing flexibility" (S.R. at 24). Under the traditional approach, the staff would have used a 2.0 percent growth rate (S.R. at 24). Considering the subsequent adjustments recommended by Mr. Cahaan ($ 19.31 stock price and 20 basis point reduction of growth rate), applying the traditional adjustment factor would result in a range of 12.52 to 13.35 percent for the recommended return on equity (See Staff Br. at 64). While the staff presented the traditional method for the Commission's review, it indicated that it has recently **[201]** *reconsidered this practice and now recommends that the baseline cost of equity should be measured as*

a range to reflect the degree of uncertainty in the estimating process. Accordingly, the staff proposes that a 3.5 percent increment be applied to common equity net of retained earnings to account for the "issuance cost" effect. As calculated by the staff, and subsequently revised by Mr. Cahaan, this issuance cost effect would result in a 1.02873 adjustment factor being applied to the baseline cost of equity to achieve the appropriate cost of common equity recommendation (See S.R. at 25-26; Staff Ex. 17A). Implementing the staff's new method results in a final return on equity recommendation of 12.37 to 13.39 percent, compared to the 12.52 to 13.35 percent recommendation which would have been derived from applying the staff's traditional method.

The Commission believes that the staff's modified issuance cost adjustment is appropriate. As indicated by the staff, the baseline cost of equity range established above implicitly recognizes the company's need for "future financing flexibility". We further agree with the staff that there is not sufficient evidence to warrant an explicit **[202]** *adjustment for "dilution". Thus, rather than applying the traditional 3.2 to 10 percent adjustment factor to the baseline cost of equity to account for issuance costs, dilution, and financing flexibility, the Commission will use the staff's generic 3.5 percent factor, applied to common equity net of retained earnings, to account solely for the "issuance cost" effect. As Mr. Cahaan explained, this "issuance cost" adjustment gives recognition to the "difference between investors' outlays and company receipts, and is necessary whenever a market-based cost of equity estimation process is used" (Staff Ex. 17, at 14). Use of the adjustment factor is not dependent, however, upon the company's issuance of new stock during the test year, or upon whether the company plans to issue stock in the near future. We also believe that the issuance cost adjustment should only be applied to common equity net of retained earnings since the company incurs no issuance costs to retain earnings. Applying the 3.5 percent issuance cost adjustment factor to the baseline cost of equity range established above, net of retained earnings, results in a range for the cost of equity of 12.37 to 13.39 percent.* **[203]**

Having adopted the staff's range as a reasonable estimation of the company's required return on equity, the Commission must determine a specific point within that range. As noted previously, IEC witness Kennedy recommended a return on equity of 12.50 percent, which is within the lower quartile of the range we have adopted in this proceeding as a reasonable estimate of Ohio Edison's cost of capital. We further note that Dr. Kennedy's analysis is useful as a check on the reasonableness of the staff's range and, indeed, supports the use of that range. In choosing the point within the adopted range, however, the Commission believes that recognition must be given to the company's aggressive and innovative actions in the past several years. Specifically, Ohio Edison has sought to balance its obligations to both rate-payers and shareholders by undertaking off-system marketing efforts (including the PEPCO sale), resolved the problems associated with the Quarto Coal contract, settled the Perry rate and prudence cases, engaged in the sale/leaseback of $ 1.4 billion of the company's ownership in Perry and Beaver Valley 2, and accomplished its rate delay and moderation program. Considering **[204]** these additional factors, the Commission concludes that a return on common equity of 13.21 percent, which falls in the upper quartile of the staff's range, represents a reasonable estimate of the cost of equity capital to this company. As a final matter, the Commission notes that, in the section of the Staff Report related to demand side management, the staff recommended that Ohio Edison "adopt a formal procedure to include the consideration of long-term impacts in evaluating the appropriateness of current and future short-term marketing goals" (S.R. at 147). Consistent with the staff's recommendation, the Commission emphasizes that, in future rate cases, one of the criteria for determining the appropriate return on equity will be the applicant's efforts in pursuing demand side management initiatives.

Rate of Return Summary:

Applying a cost of equity of 13.21 percent to the equity component of the capital structure approved herein produces, when combined with the findings relative to long-term debt and preferred stock, a weighted cost of capital of 11.20 percent. The Commission is of the opinion that a rate of return of 11.20 percent is sufficient to provide the company reasonable **[205]** *compensation for the electric service it renders customers affected by these proceedings.*

AUTHORIZED INCREASE

A rate of return of 11.20 percent applied to the jurisdictional rate base of $ 4,045,603,000 results in an allowable return of $ 453,108,000. Certain expenses must be adjusted if the gross revenues authorized

are to produce this dollar return. These adjustments, which have been calculated in a manner consistent with the analysis of accounts accepted herein, result in an increase in federal and state income taxes of $ 46,861,000, in state excise tax of $ 6,890,000, and in the allowance for uncollectibles expense of $ 368,000. Adding the approved dollar return to the adjusted allowable expenses of $ 1,355,322,000 produces a finding that applicant is entitled to place rates in effect which will generate $ 1,808,430,000 in total gross annual operating revenue, including fuel and late-payment revenue. This represents an increase of $ 142,376,000 over the total revenues which would be realized under the applicant's present rate schedules, an increase of 8.5 percent.

The company and the staff entered into a stipulation which provided that if the Commission approved a revenue **[206]** *increase of at least $ 198,500,000 that the increase should become effective in increments over a three-year period (Jt. Ex. 3). The Commission has not authorized this level of an increase; accordingly, the provisions of the stipulation are not applicable.*

OCC recommended that if the Commission granted an increase in excess of $ 122,000,000, it should be phased in over a two-year period (OCC Ex. 8, at 12). Both the staff and the company oppose OCC's recommended phase-in plan. The Commission is of the opinion that given the magnitude of the increase in this case, a phase-in plan is not warranted. OCC was concerned that a rate increase in the magnitude of 13.1 percent would result in rate shock (Id. at 14). However, the Commission has not granted an increase of that magnitude. Accordingly, OCC's recommendation should be rejected.

RATES AND TARIFFS

As part of its investigation, the staff reviewed the various rate schedules and provisions governing terms and conditions of service set out in the applicant's proposed tariffs (Co. Ex. 5A, Sched. E-1). The resulting staff recommendations (S.R. at 48-126) drew a number of objections. The issues raised are discussed below.

[207]

Revenue Distribution:

The applicant proposed rates which would produce equal rates of return for the residential and combined general service classes (Co. Ex. 13C, at 3). Staff, however, assigned more revenue responsibility to the residential and general service large/special contract customers, and less to the general service secondary customers, than did the applicant (Staff Ex. 19, at 3). The company, OCC, and North Star all objected to the staff's assignment of revenue responsibility in favor of the company's proposal.

Staff witness Howard testified that the company's proposed revenue distribution generates revenue close to the cost of service when the residential and general service classes as a whole are considered. However, instead of assigning revenues that would generate returns that were closer to the average rate of return, the applicant moved in the opposite direction, creating returns for these classes that are further from the average rate of return (Staff Ex. 19, at 3). Thus, staff assigned more revenue to the residential and general service large/special contract customers than did the company. According to Mr. Howard, this distribution results in the residential **[208]** *class generating revenues that create an equal rate of return for that class, and the combined general service class generating revenues that move in the direction of an equal rate of return (Id.).*

Ohio Edison has six residential and two general service rates in its filed tariffs. The staff accepted applicant's percentage revenue distribution within the residential class. The general service class is broken down into general service secondary and general service large/special contracts. The staff reported that even though the general service class as a whole is generating revenue that closely reflects the cost of service, the individual schedules within the class do not. The general service secondary class is generating a rate of return well above the company's average rate of return, and the general service large/special contract class is generating a below average rate of return (Id. at 4). The applicant's proposal slightly reduces the general service secondary's above average return and slightly increases the general service large/special contract customers' below average return. While staff agrees that the applicant is heading in the right direction, staff believes **[209]** *that the changes should be of greater magnitudes. The staff's proposal moves the general service classes approximately half way to the level needed to achieve an equal rate of return. To attempt to move these classes all*

the way would overlook staff's other criteria for determining appropriate revenue distribution, such as continuity and customer understanding (Id. at 5).

Under the staff's proposal, the residential class will receive a 15.74 percent increase in revenues excluding fuel that will result in a 11.54 percent rate of return. The jurisdictional average rate of return is 11.54 percent. The general service secondary class will receive a 11.74 percent increase in revenues which will result in a 13.33 percent rate of return. The general service large/special contract class will receive 21.02 percent increase which will result in a 9.79 percent rate of return (S.R. at 60, 67).

The company contends that under the staff's proposal of moving toward equalized rates of return for the general service secondary and general service large/special contract classes, there would be a large differential in the overall percentage increase experienced by the two classes, 11.74 percent **[210]** *and 21.02 percent excluding fuel, respectively. The company's proposal, however, produces a 16.83 percent and an 18.69 percent increase, respectively (Co. Ex. 13C, at 3; S.R. at 60, 66). Under the company's proposal, the rate of return is 14.45 percent for the general service secondary class, and 9.39 percent for the general service large/special contract class (S.R. at 60). In addition, the company argues that under the staff's revenue distribution, the revenue requirement will not be attainable due to the staff's failure to consider that borderline customers on rate 23 would pay less under the new rate 21 and would switch to the cheaper rate. Therefore, the staff's proposed revenue is overstated by the amount of money saved by the customers that transfer (Id. at 4).*

OCC argues that the staff's revenue distribution inappropriately shifts revenue responsibility to the residential class. OCC witness Yankel testified that the current residential rate of return of 8.16 percent should be considered equivalent to the jurisdictional average rate of return of 8.30 percent because it is within a 10 percent margin of error of the jurisdictional average. Mr. Yankel also stated that **[211]** *because the staff's proposal does not include the numerous revenue adjustments proposed by staff, it understates the residential rate of return. Finally, Mr. Yankel indicated his belief that certain costs were over allocated to the residential class in the company's cost of service study (OCC Ex. 9, at 16-19).*

North Star objected to the staff's revenue spread in that it allocates more of the increase to general service large/special contracts than the company proposed. North Star contends that, at least with respect to the special contract class, the earnings are not below the system average rate of return. North Star witness Goins testified that if the staff's reclassification of pollution control equipment as a demand-related charge is considered and the inclusion of interruptible loads in the D-1 allocation factor is taken into consideration, it will be seen that the contract customers are paying greater than the system average rate of return (North Star Ex. 16, at 14, 20).

The Commission is of the opinion that the staff's revenue distribution is the most equitable and should be adopted. The company's proposal does not fairly distribute revenue responsibility among the classes. **[212]** *The company's proposal would assign more revenue responsibility to general service secondary class which is already earning well above the system average rate of return. The staff's proposal, on the other hand, lowers the rate of return for the general service secondary class and brings it closer to the system average. Likewise, the staff's proposal will bring the general service large/special contract class closer to the system average, and the residential class will be right on average. Thus, the staff's proposal moves each class closer to its cost of service.*

The company's concern is that the percentage increase differential between the two general service classes is too large. While the company has expressed a valid concern, the Commission believes that it is outweighed by the disproportionate rates of return which would be generated by these classes under the company's proposal. Fairness dictates that the classes be moved closer to the system average rate of return. The staff's proposal does this. In the interest of gradualism, however, the staff has only moved each class approximately half way to the level needed to achieve an equal rate of return.

North Star's concerns **[213]** *are directed specifically toward the special contract class. However, the staff has not considered the special contract customers to be a separate class. The Commission believes that the staff's classification is appropriate. But for the contracts, the special contract customers are general service large customers; their firm load is billed under general service large rates (S.R. at 83-88). There is no reason to look at the special contract customers as a separate class.*

OCC argues that the residential class is already providing revenue at the approximate average rate of return; therefore it should be assigned a lesser amount of revenue responsibility than provided for by the staff. Obviously, it is difficult to determine perfectly the exact cost of providing service. However, as we have previously indicated, the staff's analysis is the most equitable. The staff's revenue distribution does not result in the residential class earning either above or below the average rate of return. OCC's other arguments, that the revenue distribution did not account for the staff's revenue adjustments or allocation of costs, are without merit. These matters will be accounted for in the determination **[214]** *of the amount of the total revenue requirement in this case. The revenues assigned to the residential class will then be adjusted proportionately.*

In summary, the Commission believes that the staff's recommendation is the most reasonable. It moves the revenue responsibility of each class in the proper direction, and it applies the principles of rate continuity and gradualism. The staff's revenue distribution shall be adopted. The Commission has based its decision on the record in this case which indicates that rate design is appropriately based upon the principle that revenues should be distributed so that the various customer classes earn close to an equalized rate of return. Nevertheless, there may be ways to design rates based upon different principles. Should any party wish to offer evidence in the future on other factors which should be considered in determining revenue distribution, the Commission is open to their suggestions.

The company next argues that, if the staff's revenue distribution is adopted, the Commission must take into consideration transfers of customers from rate 23 to rate 21, which, according to the company, will occur and result in a revenue shortfall. **[215]** *Company witness Moore testified that under the staff's proposal, borderline customers on rate 23 would pay less under rate 21 and would, accordingly, switch to rate 21. The billing units the staff used did not take these transfers into account (Co. Ex. 13C, at 4). The record reflects that, under these circumstances, the company will be precluded from earning up to $ 2.7 million in revenue authorized in this case (Staff Ex. 20A, at 1).*

The staff does not believe that any customer transfers should be taken into consideration in the rate design. The staff opposes the company's position because of its belief that it is uncertain how many customers might transfer and when such transfer might occur (Id. at 2). However, the record reflects that once new rates are approved in this proceeding, the company will contact the affected customers and place them on the cheapest rate (Tr. IX, 35).

The Commission believes that Ohio Edison should be authorized to perform a transfer study based upon the revenue level allowed in this case and modify the general service rate design so that the rates put into effect in this case can produce the authorized revenue level. One of the staff's tenets **[216]** of rate design is that the schedules should provide the utility the opportunity of recovering an authorized revenue (S.R. at 57). However, if Ohio Edison cannot adjust rate design based upon a transfer study, it will be precluded from the beginning from earning the authorized revenue level. This is an unfair result. Further, the Commission has previously, in Case Nos. 77-1249-EL-AIR and 82-1025-EL-AIR, authorized Ohio Edison rates based on transfer studies (Co. Exs. 71B and 72B). Ohio Edison's objection should be sustained.

Seasonal Rates:

Ohio Edison's tariffs contain six residential schedules, and the company proposes a rate increase in all of them. In all residential rates, except the optional time-of-day rate and the water heating service rate, the applicant incorporates a summer/winter differential with the higher summer rates reflecting the higher costs to serve. As a further reflection of costs in the summer months, the pricing of the energy blocks is inverted. The rates for higher levels of usage are higher than the rates for usage at lower levels. The company's rationale is that customers that have higher usages, generally air conditioning customers, are responsible **[217]** *for the higher demand requirement placed on the company's system (S.R. at 73). The company is not proposing seasonal rates for the general service schedules. The staff accepted the company's seasonal rate proposal.*

OCC objected to the seasonal rate for residential customers because no such rate was proposed for the other rate schedules. OCC does not accept the assumption that there is a difference in the base cost of service to customers between seasons. Further, OCC contends that all customers, not just residential customers, contribute to the higher summer service costs (OCC Ex. 9, at 37-41).

Company witness Moore testified in support of the seasonal rate proposal. He indicated that during the past three years, the company has had dominant summer peak demands and that forecasts project that Ohio Edison will remain a summer peaking company. This situation is due, in part, to increasing residential air conditioning saturation and creates a different cost pattern for the company. By having a higher rate in the four-month summer season than in the eight-month winter season, growth in the summer peak will tend to be moderated (Co. Ex. 13A, at 6-7). Mr. Moore also testified that **[218]** *seasonal rates are not feasible for general service customers because of sensitive tracking problems. In addition, summer weather sensitive equipment, such as air conditioning, is operated by the general service customers over a number of months, even year around in many cases, as opposed to the more limited use of such equipment by the residential class. Mr. Moore stated that the greater use of this equipment by general service customers results in reasonable recovery of costs under the existing rate structures (Id. at 16).*

The Commission believes that the company's seasonal rate proposal is reasonable and should be accepted. Although seasonal rates may be new to Ohio Edison, they are not a new concept in Ohio. All but one of the other six major Ohio electric companies have seasonal rates (Co. Ex. 13D, at 2). The evidence shows that Ohio Edison is now a summer peaking company. The evidence also shows that the coincident summer demands of the residential class at the time of the monthly system peaks have increased at a faster rate than general service summer demands, and that residential air conditioning is responsible, in part, for this increase (Staff Ex. 20, at 12). **[219]** *The seasonal rates will help in moderating the growth in the summer peak and tend to delay the need for new capacity and encourage better utilization of the company's facilities. OCC's objection is overruled.*

In connection with seasonal rates, the staff has recommended that before the company's next rate case, Ohio Edison should perform and provide a seasonally adjusted cost of service study for all classes, in addition to the cost of service study it normally provides. The study should provide additional information on the appropriate levels of seasonal rates, identify the degree seasonal rates alter consumption patterns, and consider whether seasonal rates for the general service classes are appropriate (Staff Ex. 20, at 12). The company should perform this study. The company argues that sufficient time will not have passed by the next rate case to generate the required data or complete the study. If, at the time of the next rate case, the company has had insufficient time to gather data or complete the study, it should request a waiver at the time it files its notice of intent.

Standard Rate 10:

The company has proposed to divide its present standard residential rate **[220]** *10 into two rates. The company's present standard residential rate incorporates an energy only rate and a load management rate. Proposed rate 10 is an energy only rate and proposed rate 17 is a load management rate. Proposed rate 10 will become the new standard rate which will generally be applicable to customers whose monthly usage is significantly less than 1,000 kWh. The standard rate was designed to be less expensive than the load management rate for a majority of the residential customers. Further, because the standard rate is a kWh rate and requires only standard kWh metering, it will diminish the need for relatively more expensive load meters (Co. Ex. 13A, at 9). The optional small use rate has been incorporated into the standard rate. This rate also contains a controlled water heating provision in order to offer customers on that rate a water heating option (Id. at 10). The staff found that the proposed changes to rate 10 do not eliminate any of the options available to residential customers and recommended, with one exception, approval of the proposed standard rate (S.R. at 48).*

The company proposed that the standard rate will be available to customers where "monthly **[221]** *usage is generally less than 1,000 kWh" (Co. Ex. 13C, at 15). The staff rejected the availability language on the grounds that it is unnecessary, misleading, and confusing (Staff Ex. 19, at 11). Staff witness Howard testified that a residential customer at any level of consumption could be served under this rate (Id. at 12).*

Company witness Moore testified that the availability language was proposed in order to clarify the general type of customer to whom the rate will be applied and is not meant to be a strict criterion. It is intended as a guideline for company personnel and customers to use in determining the appropriate rate (Co. Ex. 13C, at 15).

The Commission finds that the company's proposed availability language serves a valid purpose and should be approved. The majority of residential customers will be served under this rate, and the company will use the 1,000 kWh usage as an initial screening device in determining which rate schedule will produce the lowest annual bill (Co. Ex. 13A, at 10). If the company determines that a different rate schedule will benefit a customer, that customer will be changed to the most beneficial rate schedule. However, as a general rule, **[222]** customers whose monthly usage is 1,000 kWh or less will have a lower bill under this standard rate.

Load Management Rate 17:

The company is proposing a new separate load management rate which was previously a part of rate 10. In order to qualify, a customer must have a load meter, or have equipment capable of accepting a load meter. The proposed rate structure is similar to the load management provision of the current rate 10, except that the applicant is proposing to increase the minimum demand from 5 kW to 6 kW. In addition, in order to qualify, a customer's six highest monthly kWh usages out of the 12 preceding months must average 850 kWh or more. This average usage compares to 675 kWh in the present rate (S.R. at 51, 78).

The staff recommends that the present 5 kW minimum demand and average 675 kWh usage be retained. According to the staff, the company's proposal would eliminate certain customers that can practice load management. Staff witness Fortney testified that not all customers who have load between 5 kW and 6 kW are able, or willing, to practice load management. However, the minimum level should not be increased to eliminate those customers with a lower demand **[223]** *who are both willing and able to practice load management. As pointed out by Mr. Fortney, the Commission is in the process of implementing integrated resource planning procedures which encourage demand side management practices. Staff believes that it is unreasonable that, at the same time load management practices are being encouraged, the applicant is proposing changes which will eliminate potential opportunities for its residential customers to engage in those practices (Staff Ex. 20, at 9).*

The company contends that only customers with a load of 6 kW have the capability to practice meaningful load management. Based upon the company's load research data, the company determined that customers with only one major appliance have a median load of 6 kW. Because two major appliances are required in order to practice meaningful load management, the company contends that 6 kW is the minimum load most customers with more than one major applicance would attain (Co. Ex. 13C, at 7-8). The company concedes that some customers with loads between 5 kW and 6 kW can benefit from the load management rate, but argues that rate 17 should not be used to reward happenstance (Co. Ex. 13D, at 9). **[224]**

The Commission is of the opinion that the present 5 kW minimum load provision should be retained. The minimum load provision should not be increased to eliminate those customers who are practicing load management under the company's present load management rate provisions.

The company has also proposed that the load management rate be available to customers whose six highest monthly kWh usages out of the 12 preceding months average 850 kWh or more and that a customer may be removed from the rate at his option or if his usage has not exceeded 800 kWh in each of the 12 preceding months (S.R. at 51). The staff recommends that these usages remain at 675 kWh and 625 kWh, respectively (Id.).

Company witness Moore, however, testified that the staff's recommended changes to the kWh criteria for rate 17 availability are inappropriate even under the staff's recommended 5 kW minimum billing load. The staff's recommendations would result in segments of the residential customers being placed on staff's recommended rate 17 who would pay higher annual bills than if they were billed under proposed rate 10. Customers with monthly usages of 675 kWh or less and billing loads in excess of 5 kW **[225]** *would pay more than they would had they been billed on rate 10 (Co. Ex. 13C, at 11). The staff acknowledges that this may be true; however, staff relies on applicant's annual review of residential customers' bills to determine which rate would be cheaper for them (Staff Ex. 20, at 10).*

The Commission is concerned that the staff's kWh usage recommendation will result in customers being placed on a rate which is not beneficial to them. Under the staff's kWh usage, a customer may qualify for the load management rate and be placed upon that rate. However, at the lower kWh usage, the

load management rate would be more expensive. A requirement that the load management rate be made available to those who cannot benefit would result in customer confusion. Although the company's annual review of customer accounts will assist in placing a customer on the lowest rate, it will not prevent the customer from getting on the wrong rate in the first place. The company's proposal provides adequate rate separation to insure stable and appropriate customer placement and will be adopted.

Residential Rate Design:

With the exception of the load management rate, which is discussed above, staff **[226]** *accepted applicant's proposed rate design for each of the residential classes. The differences between the company's and the staff's rates reflect the difference in the revenue distribution and the differing level of customer charges (Staff Ex. 20, at 13).*

OCC objected to the proposed residential rate designs. According to OCC, the rate structure should generally be flat or inverted, and the deeply discounted portions of the rates should be granted a rate increase. However, according to OCC, the company has proposed declining block rates for the residential rate schedules which contain sharply declining elements and proposed no increase for the deeply discounted portions of these rates. OCC further objected that the company proposed different percentage increases, instead of a uniform increase, for the various residential rate schedules in spite of the fact that there was no cost of service study which separately delineated the cost of serving each residential schedule (OCC. Ex. 9, at 50-56). OCC proposed its own rate schedules which provide a gradual move to flatten the declining rate structure and to reflect a more uniform revenue spread to the various rate schedules within **[227]** *the residential class (Id. at 56-61).*

According to the staff, the applicant has provided its rationale for the design of rates. Rates in one schedule are designed to track rates in other schedules for consistency or to reduce the likelihood of rate jumping. Some rates are left unchanged to reflect costs. Experimental rates may be adjusted to maintain the integrity of the experiment. The basic formats of the rate schedules have previously been approved by the Commission. While cost is a major consideration, a utility should be able to exercise discretion and flexibility as to the level and form that rates take within a particular class to achieve objectives. Staff finds the company's rate design to be acceptable (Staff Ex. 20, at 13).

The Commission finds no useful purpose would be served by analyzing in this opinion and order each residential schedule block by block and change by change. The company's proposed rate design is detailed and interrelated with each rate being designed to serve a purpose. The Commission will accept its staff's recommendation on the residential rate design and approve the company's proposed design. The rate designs have been previously approved **[228]** *by the Commission, and the staff has had an opportunity to observe how they work. Based upon this record, the Commission is not inclined to adopt new, untested rate structures as proposed by OCC.*

Both the staff and OCC recommend that the company should perform and provide a cost of service study which differentiates the existing residential rate classes. The company should perform the study and provide it for its next rate proceeding. If there has been insufficient time to gather the data at the time of the next proceeding, the company should request a waiver at the time it files its notice of intent.

Contract Language for Residential Schedules:

In its original filing, the company proposed certain language to be added to rates 10 and 17 so that service under these schedules would be for a minimum period of one year. This provision is intended to eliminate continual rate jumping due to seasonal load variations. While the staff believed that the restructuring was appropriate, it felt that certain additional language should be added (S.R. at 50).

At the hearing, staff witness Howard agreed with the company that the following language would be appropriate:

Customers selecting **[229]** this rate schedule will be billed for service hereunder for a minimum period of one year unless: 1) service is no longer required by the customer at the same address at any time during the remainder of the one-year period; or 2) at the customer's request when the customer adds or removes load and the company projects that the customer's load characteristics for the next

twelve months can be served more economically under an alternative tariff for which the customer qualifies.

(Tr. XXVI, 54-55). Mr. Howard also testified that this language should be added to rates 10 and 17 and replace the current language contained in rates 11, 12, and 19 (Id.). The Commission agrees that the language is appropriate and should be adopted.

Customer Charge:

The purpose of the customer charge is to provide a utility with a partial recovery of the fixed costs which it incurs in order to provide service to a customer by mere reason of the customer's connection to the utility's system. The staff, Ohio Edison, and OCC have each employed a different methodology in arriving at their recommendation as to the appropriate customer charge which the Commission should adopt in this proceeding.

The **[230]** *staff's policy regarding the methodology for determining the customer charge was established in June of 1980, and has been adopted by the Commission numerous times. Its methodology derives a charge which is minimally compensatory, and uses expenses which are solely attributable to the number of customers regardless of demand and consumption (Staff Ex. 19, at 6). The staff determined that the customer charge for customers that have standard kWh meters should be $ 4.05 (Tr. XXVI, 6-7; Tr. XXVII, 79; Staff Rate Design Reply Br. at 21). The proposed customer charge for the load management rate is $ 6.05; and the time-of-day rate is $ 9.89 (Staff Ex. 19, at 6; Tr. XXVI, 6-7; Tr. XXVII, 79; Staff Rate Design Reply Br. at 21). Because the residential water heating rate is in the process of elimination, the staff recommends that its customer charge be increased by the percent equal to the overall percentage increase granted in this case (Staff Ex. 19, at 7).*

The company's proposal for the customer charge for customers that have standard kWh meters is $ 6.00, and it is $ 8.00 for the load management customers (Co. Ex. 13C, at 12). A basic difference between the company and the staff is **[231]** *that, in addition to costs associated with meters and services, the company's method includes the costs of a minimum distribution system. Company witness Moore testified that historically, the present $ 2.00 customer charge of the standard residential rate has been set at an artificially low level (Id. at 12-13).*

Although OCC agrees generally with the staff's proposed methodology, OCC believes that the staff has included certain expenses which are not customer based. As an example, OCC witness Yankel testified that 93 percent of account 908 expenses should be excluded from the calculation because they are related to marketing activities and should not be attributable to residential customers (OCC Ex. 9, at 32-33). However, the staff had already excluded a large portion of account 908 expenses from its calculation (Tr. XXVI, 74-76). Further, Mr. Yankel did not believe that costs concerning account collection activities should be included (OCC Ex. 9, at 34). Mr. Yankel is incorrect on this point. Clearly account collection costs are customer-based activities. Mr. Yankel's other concern about metering costs was accepted and addressed by the staff at the hearing (Staff Ex. **[232]** *19, at 6). OCC's proposed customer charge for customers with kWh meters is $ 2.10, and the load management customer charge is $ 4.10 (OCC Ex. 9, at 35-36).*

Upon consideration of customer charge proposals presented in this proceeding, the Commission concludes that the staff's proposal is the most reasonable. Although the company's proposal is predicated on customer-based costs, it results in a percentage increase in the customer charge which is extremely high. On the other hand, OCC's proposal does not account for even the minimum amount of customer-based costs, and its adjustments are not proper. The staff's proposal is based upon the principles of gradualism and stability and recovers expenses attributable to solely the number of customers. The staff's customer charge proposal should be adopted, with one exception.

In the staff report, the staff recommended that in the event the Commission does not authorize rates which recover the applicant's requested revenues, the customer charges should not be adjusted to a lower level because the staff's customer charges are minimally compensatory in the first place (S.R. at 70). However, at the hearing, staff witness Fortney testified **[233]** that the customer charge increase should be reduced proportionately (Staff Ex. 20, at 15-16). The Commission is of the opinion that the staff's first inclination, that the customer charges should not be adjusted, is more appropriate given

that they have been set at a minimum level. The staff's proposed customer charges should be adopted without adjustment for the authorized revenue level.

Seasonal or Temporary Discontinuance of Service Charge:

The company has proposed a seasonal or temporary discontinuance of service charge equal to the customer charge times the number of months a customer is disconnected, plus a $ 20.00 reconnection charge (S.R. at 49). This charge will be applicable when a customer wants to remain a customer at a certain location but wants the electric current to the residence temporarily discontinued due to the customer's occupancy being temporarily discontinued for reasons such as the customer is planning an extended vacation, has two homes, or owns a special purpose residence. The company contends that during the period of disconnection, expenses of standing ready to serve the customer and fixed costs continue. The company's proposal assigns these continuing **[234]** *costs to the temporarily disconnected customers instead of to customers taking service on a year-round basis (Co. Ex. 13C, at 14-15).*

The staff finds this charge to be inappropriate. The staff recommends that customers who request to have their service discontinued, seasonally or temporarily, should be assessed a charge equal to that of the approved reconnection charge (Staff Ex. 19, at 10). The Commission agrees.

The applicant's proposal would treat customers that are not receiving electric service, as if they were receiving service. A customer is charged a monthly customer charge to recover costs associated with the customer receiving service for that month. If a customer has chosen not to receive electric service for a number of months, that customer should not be subject to customer charges for those months (Staff Ex. 19, at 10). Ohio Edison's proposal should be rejected. A customer who requested to have service temporarily or seasonally discontinued should be assessed the approved reconnection charge when the customer chooses to recommence service.

Employee Discovery Fee:

The company has a program whereby company employees, except those whose specific job it is to **[235]** *find unauthorized use, are encouraged by the use of a $ 25.00 reward to discover and report unauthorized use of electricity. This program enables the company to recover the costs associated with fraud, which may have otherwise gone undetected (Co. Ex. 14C, at 4). This $ 25.00 reward is the employee discovery fee which the company proposes to charge to the customer.*

The staff and OCC oppose the $ 25.00 employee discovery fee. According to staff witness Howard, the company already has a tampering/investigation charge which recovers actual costs incurred by the applicant as a result of a customer's fraudulent practices. The employee discovery fee is not a cost that the applicant has incurred because of the customer. The company simply desires to provide monetary rewards to employees who report fraudulent practices. The staff believes that reporting fraudulent practices should be a part of the employees' job requirements (Staff Ex. 19, at 8).

The Commission agrees with staff and OCC. The actual costs incurred by the company associated with fraudulent use of electricity are recovered from the customer by imposition of the tampering/investigation charge. The company has presented **[236]** no argument which persuades the Commission that additional charges ought to be imposed. If the applicant desires to reward its employees with $ 25, then it should be the company that is responsible for this fee, not the ratepayers.

Other Miscellaneous Charges:

The company has proposed several other changes to the miscellaneous charges section of its tariff. Specifically, the company has proposed to increase the disconnection call charge from $ 5.00 to $ 7.00 and to increase the reconnect charge from $ 10.00 to $ 20.00 during normal business hours and from $ 20.00 to $ 30.00 after normal business hours (S.R. at 55). The company also proposes an increase in the dishonored check charge from $ 5.00 to $ 7.00 (Id.). Ohio Edison proposes to increase the meter test charge from $ 25.00 to $ 50.00 (Id.). Additionally, the company proposes to establish a tampering/investigation charge of $ 125 (Id.). The staff's investigation revealed that these charges are cost-based, and the staff recommends approval of the charges (Staff Ex. 19, at 7, 9).

In OCC's view, even though these charges may be assigned to particular customers, the increases are inappropriate given the overall **[237]** *negative impact (OCC Ex. 9, at 64). In reaching this conclusion, OCC determined that if these costs were spread over all the customers, it would not have a significant negative impact upon the other customers. Further, an increase in these fees will have little impact in reducing the work load of the company (Id. at 64-65). Finally, from a customer relations perspective, the impact of these charges is very negative and increasing the charges will make matters worse (Id. at 65).*

The Commission finds that the company's proposed increases to the miscellaneous charges as set forth above should be accepted. The costs associated with these charges can be assigned to particular customers, and under these circumstances, it has been the Commission's policy that the customers who cause the costs to be incurred should be responsible for paying those cost.

Pole Attachment Tariff :

Although there were several filed objections relating to Ohio Edison's pole attachment tariff, the issues raised have been resolved to the satisfaction of the affected parties by a joint stipulation and recommendation (Jt. Ex. 1). Ohil Edison, the Ohio Cable Television Association (OCTA), and the staff **[238]** agree that for purposes of this proceeding, the pole attachment rate should be $ 4.69 per year. The parties negotiated certain indemnification language for inclusion within the tariff. They also included the language on limitation of liability required by the Commission in Limitation of Liability Clauses in Utility Tariffs , Case No. 85-1406-AU-COI (October 6, 1987). In order to insure that the additional language is taken in proper context if the need to rely on the indemnity language should ever arise, the Commission notes, as provided in the stipulation, the following:

The Commission recognizes that the first two paragraphs of the indemnification clause in the pole attachment tariff were negotiated at arms length by the OCTA, as representative of the cable companies, and the company, two sophisticated parties of equal bargaining position. And it is the OCTA's and the company's belief that said indemnification clause represents an essential element in the fair balancing of the relevant interests in resolving the pole attachment issues. The staff believes that the pole attachment tariff is reasonable.

The Commission finds that the stipulation is reasonable and should **[239]** be adopted for purposes of this case.

Allocation of Pollution Control Costs:

As part of the applicant's allocated cost of service study, the company allocated the cost of pollution control equipment based upon an energy allocator. In the staff report, the staff accepted this allocation in determining the class revenues necessary to achieve a levelized rate of return (S.R. at 59). IEC, North Star, and RMI all objected to the classification of pollution control equipment as energy-related. At the hearing, however, the staff agreed with these intervenors that these costs should be allocated on a demand basis (Staff Ex. 20, at 16).

The pollution control equipment that Ohio Edison seeks to classify and allocate on the basis of energy are those facilities which were installed for the purpose of removing and storing pollutants produced in the generation of electricity (Co. Ex. 10A, at 13). The company has classified this equipment on an energy basis because of its belief that the size and capacity of the equipment are a function of the volume of energy produced by the generating facilities (Tr. V, 50, 81). The company also contends that these facilities are tradeoffs to permit **[240]** *utilization of less expensive coal than more expensive oil or gas and are, therefore, energy-related (Co. Ex. 13D, at 17).*

The staff and intervenors argue that in general, fixed costs are classified as demand and variable costs are classified as energy. They contend that the pollution control equipment costs are included in production plant accounts, which should be demand allocated. These costs are fixed and should be treated consistently with other production plant. The investment in pollution control equipment does not vary over time or with the amount of energy produced (Staff Ex. 20, at 16).

Based upon the record in this case, the Commission is of the opinion that the pollution control equipment should be allocated on an energy-related basis. While it is true that pollution control costs are fixed, the pollution control equipment was installed for the purpose of removing and storing

pollutants produced in the generation of electricity. Thus, the cost responsibility is a function of the amount of energy usage (Co. Ex. 10A, at 13). Further, Ohio Edison's investment in pollution control facilities is approximately $ 1 billion. This investment has served to reduce fuel costs **[241]** *for Ohio Edison's customers. For instance, pollution control facilities at the Mansfield plant were constructed to control pollutants produced by burning coal. Had oil or natural gas been the company's choice for fuel, there would have been no need for the facilities. Therefore, these installations were tradeoffs to permit the use of less expensive coal rather than more expensive oil and natural gas (Co. Ex. 13D, at 16-17). In making its rate design determinations, the staff used the company's cost of service study which allocated the cost of pollution control equipment based upon an energy allocator. Thus, the staff's rate design, which the Commission is accepting in this case, already incorporates the Commission's determination herein that the pollution control facilities be allocated on an energy-related basis. The objections of IEC, RMI, and North Star are overruled.*

The allocation of pollution control costs continues to be of interest to the Commission, and we will continue to review this matter in future rate cases of electric utilities. Our disposition of this issue, based upon the record in this case, does not foreclose the presentation of other evidence on this subject **[242]** in future proceedings.

General Service Large Tailblock:

Both the company and the staff proposed that there be no increase to the second block of the energy charge for the general service large/special contract class (S.R. at 84). North Star, however, argues that this tailblock should be increased because of its belief that the tailblock is under-priced and does not fully recover the variable cost of service (North Star Ex. 16, at 17). North Star further contends that the company's and staff's treatment of the second block benefits high load-factor customers at the expense of low load-factor customers (Id.).

Staff witness Fortney testified that the present charge of 92 cents per kWh reflects the average variable non-fuel production costs. Mr. Fortney stated that the Commission has recognized as appropriate and approved tailblock rates which approximate the average variable production operation and maintenance espenses. Furher, the staff finds it appropriate that rates reflect the more efficient use of facilities by higher load factor customers (Staff Ex. 20, at 11).

The Commission is of the opinion that based upon the record presented, North Star's objection must be overruled. **[243]** North Star's own exhibit (North Star Ex. 13) shows a calculation of 85 cents per kWh as the average variable non-fuel rate for the company (Tr. IX, 5). Clearly, at a rate of 92 cents per kWh, the tailblock cannot be underpriced. Further, a good rate design will encourage customers to improve their load factors. The company benefits from high load factor customers because the demand is more consistent throughout the day. With a high load factor, the company better uses its facilities by avoiding start-up and cycling of unit-type costs, thereby keeping its operations and maintenance costs down (Tr. XXI, 116-117). The setting of the tailblock of the energy charge at the staff's and company's level will encourage efficient use of facilities. The Commission concludes that the company's and staff's proposed second block of the energy rate should be adopted. It comports with the rate design principle that the tailblock energy charge should be held at a level approximating non-fuel variable costs and it encourages the efficient use of facilities. Cleveland Electric Illuminating Company, Case No. 85-675-EL-AIR (June 2, 1986) at 83-84.

Allocation of Demand-Related Costs to **[244]** *Interruptible Load :*

The company allocates demand-related production costs on the basis of each class' contribution to the 12 monthly system coincident peak demands. Both the staff and the company allocated fixed production and transmission costs to interruptible service based upon demand equal to 25 percent of the class' monthly coincident peak demands (Staff Ex. 20, at 6; North Star Ex. 16, at 19). IEC and North Star objected to this allocation. IEC's and North Star's position is that because the load that is interrupted should not be considered in a utility's capacity planning, and is less costly to serve, that load should not be assigned any production or transmission-related fixed costs (IEC Ex. 6, at 31; North Star Ex. 16).

Both the company and the staff provided testimony indicating that if interruptible load could be interrupted at any time capacity is required by the utility, then it would be appropriate not to assign

any of the demand-related costs to this class (Staff Ex. 20, at 6; Co. Ex. 13D, at 12). However, this is not the case for Ohio Edison. The terms of the agreements under which the company provides interruptible service limit the company's ability to interrupt. **[245]** *First, the interruptions are limited to 30 per year, not to exceed five per month. Each interruption is limited to a maximum duration of 13 hours. Second, an interruptible customer can terminate its contract upon 60 days notice at which time the company becomes obligated to serve that customer's load on a firm basis. Third, load reduction depends on the customer's response to the company's request to interrupt. If a customer chooses not to respond to an emergency interruption request, the company has the right to terminate the contract and the customer would revert to firm load status. Finally, economic interruptions can be avoided by the customers by forfeiting the interruptible credit for the month (Staff Ex. 20, at 7).*

The Commission finds that the 25 percent assignment of demand-related production and transmission costs to the interruptible customers is appropriate. This assignment recognizes that the interruptible load provides operational benefits to the company while taking into account the fact that this load cannot be interrupted at any time and for unlimited duration. Thus, the interruptible customers are responsible for a portion of the demand-related production **[246]** and transmission costs. The objections of IEC and North Star on this point are overruled.

Interruptible Demand Credit:

Standard interruptible and interruptible rate contract customers are billed for their total load and usage according to the general service large rate. An interruptible demand credit of $ 3.68 per kVa is then applied to a contract interruptible amount. Further, the contracts contain a provision that kVa charges may only be increased by 6 percent annually (S.R. at 88; Staff Ex. 19, at 13). Staff agrees that the applicant's capped kVa portion of the rate should be approved because it reflects the 6 percent increase allowed (Staff Ex. 19, at 13).

IEC objected to staff's proposal to increase the demand and energy charges for the interruptible customers without recommending an increase in the interruptible demand credit. According to IEC, the failure to increase the demand credit results in a proportionately greater revenue increase to the interruptible customers on the standard contract than to the firm contract service customers (IEC Ex. 6, at 33; Tr. XXXVI, 136). RMI joins in IEC's arguments.

The $ 3.68 demand credit is one provision of a contract providing **[247]** *for interruptible service. The parties to the contracts tied the energy and demand charges to the general service large rate. However, they made no provision which would allow for modification of the demand credit. IEC would have the Commission find that one provision of the interruptible contracts has become unreasonable and unilaterally change that provision of the contracts. The Commission is not inclined to take this action. Each contract was agreed to by the parties and submitted for Commission approval. The Commission has found the contracts as a whole to be reasonable under Section 4905.31, Revised Code. There is simply no justification for the Commission to change the demand credit provision provided for by the parties.*

IEC and RMI both contend that these contracts are not really arrived at by arms-length bargaining, but are presented to the customers as a take-it-or-leave-it situation. In support of this contention, they point to the uniform nature of the level of the credit in each contract contending that it is not a negotiated provision (Tr. XX, 172-173). They further point to a recent contract approved by the Commission in Ohio Edison Company/Copperweld Steel **[248]** *Company*, Case No. 90-465-EL-AEC (May 8, 1990), where Ohio Edison was able to negotiate more favorable terms, but the level of the demand credit remained at $ 3.68. Thus, they contend that the demand credit is not subject to negotiation. This contention is belied, however, by the recent amendment to the Ohio Edison/Copperweld contract filed with the Commission in the same case on June 4, 1990. The amendment provides that the demand credit range from $ 2.76 per kVa to $ 5.13 per kVa based upon the customer's load factor. The Commission cannot look behind the terms of the contracts and speculate on whether or not there was arms-length bargaining or what was in each party's mind when the $ 3.68 demand credit was agreed upon. IEC's objection should be overruled.

Optimum Interruptible Load :

In the general service large tariff, the company is proposing to change language which currently reads, "[t]he company will negotiate providing interruptible service . . ." to "[t]he company may, at its option, negotiate providing interruptible service . . ." The staff opposes the change on the grounds that the proposed language could result in discrimination. However, the staff proposed **[249]** *additional language stating that negotiations will be contingent upon the company's aggregate interruptible load not exceeding its optimum level. According to the staff, this level is currently being determined by the applicant and should be included in the tariff when it becomes available (S.R. at 52-53).*

RMI and North Star objected to the staff's proposed additional language on the optimum interruptible load contending that the parties should have the opportunity to participate in a determination on the optimum interruptible level. They fear that the staff's proposed language would place the determination of the optimum interruptible load solely in the hands of Ohio Edison (North Star Ex. 16, at 21). Staff believes that their fear is unfounded because when the optimum level is determined by the company, it will have to seek approval for its inclusion in the tariff. Staff would only recommend approval of an optimum level after an investigation as to the appropriateness of that level is performed. The staff believes that the parties should pursue their interest at that time (Staff Ex. 19, at 12).

The Commission agrees with the staff that Ohio Edison's proposal to change its tariff **[250]** *to provide for negotiation at the option of the company should be rejected. However, the Commission does not agree with the staff's proposal to include language that negotiations will be contingent upon applicant's aggregate interruptible load not exceeding its optimum level. Ohio Edison has not yet determined the optimum level of interruptible load. When Ohio Edison does make this determination, it can apply for Commission approval of both the tariff language and the appropriate optimum level. At the present time, no reason exists for the inclusion of such language.*

CONSUMER SERVICES

The staff of the consumer services department investigated the company's service procedures, customer complaints, and selected company policies and procedures for compliance with the company's tariffs. In addition, the staff investigated two separate issues at two of the nuclear plants partially owned by Ohio Edison (S.R. at 149). As a result of its review, the staff made several recommendations (S.R. at 149-189). A number of these recommendations were resolved by a stipulation entered into between the company and the staff (Jt. Ex. 2). No party has opposed the stipulation. The stipulation **[251]** *provides that Ohio Edison will implement certain procedures and report to the staff on its meter test program, pad-mounted enclosure inspection program, line clearance program, service interruption reporting program, customer information, and the Perry offgas system report. The Commission finds the stipulation to be reasonable and will adopt it.*

The company has proposed language in the meter test charge provision of its tariff which states that when the company tests a meter at the request of the customer, a charge of $ 50.00 shall be paid by the customer after testing is performed (Co. Ex. 5A, Sched. E-1, proposed sheet 53). The amount of this charge has been discussed previously in this opinion and order. Putting aside the amount of the charge, the staff expressed concerns over the language of the tariff. The staff found that the language was unclear as to under what circumstances a charge may be levied and recommended that the tariff should expressly state what the meter test charge is for and under what circumstances it applies (S.R. at 150). The company objected to staff's recommendation.

Staff witness Kirk testified at the hearing that the tariff should read as follows: **[252]** *"The company will test a meter at the request of the customer. The first test shall be at no charge to the customer. The company shall charge $ 50.00 for any subsequent tests performed at the customer's request. No payment will be required of the customer if the meter is found to be registering incorrectly" (Staff Ex. 25, at 3). Ms. Kirk testified that in 1989, of the 2,781 customer-requested meter tests that were conducted, only 197 customers were actually charged the tariffed rate (Id.). The staff's proposal, providing that the first meter test would be free, would avoid discrimination in the imposition of the charge (Tr. XXIV, 128).*

Company witness Moore testified that the company expends considerable effort in resolving high bill investigations. Meter testing is somewhat a last resort. The company will perform a meter test at its cost if it has reason to believe that the meter could be reading improperly. Only when the company

does not believe that there is a valid cause for concern, and the customer insists on a meter test, does the company charge for the test (Co. Ex. 13D, at 10).

The Commission finds that the staff proposed language should be adopted. Under the **[253]** *company's present tariff, it appears that the company does not impose a meter testing charge in most instances. Only when the company does not believe that the customer has a valid concern, does it impose the charge. The Commission finds that the company's practice results in unequal treatment of customers. How does one determine whether the customer's concern is valid or not? How does one determine whether the meter could be reading improperly? The Commission believes that the staff's proposal will result in more equitable treatment of customers. The company's objection is overruled.*

MANAGEMENT AND OPERATIONS REVIEW

Section 4909.154, Revised Code, states that the Commission shall consider the management policies, practices, and organization of a utility when fixing the rates that the utility will charge for service. For purposes of performing a review of the company's management and operations in this proceeding, staff selected several different areas of investigation: reorganization and marketing; internal auditing, inventory management and control, and risk management; rates and tariffs; and marketing and demand-side management (S.R. at 127). Staff offered a number **[254]** *of recommendations as the result of its investigation (S.R. at 128-147). Several of the staff's recommendations in this proceeding were resolved by a stipulation entered into between the company and the staff (Jt. Ex. 2). No party has opposed the stipulation, which provides that the company will perform certain studies and provide certain information to the staff related to the company's reorganization, marketing procedures, inventory management and control, and rates and tariffs. The Commission finds the terms of this stipulation to be reasonable and will approve it for purposes of this proceeding.*

Three other recommendations made by staff in this proceeding drew no objections from the parties. The staff recommended that the Commission accept the company's proposal to report on certain marketing activities on a quarterly basis (S.R. at 132). The staff also proposed that the company be directed to consider implementing a formalized communication process that would provide for timely reporting to the risk management department concerning the status of certain insurance required for services provided through contracts or other transactions and to report to the staff within 90 days **[255]** *of this opinion and order (S.R. at 141). Finally, the staff proposed that the company adopt a formal procedure to include the consideration of long-term impacts in evaluating the appropriateness of current and future short-term marketing goals (S.R. at 147). The Commission finds these recommendations to be reasonable and adopts them.*

OCC voiced two objections to the staff's marketing and demand-side management review. The staff reported that the company sets marketing goals in terms of sales targets. Currently the target is for two percent growth per year in sales, with the emphasis on off-peak sales. The staff indicated that although the current goals are for increased sales, other types of demand-side programs are also being evaluated to prepare for the day that reducing the growth rate of demand may be the primary marketing goal (S.R. at 147). OCC's objection is that the staff should have evaluated the reasonableness of Ohio Edison's sales target of two percent strategic growth per year. Further, OCC believes that the staff should have recommended that Ohio Edison be ordered to broaden its demand-side management efforts beyond strategic load growth to include conservation **[256]** *objectives.*

OCC's objections should be overruled. The Commission agrees with staff witness Puican that these determinations are more properly considered in an integrated resource planning proceeding (Staff Ex. 15, at 3-4). This opinion and order demonstrates that the rate case proceeding is already detailed and complicated enough without interjecting subjects which are specifically subjects of other proceedings.

NUCLEAR PERFORMANCE STANDARDS

The staff and IEC have recommended that the Commission adopt the same nuclear performance standards for Ohio Edison's shares of Perry and Beaver Valley Units 1 and 2 which were adopted for Toledo Edison and CEI in Case Nos. 88-170-EL-AIR and 88-171-EL-AIR. Staff witness DeVore testified that ratepayers of Ohio Edison are entitled to the same protection against poor nuclear plant performance that Centerior's ratepayers are, especially since Ohio Edison and Centerior share ownership in two of the nuclear plants (Staff Ex. 27, at 6).

Mr. DeVore indicated that the standard would first be applied in a 1991 electric fuel component proceeding. In that proceeding, the 36-month average operating availability factor of Perry and Beaver Valley Units **[257]** *1 and 2 would be compared to the computed 36-month average operating availability factors of domestic nuclear units. To the extent that the average operating availability factor for the company's nuclear units is below the 36-month average, a disallowance will be computed and applied through the reconciliation adjustment of the electric fuel component rate. If performance of the company's nuclear units is above the industry average, then certain other provisions apply which enable the company to offset poorer than average performance. There is also a provision in the standard for determining whether a company should receive recovery of and on its nuclear investment if availability falls below the 35 percent level (Id. at 6-7).*

Although Ohio Edison opposes the application of nuclear performance standards to it, it has presented no valid reason in support of its position. It argues that the Commission has in the past rejected nuclear performance standards for Ohio Edison and that Beaver Valley 1 is not part of the Centerior standards. The Commission, however, agrees with the staff and IEC that the Centerior nuclear performance standards should apply to Ohio Edison. First of **[258]** *all, Perry 1 and Beaver Valley 2 are already a part of the nuclear performance standard approved for CEI and Toledo Edison. The standard is already applicable to these nuclear units, and Ohio Edison's portion of those units should also be governed by the same standard. Second, Ohio Edison owns part interest in Beaver Valley 1. This unit should also be governed by the performance standard. The same reasons prompting the establishment of standards for the other nuclear units exist for establishing a standard for Beaver Valley 1 (IEC Ex. 6, at 15). The Commission believes that the Ohio ratepayers of all the owners of shares of nuclear units are entitled to the same protections. Accordingly, the Commission will adopt the Centerior nuclear performance standards for Ohio Edison's share of Perry 1 and Beaver Valley 1 and 2.*

The stipulation on nuclear performance standards adopted by the Commission in the Centerior cases provides that it would be desirable to use equivalent availability data in lieu of the operating availability data contained in NUREG-0020. According to the stipulation, such equivalent availability data is maintained for the units, but it is not readily available **[259]** *on an industry-wide basis like that contained in NUREG-0020. The stipulation provided that if reliable, equivalent availability data becomes readily available, the nuclear performance standards will be modified to use equivalent availability data in lieu of operating availability data. IEC suggests that now is the appropriate time to switch to the use of equivalent availability data. However, there is no evidence of record to indicate that the equivalent availability data is readily available on an industry-wide basis. Therefore, this IEC recommendation will not be adopted. However, the Commission remains interested in pursuing this issue and, accordingly, all interested parties shall provide testimony in Ohio Edison's Spring 1991 EFC proceeding concerning whether equivalent availability data can be obtained and how it could be applied. If it cannot be obtained, then the parties should develop alternatives which will assist in the development of standards which will result in an improvement over the operating availability standard.*

EFFECTIVE DATE

The Commission's general practice is to require that the applicant utilities notify customers of any rate increase authorized prior **[260]** *to the effective date of the new tariffs, and to delay the effective date in order that this customer notification can be accomplished. However, in instances where the Commission has not acted upon a rate application within 275 days of the date of filing, and where the applicant utility has not invoked the provisions of Section 4909.42, Revised Code, to attempt to place its proposed rates in effect subject to refund, the Commission establishes the effective date of the new tariffs as the date they are approved by entry so as not to penalize the company for its for-bearance. In this case, the applicant has not attempted to place its proposed rates in effect although the 275-day period has expired. Thus, the Commission finds that the effective date of the tariffs filed pursuant to this opinion and order shall be the date applicant files four complete, printed final copies of its tariffs pursuant to the entry approving the form of the new tariffs. The applicant shall notify the affected customers of the increase in rates authorized herein by means of insert or attachment to its billings, by special mailing, or by a combination of the above methods. The applicant shall submit copies* **[261]** of a proposed customer notice for the Commission's review when it files its new tariffs for approval.

FINDINGS OF FACT:

1) The value of all of applicant's property used and useful for the rendition of electric service to the jurisdictional customers affected by this proceeding, determined in accordance with Sections 4909.05 and 4909.15, Revised Code, as of the date certain of June 30, 1989, is not less than $ 4,045,603,000.

2) For the twelve-month period ending December 31, 1989, the test period in this proceeding, the revenues, expenses, and net operating income realized by the applicant under its present rate schedules were $ 1,666,054,000, $ 1,301,203,000, and $ 364,851,000, respectively.

3) This net annual compensation of $ 364,851,000 represents a rate of return of 9.02 percent on the jurisdictional rate base of $ 4,045,603,000.

4) A rate of return of 9.02 percent is insufficient to provide applicant reasonable compensation for the service rendered to customers affected by the application.

5) A rate of return of 11.20 percent is fair and reasonable under the circumstances presented by this case and is sufficient to provide the company just compensation and return on the **[262]** *value of its property used and useful in furnishing electric service to its customers.*

6) A rate of return of 11.20 percent applied to the rate base of $ 4,045,603,000 will result in net operating income of $ 453,108,000.

7) The allowable annual expenses of the company for purposes of this proceeding are $ 1,355,322,000.

8) The allowable gross annual revenue to which applicant is entitled for purposes of this proceeding is the sum of the amounts stated in Finding 6 and 7, or $ 1,808,430,000.

9) Applicant's present tariffs should be withdrawn and canceled and applicant should submit new tariffs consistent in all respects with the discussion and findings set forth above.

CONCLUSIONS OF LAW:

1) The application in this case was filed pursuant to, and this Commission has jurisdiction thereof, under the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code. Further, the applicant has complied with the requirements of those statutes.

2) A staff investigation was conducted and a report duly filed and mailed, and public hearings have been held in this case, the written notice of which complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.

3) The **[263]** *existing rates and charges as set forth in the tariffs governing electric service to customers affected by this application are insufficient to provide applicant with adequate net annual compensation and return on its property used and useful in the rendition of electric service.*

4) A rate of return of 11.20 percent is fair and reasonable under the circumstances of this case and is sufficient to provide applicant just compensation and return on its property used and useful in the rendition of electric service to its customers.

5) Applicant should be authorized to cancel and withdraw its present tariffs governing service to customers affected by this application and to file tariffs consistent in all respects with the discussion and findings set forth above.

ORDER:

It is, therefore,

ORDERED, That the application of Ohio Edison Company for authority to increase its rates and charges for electric service is granted to the extent provided in this opinion and order. It is, further,

ORDERED, That applicant is authorized to cancel and withdraw its present tariffs governing service to customers affected by this application and to file new tariffs consistent with the discussion and findings **[264]** *set forth above. Upon receipt of four complete copies of tariffs conforming to this opinion and order, the Commission will review and approve those tariffs by entry. It is, further,*

ORDERED, That the effective date of the new tariffs shall be the date applicant files four complete, printed final copies of its tariffs pursuant to the entry approving the form of the new tariffs. The rates contained in the new tariffs shall be applicable to all bills rendered on or after the effective date. It is, further,

ORDERED, That applicant shall immediately commence notification of its customers of the increase in rates authorized herein by insert or attachment to its billings, by special mailing, or by a combination of these methods. Applicant shall submit a proposed form of notice to the Commission when it files its tariffs for approval. The Commission will review the notice and, if it finds it to be proper, will approve the notice by entry. It is, further,

ORDERED, That applicant comply with all Commission directives set forth in this opinion and order. It is, further,

ORDERED, That all objections and motions not specifically discussed in this opinion and order, or rendered moot thereby, **[265]** *are overruled and denied. 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

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals.	)	Case No. 07-551-EL-AIR Case No. 07-552-EL-ATA Case No. 07-553-EL-AAM Case No. 07-554-EL-UNC

OPINION AND ORDER

The Commission, coming now to consider the above-entitled application, testimony, partial stipulation, and other evidence presented in this proceeding, hereby issues its opinion and order.

APPEARANCES:

Stephen L. Feld, Kathy J. Kolich, Arthur E. Korkosz, James W. Burk, Mark A. Hayden, Ebony L. Miller, FirstEnergy Service Company, 76 South Main Street, Akron, OH 44308, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and William L. Wright, Thomas W. McNamee and John H. Jones, Assistant Attorneys General, 180 East Broad Street, Columbus, OH 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small and Richard C. Reese, Assistant Consumers' Counsels, 10 West Broad Street, Suite 1800, Columbus, OH 43215, on behalf of residential utility consumers of the FirstEnergy Companies.

Chester, Willcox and Saxbe, LLP, by John W. Bentine and Mark S. Yurick, 65 E. State Street, Suite 1000, Columbus, OH 43215, and Robert J. Triozzi, Director of Law, and Harold A. Madorsky, Assistant Director of Law, 601 Lakeside Avenue, Room 106, Cleveland, OH 44114-1077, on behalf of the City of Cleveland.

McNees, Wallace & Nurick, by Samuel C. Randazzo, Lisa G. McAlister, and Joseph M. Clark, 21 East State Street, 17th Floor, Columbus, OH 43215, on behalf of Industrial Energy Users-Ohio.

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McNees, Wallace & Nurick, by Thomas L. Froehle, 21 East State Street, 17th Floor, Columbus, OH 43215, on behalf of Ohio Home Builders Association.

David C. Rinebolt, Executive Director and Counsel, 231 West Lima Street, P.O. Box 1793, Findlay, OH 45839, and Colleen L. Mooney, Counsel, 1431 Mulford Road, Columbus, OH 43212, on behalf of Ohio Partners for Affordable Energy.

Bricker & Eckler LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, OH 44114, and E. Brett Breitschwerdt, 100 South Third Street, Columbus, OH 43215, on behalf of the Ohio Schools Council.

Brickfield, Burchette, Ritts & Stone, P.C., by Garrett A. Stone and Michael K. Lavanga, 1025 Thomas Jefferson Street, N.W., 8th Floor, West Tower, Washington, D.C. 20007, on behalf of Nucor Steel Marion, Inc.

Boehm, Kurtz & Lowry, by David F. Boehm, Michael L. Kurtz, and Kurt J. Boehm, 36 East Seventh Street, Suite 1510, Cincinnati, OH 45202, on behalf of the Ohio Energy Group.

Boehm, Kurtz & Lowry, by Michael L. Kurtz and Kurt J. Boehm, 36 East Seventh Street, Suite 1510, Cincinnati, OH 45202, on behalf of the Kroger Co.

Bricker & Eckler LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, OH 44114, on behalf of the Ohio Association of School Business Officials, the Ohio School Boards Association and the Buckeye Association of School Administrators.

Vorys, Sater, Seymour and Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, OH 43216-1008, and Cynthia A. Fonner, Constellation Energy Group, Inc., 550 W. Washington Street, Suite 300, Chicago, IL 60661, on behalf of Constellation NewEnergy, Inc

Vorys, Sater, Seymour and Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, OH 43216-1008, and Bobby Singh, Integrys Energy Services, Inc., 300 West Wilson Bridge Road, Suite 350, Worthington, OH 43085, on behalf of Integrys Energy Services, Inc.

Joseph P. Meissner, The Legal Aid Society of Cleveland, 1223 West 6th Street, Cleveland, OH 44113, on behalf of Neighborhood Environmental Coalition, Consumers for Fair Utility Rates, and The Empowerment Center of Greater Cleveland.

HISTORY OF THE PROCEEDING:

The applicants, The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, Companies or FirstEnergy), are electric companies as defined by Section 4905.03(A)(4), Revised Code, and public utilities as defined by Section 4905.02, Revised Code. Accordingly, the Companies are subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code. The Companies are Ohio corporations engaged in the business of providing retail electric distribution services to approximately 2.1 million consumers in 44 counties in Ohio.

On May 8, 2007, the Companies filed a notice of intent to file an application for an increase in rates for electric distribution service for all of the Companies' service territories. FirstEnergy requested that the test year begin March 1, 2007, and end February 29, 2008, and that the date certain be May 31, 2007. By entry of May 30, 2007, the Commission approved the requested date certain and test year. On June 7, 2007, the Companies filed an application to increase their electric distribution rates, effective January 1, 2009, for TE and OE, and effective May 2009 for CEI. Also on May 8, 2007, the Companies requested waivers of various standard filing requirements contained in Rule 4901-7-01, Appendix A, Chapter II, Ohio Administrative Code (O.A.C.), to the extent that the requirements require information related to generation service, which is now competitive and no longer owned and controlled by the Companies, or information that is sensitive, confidential, or would be unduly burdensome to provide. On August 1, 2007, the Commission issued an entry that accepted the application for filing as of June 7, 2007. The Companies' waiver requests were granted on May 30, 2007, and June 6, 2007. On February 12, 2008, proofs of publication of the application were admitted into the record (Co. Ex. 18).

Pursuant to Section 4909.19, Revised Code, Staff conducted an investigation of the matters set forth in the Companies' application. On December 4, 2007, Staff filed with the Commission its written reports of investigation, one for each company (Staff Reports). By entry dated December 21, 2007, persons wishing to file objections to the three Staff Reports were directed to do so by January 3, 2008, and those wishing to intervene were directed to file motions to intervene by January 15, 2008. This entry also scheduled a prehearing conference for January 22, 2008, and granted the Office of the Ohio Consumer's Counsel's (OCC) motion for a one-week extension of time for filing intervenor testimony to January 10, 2008.

The following parties were granted intervention by entries dated August 1, 2007, December 21, 2007, January 7, 2008, and during the prehearing conference on January 22, 2008:

Ohio Energy Group (OEG)
Kroger Company (Kroger)

OCC
Ohio Home Builders Association (OHBA)
Northwest Ohio Aggregation Coalition communities (NOAC)
Ohio Partners for Affordable Energy (OPAE)
City of Cleveland (Cleveland)
Ohio Schools Council (OSC)
Ohio Manufacturer's Association (OMA)
Constellation NewEnergy, Inc. (CNE)
Nucor Steel Marion, Inc. (Nucor)
Neighborhood Environmental Coalition, Consumers for Fair Utility Rates, Empowerment Center of Greater Cleveland (jointly, The Citizens Coalition)
Integrys Energy Services, Inc. (Integrys)
Industrial Energy Users-Ohio (IEU)

Additionally, motions to admit the following counsel to practice pro hac vice before the Commission in this proceeding were granted on December 21, 2007: David C. Rinebolt (OPAE), Cynthia A. Fonner (CNE), Garrett A. Stone (Nucor), and Micahel K. Lavanga (Nucor).

On January 3, 2008, objections to the Staff Reports were filed by the following parties: FirstEnergy, Cleveland, CNE, IEU, Kroger, Nucor, OCC, OEG, OHBA, OPAE, and OSC.

On January 7, 2008, the attorney examiner issued an entry scheduling the evidentiary hearing to commence on January 29, 2008. Subsequently, entries issued on February 13, 2008, and February 14, 2008, scheduled twelve local public hearings in the following cities in the Companies' three service territories and ordered the Companies to publish notice of the local public hearings Akron, Barberton, Austintown, Wauseon, Toledo, Maumee, Geneva, Cleveland, Shaker Heights, Sandusky, Springfield, and Mansfield.

Approximately 654 members of the public attended the twelve public hearings regarding FirstEnergy's proposed distribution rate increase, and approximately 188 witnesses provided sworn testimony. Numerous witnesses testified opposing the distribution rate increase. Many of those witnesses argued that FirstEnergy's rates on a total bill basis were already high and they could just not afford to pay any additional amounts for electric service, or for any other service. Many of those witnesses explained their personal situations and stressed the hardship of recent gasoline price spikes, which were causing other products to increase as well. Others focused on service quality issues in their neighborhoods. Over 40 representatives from various school districts and school boards testified regarding the detrimental impact that the elimination of the discounted school tariffs would have on the school districts and their financial situations. The school

representatives also stated that FirstEnergy's Energy for Education II Program (E4E II Program) was scheduled to end on December 31, 2008, which would add an additional burden on those schools who took advantage of the program that provided for a discount on their total electric bills if they prepaid their expected electric bill. Conversely, several witnesses testified that FirstEnergy was a good corporate citizen, praising community involvement and customer service.

The evidentiary hearing commenced on January 29, 2008. During the evidentiary hearing, a partial stipulation and recommendation (stipulation) was entered into between a number of parties with diverse interests, addressing revenue distribution and non-residential rate design issues. The stipulation was filed on February 11, 2008 and admitted into evidence as Signatory Parties Ex. 1 on February 25, 2008. The stipulation only resolved certain issues for certain parties, and thus was fully examined through the course of the evidentiary hearing as discussed below.

COMMISSION REVIEW AND DISCUSSION:

In this proceeding, CEI seeks an increase in revenues of $108,598,923, which represents an increase of 24.59 percent over current revenues. Staff recommended a revenue increase of between $29,250,365 and $31,035,018, which represents an increase over current revenue between 6.71 and 7.12 percent (CEI Staff Report at 92, Schedule A-1, and Staff Ex. 19 at LET-2 CEI). TE seeks an increase in revenues of $70,539,796, which represents an increase of 44.60 percent over current revenues. Staff recommended a revenue increase of between $37,937,862 and $38,663,794, which represents an increase over current revenue between 24.18 and 24.64 percent (TE Staff Report at 92, Schedule A-1, and Staff Ex. 19 at LET-2 TE). OE seeks an increase in revenues of $160,762,886, which represents an increase of 31.05 percent over current revenues. Staff recommended a revenue increase of between $69,049,711 and $71,190,494, which represents an increase over current revenue between 13.59 and 14.01 percent (OE Staff Report at 91, Schedule A-1, and Staff Ex. 19 at LET-2 OE).

RATE BASE AND OPERATING INCOME:

Uncontested Issues

The parties filed a number of objections which Staff agreed to at the hearing and which no other party disputed. Staff filed revised schedules to address these objections (Staff Ex. 19).

The Companies objected to Staff's decision to eliminate certain subtransmission land rights from plant in service. The evidence in the record demonstrates that the property in question was properly jurisdictionally allocated to distribution functions rather than the transmission function (Co. Ex. 9-B at 2-4). Staff agreed with this objection

(Staff Ex. 4 at 3). FirstEnergy also objected that the Staff Reports misclassified ATSI lease revenues. Staff agreed with this objection (Staff Ex. 4 at 3-4).

FirstEnergy objected to Staff's calculation of FICA tax expense. Staff agreed with the objection (Staff Ex. 17 at 5). Moreover, in calculating the FAS 109 adjustment in the Staff Report, the most current available information was used. Subsequently, more current information became available and was incorporated at the hearing (Staff Ex. 8 at 5-6). In addition, the current amortization was added back into operating expenses (Staff Ex. 8 at 9).

Further, Staff agreed to several corrections to the calculation of real and personal property tax expense (Staff Ex. 16 at 15-17). Staff also determined that the municipal tax deferral amortization included in the Staff Report is not needed as it duplicates the effect of the annual reconciliation and that deferred federal taxes should have been calculated to reflect various changes Staff made to local and Pennsylvania tax rates (Staff Ex. 8 at 7).

Staff also agreed to a correction to Account 190 recommended by OCC and agreed to by FirstEnergy witness Young (Co. Ex. 6-B at 2; Staff Ex. 8 at 11). Staff agreed to OCC's objection that some wage increases were mistakenly double-counted in the Staff Report (Staff Ex. 17 at 4). Finally, Staff agreed that an adjustment should be made to reflect an adjustment to the Pennsylvania Capital Tax expense (Staff Ex. 16 at 15).

Service Company General Plant

The Companies objected to the failure of Staff to include in rate base the allocated portion of certain assets, which the Companies erroneously failed to include in the Companies' filing as part of the rate base. The Companies argued that these assets were on the books of the operating companies at the time of the last rate case and were subsequently transferred to the services company in 2000 (Co. Ex. 1-C, at 2-6). However, these assets were transferred back to the operating companies, effective January 2008. The Companies claimed that these assets are used to support distribution functions and that there is no dispute that these assets are used and useful. Further, the Companies argued that, although these assets were not included in its rate case filings, it had disclosed the existence of the assets to Staff in sufficient time to allow Staff to investigate and review the assets.

Staff argued that the Companies sought to include in rate base the value of plant which was transferred to its books after the date certain in this case (Staff Ex. 7 at 2; Tr. IX at 145). Staff contended that, by statute, the value of rate base must be determined by examination as of date certain. Section 4909.15(A)(1), Revised Code. Moreover, Staff stated that it had not audited the disputed assets and that, without an audit, Staff cannot say that these assets are used and useful or if these assets even exist. Moreover, Staff

pointed out that depreciation on these assets is still included in the payments to the service company made by the operating companies (Co. Ex. 1-C at 8).

The Commission finds that the assets were properly excluded from the rate base because the assets were transferred back to the Companies books after the date certain in this proceeding. We agree with Staff's position that Section 4909.15(A)(1), Revised Code, requires that the value of the rate base must be determined at date certain. Further, we find that the timing of the transfer of the assets back to the books of the Companies did not allow Staff a sufficient opportunity to audit these assets. Thus, we find that Staff properly excluded these assets from the rate base.

Working Capital

In their application, the Companies set their working capital allowance to zero for purposes of this proceeding. Nonetheless, the Companies filed a number of objections to the Staff Report related to working capital. As the Companies pointed out, the working capital allowance cannot be negative in a rate base determination; therefore, in setting the working capital at zero, the Companies rendered moot the issue of cash working capital. In light of the fact that the issue of cash working capital is moot in this case, it is unnecessary for the Commission to reach a determination on the objections filed by FirstEnergy regarding working capital.

Customer Deposits

FirstEnergy raised two objections with respect to customer deposits. First, FirstEnergy argued that the Staff Report considered all customer deposits to be distribution-related, rather than splitting customer deposits between generation and distribution. Staff corrected this error (Staff Ex. 16 at 3.).

In addition, the Companies objected to Staff's failure to address how customer deposits related to generation will be treated for regulatory purposes. Staff acknowledged that it had not addressed generation-related customer deposits, but Staff contended that it would not be appropriate to address the treatment of generation-related customer deposits in a distribution rate case.

The Commission agrees with Staff's position. Generation-related customer deposits are not an appropriate issue for a distribution rate case, and this issue should be addressed in a proceeding related to generation rates and charges.

Rate Certainty Plan (RCP) Fuel Deferral

The Companies objected to Staff's failure to recommend recovery of the deferral of fuel costs permitted under the RCP Stipulation approved in Case No. 05-1125-EL-ATA, et al., Opinion and Order (January 4, 2006), Entry on Rehearing (January 25, 2006), and Entry on Rehearing (March 1, 2006). The Companies also noted that a separate proceeding has been opened to consider a cost recovery mechanism for the deferred fuel costs. *In re FirstEnergy*, Case No. 08-124-EL-ATA. Staff contended that Case No. 08-124-EL-ATA is the proper proceeding to consider this issue.

The Commission agrees with Staff that the instant proceeding, a distribution rate case, is not a proper proceeding to consider recovery of fuel costs related to generation. Therefore, the Commission finds that this issue should be addressed in Case No. 08-124-EL-ATA.

Date Certain Deferrals

The Companies believe that post date certain balances should be used for certain expense determinations. FirstEnergy argued that depreciation, amortization of limited term property, and property tax expense on plant in service should be calculated based upon end of test year balances rather than the date certain balances, which are lower. In addition, the Companies claimed that line extension deferrals, transition tax deferrals, and demand side management (DSM) deferrals also should be based upon end of test year balances rather than the date certain balances. The Companies argued that each of these expenses is now known through the end of the test year and that these expense levels will be more representative of the levels which will be experienced during the period in which rates will be in effect. FirstEnergy argued that the Commission has allowed similar treatment of this issue in the past. See *In re Cleveland Electric Illuminating Co.*, Case No. 80-376-EL-AIR, Opinion and Order at 29 (May 1, 1981).

Staff argued that the disputed items are rate base items. Rate base items must be calculated as of the date certain. See Section 4909.15(A)(1), Revised Code. Further, Staff argued that the Companies' reliance on Case No. 80-376-EL-AIR is misplaced because the Commission held in that case that depreciation expense should match date certain net plant. *Cleveland Electric Illuminating Co.*, Case No. 80-376-EL-AIR, Order at 12.

We agree with Staff's position that Section 4909.15(A)(1), Revised Code, requires that the value of the rate base must be determined at date certain. The disputed items are rate base items; by statute, their value must be calculated as of the date certain.

Line Extension Capital Costs

FirstEnergy objected to the failure of Staff to include capital costs for line extensions. Staff agreed with the objection (Staff Ex. 16 at 9-10). FirstEnergy also objected to Staff's position that monthly customer payments were intended to be the total recovery of capital costs. Staff conceded this issue and provided the alternative calculation at the hearing (Staff Ex. 16, Attachment MAC-2).

Finally, FirstEnergy argued that the carrying charges for the line extension deferred costs should be calculated on a gross of tax, rather than a net of tax basis. The Commission will address next the calculation of the carrying costs for deferrals of line extension costs as well as deferrals of distribution costs and transition taxes.

Calculation of Carrying Charges for Deferrals

OCC objected to the failure of the Staff Report to calculate the carrying charges for various deferrals on a net-of-tax basis. OCC's witness Effron testified at the hearing that "if a particular cost is deductible for income tax proposes as incurred, then the net cash investment to fund the deferred recovery of such a cost is reduced by the income tax savings associated with the tax deduction. Therefore, applicable deferred taxes should be offset against the balance on which interest is accrued" (OCC Ex. 1 at 28).

At the hearing, Staff agreed with OCC's objection. Staff witness Castle testified that the calculation of the deferrals on a net-of-tax basis was "sound regulatory policy" (Staff Ex. 16 at 8, 12). Staff noted that Commission practice has been to calculate carrying charges on a net-of-tax basis. *In re Cleveland Electric Illuminating Co.*, Case No. 88-205-EL-AAM, Entry (February 17, 1988); *In re Cleveland Electric Illuminating Co.*, Case No. 92-713-EL-AAM, Entry (December 17, 1992). Staff contended that this is good regulatory practice because the purpose of a carrying charge is to compensate the utility for carrying the "investment." Since the "investments" are expenses for tax purposes, they are deductible and serve to reduce the current federal tax obligation; thus, Staff reasoned, the Companies are not carrying the cost of the "investment" to the extent there is a tax benefit.

FirstEnergy argued that the calculation of carrying charges for the deferrals should not be done on a net-of-tax basis. FirstEnergy's witness Wagner testified that nothing in the RCP Stipulation or the Commission orders approving the stipulation requires such an adjustment and that the calculation of the carrying charges on a net of tax basis would change the economics of the RCP Stipulation for FirstEnergy (Co. Ex. 3-C at 5). The Companies also contended that, based upon the testimony in support of the RCP Stipulation, the Commission should have inferred that the calculation of the carrying charges was intended to be on a gross-of-tax basis (Tr. VIII at 26; Co. Ex. 3-C at 5).

The Commission notes that Staff has recommended that the tax deductibility of the debt rate be reflected in the carrying charge on a net-of-tax basis. However, although Staff's recommendation accounts for the deductibility of the debt rate, the recommendation does not account for the fact that the revenues collected are taxable. If we were to adopt Staff's recommendation, the Companies would not recover the carrying charges provided for in the RCP Stipulation, which stated that the carrying charges would be equal to the Companies' actual long term cost of debt. Therefore, we find that the carrying charges on the deferrals should be calculated on a gross of tax rather than a net-of-tax basis in order to ensure that the Companies recover their actual long term cost of debt.

The Commission notes that our decision in this proceeding is not consistent with our decision in *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., Toledo Edison Co.*, Case No. 08-935-El-SSO Opinion and Order at 58 (December 19, 2008). We further note that the order is of no effect, therefore, our decision in Case No. 08-935-EL-SSO need not be addressed.

Distribution Deferrals

In the RCP Stipulation, the Companies were authorized to defer up to $150 million per year in distribution expenses for 2006, 2007, and 2008. In this case, the Companies seek to begin recovery of the full $450 million plus carrying charges. FirstEnergy claimed that no party has challenged the specific level of any individual element or suggested that any of the underlying expenditures were imprudent or unreasonable. Moreover, FirstEnergy claimed that OCC's challenges to the deferrals are contrary to its obligations as a signatory party to the supplemental stipulation in the RCP proceeding and that the Commission should not entertain OCC's objections.

OCC argued that the Companies failed to establish that the expenses incurred by the Companies exceeded the amounts being recovered in rates. OCC claimed that the expenditures on distribution operations and maintenance by the Companies were $8.6 million less in 2006 than they were in 2000 when distribution rates were capped. Moreover, OCC argued that Staff's acceptance of the Companies' method for the computation of the distributions deferrals is inappropriate for two reasons. First, Staff relied on an improper definition of distribution operation and maintenance (O&M) expense (OCC Ex. 1 at 16). Second, OCC claimed that Staff improperly measured the distribution O&M embedded in current rates. OCC argued that the calculation of distribution O&M expenses embedded in current rates should recognize the growth in sales by FirstEnergy over the time elapsed since its last rate cases. Thus, in order to calculate the amount of distribution revenues embedded in current rates, OCC's witness Effron calculated the proportion of distribution revenues that covered distribution O&M

expenses and applied that proportion to the Companies' current revenues (OCC Ex. 1 at 18).

Staff responded to OCC by stating that it calculated the distribution O&M amount by starting with the 2006 total O&M and removing amounts which were not distribution-related. Staff acknowledged one error in its calculations, which Staff stated was easily corrected. Staff also argued that the full $150 million for 2007 cannot be recovered because the expenditures did not occur prior to May 31, 2007, the date certain in this case. Instead, Staff recommended that FirstEnergy be permitted to recover $62,500,000, which is five-twelfths of the deferral authorized for 2007.

The Commission finds that Staff has properly calculated the amount of the distribution deferrals in accordance with the RCP Stipulation and our order adopting the RCP Stipulation. The evidence in the record demonstrates that in determining the allowable distribution deferrals, Staff used the distribution O&M expenses established in the FirstEnergy electric transition plan proceeding, Case No. 99-1212-EL-ETP as the baseline for the distribution O&M expenses currently in base rates. Staff then subtracted this amount from both the 2006 and 2007 distribution O & M expenses, to determine the amount of O&M expenses which should be deferred (Staff Ex. 16, Exhibit MAC-1 at 3, 9, 15). Because the RCP Stipulation does not provide for adjustments to the amounts of distribution expenses currently embedded in base rates, the Commission does not believe that the adjustments to the baseline proposed by OCC are appropriate to determine the amount of expenses currently in base rates. However, with respect to the 2007 deferrals, neither the Companies' approach of including the full amount of the deferrals authorized by the RCP Stipulation nor Staff's approach of including five-twelfths of the deferrals for 2007 authorized by the RCP Stipulation determines the deferral balance as of the date certain. As discussed above, rate base items should be calculated as of the date certain. Accordingly, the Commission finds that the amount of the 2007 distribution deferrals included in the rate base should be the balance as of the date certain, $71,917,186 (Staff Ex. 16, Exhibit MAC-1 at 1).

Transition Tax Deferral

In addition to arguing that the carrying charges for the transition tax deferrals should be calculated on a net-of-tax basis, OCC objected to the inclusion of transition tax deferrals in the Companies' rate bases (OCC Ex. 1 at 26). OCC believes that, given the relatively short period for recovery of the transition tax deferrals (i.e., five years), including the deferrals in the rate bases is neither necessary nor appropriate. In the alternative, OCC argued that, if deferrals are included in the Companies rate bases, the carrying charges should be no higher than the embedded cost of debt.

Staff noted that the stipulation which formed the basis for this deferral allows accrual and capitalization of interest on the deferred transition tax balance. Staff also argued that including the deferral balance in rate base will provide current carrying charge recovery, will halt further interest capitalization, and is a much more straight-forward carrying charge recovery mechanism. However, Staff agreed that the carrying charges should be no higher than the embedded cost of debt (Staff Ex. 16 at 11-12).

The Commission agrees with Staff's position on this issue. Including the deferral balance in rate base stops any further interest capitalization and is consistent with the stipulation approved by the Commission in *In re FirstEnergy*, Case No. 99-1212-EL-ETP, et al.

Advertising Expense

FirstEnergy objected to the elimination in the Staff Report of certain advertising expenses. At the hearing, Staff witness Smith agreed that certain recruitment-associated expenses should be allowed; however, Staff objected to the recovery of expenses for promotional advertising (Staff Ex. 17 at 3). FirstEnergy's witness Burgess testified that the advertising materials in question were informational rather than promotional (Co. Ex. 10-B at 3).

Staff noted that the applicable test for determining whether the advertising is institutional, promotional, consumer informational or conservational is the dominant message test. Institutional and promotional advertising does not provide a direct primary benefit to customers, and the expenses from such advertising should not be recovered in rates.

The Commission finds that the advertising for which recovery is sought simply announces that the service quality for the Companies has improved; therefore, we find that the dominant message was promotional and that recovery of such advertising expenses should be denied.

Uncollectable Revenues

FirstEnergy filed two objections related to uncollectible revenues. First, the Companies objected to the failure of Staff to provide a recommendation addressing uncollectible revenues associated with generation service. Second, the Companies objected to Staff's failure to exclude wholesales sales, for which there are no bad debts, from its calculation.

Staff argued that no recommendation was made regarding uncollectible revenues associated with generation service because this is a distribution rate case and issues related

to generation should be addressed in a generation-related proceeding. With respect to the second objection, Staff agreed and accepted the value testified to by the Companies' witness Ridmann (Co. Ex. 1-C at 15).

The Commission finds that uncollectible revenues related to generation should be addressed in a generation-related proceeding rather than a distribution rate case.

Depreciation of Meters

FirstEnergy proposed a ten-year depreciation accrual rate for meters using an estimated average useful life in order to begin to transition from current meters to advanced metering equipment (Co. Ex. 5-B at 4). Staff noted that there is no specific plan for the replacement of the meters (Tr. I at 118-119). Staff believes that, in the absence of a specific plan for the replacement of the existing meters, any adjustment would be based upon speculation, which is not a basis for ratemaking.

We agree with Staff's position that it is premature to accelerate depreciation of the existing installed base of meters in the absence of a specific plan to retire and replace those meters.

Private Outdoor Lighting

FirstEnergy proposed to terminate its private outdoor lighting programs and has requested authority to depreciate the assets used to provide this service over five years rather than their remaining useful life. However, Staff noted that existing private outdoor lighting customers can continue to receive this service as long as they wish; FirstEnergy is simply not accepting any new customers for this service. Further, Staff explained that, when a customer chooses to terminate this service, disposal of the asset is the responsibility of the customer (Staff Ex. 6 at 12-13). Thus, Staff concluded that there is no need to accelerate the depreciation of these assets.

We agree with Staff's position that there is no need to accelerate the depreciation of the assets because the termination of the program has no effect upon existing assets.

Annualized Employee Count

FirstEnergy objected to the manner in which Staff calculated annualized labor expense. The Companies adjusted payroll expense and payroll tax expense to reflect estimated employee levels and wage levels for full-time employees as of the end of the test year (Co. Ex. 4 at 2). In the Staff Report, Staff adjusted payroll expense to reflect the average number of employees for the most recent six months of actual employee counts (Staff Ex. 17 at 4). The Companies argued that Staff's use of average employee levels

during the period from March 2007 and August 2007 bears no correlation to the number of employees during the period when rates will be in effect. The Companies noted that the record reflects the fact that the employee levels for full-time employees have steadily increased during each month of the test year (Co. Ex. 4-C, Exhibit JRK-7).

Staff argued that the most recent actual data should be used in determining the employee level to calculate labor expense. However, Staff claimed that FirstEnergy has not provided sufficient actual information to allow this calculation to be completed.

The Commission finds that the annualized employee count should be based upon the most recent actual data available in the record rather than an estimate. The Companies did not argue that Staff failed to consider the most recent actual data or that additional data was made available to Staff; the Companies contended that the calculation should be based upon an estimate instead. Staff contended that it based its calculation upon the most recent data made available to it by the Companies. However, Staff used a six-month average rather than the most recent month for which data is available. This does not properly take into account the fact the employee count has been trending up (Co. Ex. 4-C. Exhibit JRK-7). Accordingly, the Commission finds that annualized employee count and calculation of labor expense should be based upon the most recent monthly data available.

Retired Plant Expenses

FirstEnergy seeks recovery of certain expenses associated with securing and maintaining several retired OE generation facilities. FirstEnergy noted that, although these facilities were used for generation, the retired facilities remain assets of the distribution company, and OE continues to have expenses associated with the facilities.

Staff explained that these facilities did not render any utility service during the test year. Thus, Staff argued that these expenses are not part of the cost to the utility of rendering public utility service for the test year and that there is no basis under law to allow recovery of these expenses.

The record demonstrates that these generation assets were not used to provide generation service during the test year. Thus, the Commission finds that these expenses do not reflect costs to the utility of rendering public utility service for the test period in accordance with Section 4909.15(A)(4), Revised Code, and the expenses related to the assets are not recoverable.

Rate Case Expense

FirstEnergy proposed to amortize the rate case expense over one year rather than the three years generally ordered by the Commission because the Companies' anticipate

filing a new rate case in the next three years (Co. Ex. 10-B at 6). Staff testified that, historically, the Commission has amortized rate case expense over three to five years (Staff Ex. 17 at 7).

The Commission agrees with Staff. The Commission cannot anticipate when the Companies will file a new distribution rate case. Thus, we will adhere to our general policy of amortizing rate case expenses over three years.

Further, we find that the record in this case demonstrates that Staff properly calculated the federal income tax effect of the amortization of the rate case expense (Staff Ex. 8 at 8-9). Staff's approach ensures that the tax effect of the entire expense is spread over the amortization period and that rates accurately reflect the Companies' costs.

PUCO and OCC Assessments

FirstEnergy objected to the use of the actual 2006 PUCO and OCC assessments in reclassifying the assessments. Staff argued that the 2006 assessments are the latest known actual data and should be used. However, Staff acknowledged an error in the OE and TE Staff Reports and corrected that error during the hearing (Staff Ex. 16, Attachment MAC-4).

The Companies do not dispute that the 2006 assessments are the latest known actual data. The Commission finds that the use of the latest known actual data is appropriate regulatory policy and that the 2006 assessments should be used.

Likewise, the Companies objected to Staff's failure to use an estimate of future PUCO and OCC assessment in the calculation of the gross revenue conversion factor (Co. Ex. 1-B at 2). Staff contended that use of an estimate is not sound regulatory policy and that the Commission has rejected such use of an estimate in the past. *In re Columbia Gas of Ohio, Inc.*, Case No. 76-704-GA-CMR, Opinion and Order (June 29, 1977); *In re Dayton Power and Light Co.*, Case No. 78-92-EL-AIR, Opinion and Order (March 9, 1979).

The Commission agrees with Staff that the use of an estimate for this purpose is not sound regulatory policy and violates the established practices of the Commission setting rates.

Post-Retirement Transition Obligation

OCC objected to the Staff Reports' failure to exclude the transition obligation related to post-retirement benefits from the rate bases of the Companies. At the hearing, OCC witness Effron testified that the transition obligations represents the deferred recognition of a liability and that it does not represent funds actually expended; therefore,

it does not require investor funds and it should not be included in rate base (OCC Ex. 1 at 4-5).

FirstEnergy claimed that, although recognition of the transition obligation was represented by non-cash accounting entries at the time the obligations were initially recorded in 1993, these non-cash entries have been reduced by cash payments for retiree health costs applicable to the obligations initially recognized in 1993 (Co. Ex. 2-3).

Staff agreed with OCC at the hearing. Staff claimed that the transition obligation should not be included in the rate base because it does not represent any investment by FirstEnergy (Staff Ex. 16 at 14; Tr. VIII at 46). Staff also noted that ratepayers already fund the current amortization of the transition obligation.

The weight of the evidence in the record indicates that there is no investment by the Companies on which to earn a return. Therefore, the Commission finds that the transition obligation should not be included in the rate base.

Pension and Other Post-Retirement Employee Benefits (OPEB)

OCC and IEU objected to the manner the Companies and Staff accounted for pension and OPEB expenses. Staff and the Companies accounted for pension and OPEB expenses by including the service cost (i.e., the current payments made) in the test year expenses. OCC and IEU argued that the full accrual of pension and OPEB expenses should be included in the test year expenses. However, Staff argued that, if the full accrual is used, a corresponding rate base item must be created and a return calculated for it. Staff contended that, although this approach is acceptable in theory, Staff does not have the information required to implement this approach.

Although either approach to accounting for pension and OPEB expenses may be acceptable from an accounting perspective, the Commission agrees with Staff that including the full accrual of pension and OPEB expenses in the test year without creating a rate base item and calculating a return would be improper. Since there is insufficient information in the record to create the rate base item and calculate a return on that item, we will adopt the approach originally proposed by Staff and the Companies. However, the Commission directs FirstEnergy to provide sufficient information in its next rate case filing to determine pension and OPEB expenses using both methods, and we direct Staff to review such information and determine the best approach for the accounting of pension and OPEB expenses for ratemaking purposes.

Incentive Compensation

OCC argued that any portion of incentive compensation that relates to the attainment of financial goals should be excluded from expenses in revenue requirements. FirstEnergy responded that customers and shareholders alike benefit from a financially healthy utility because a financially sound utility can borrow money at a lower cost in order to reinvest in needed infrastructure. FirstEnergy acknowledged that investors benefit from increased earnings but the Companies believe that customers do as well.

According to Staff, 20 percent of the incentives were paid for achieving financial goals. Staff believes that the direct primary benefit of such incentives accrued to shareholders rather than ratepayers. Therefore, Staff agreed that 20 percent of the incentive pay be eliminated (Staff Ex. 17 at 7).

The Commission finds that Staff has struck the proper balance regarding incentive compensation. To the extent that financial incentives are awarded for achieving financial goals, the primary benefit of such financial incentives accrues to shareholders and that portion of incentive compensation should not be recovered from ratepayers.

Rate Base Summary

Consistent with the foregoing discussion, the Commission finds the Companies' jurisdictional property used and useful in the rendition of electric service as of the May 31, 2007, date certain, to be as set forth below.

Adjusted Jurisdictional Rate Base

	CEI	TE	OE
Plant in service	$1,927,057,371	$ 771,476,532	$ 2,074,000,252
Depreciation reserve	(773,008,473)	(376,776,204)	(803,030,498)
Net plant in service	1,154,048,898	394,700,328	1,270,969,754
Working capital	-0-	-0-	-0-
Construction work in progress	-0-	-0-	-0-
Contributions in aid of construction	-0-	-0-	-0-
Rate base deductions	(170,4747,824)	19,272,031	(19,718,216)
Rate base	$ 983,574,074	$ 413,972,359	$ 1,251,251,538

The Commission finds the rate bases determined herein to be reasonable and proper and adopts the valuation of $983,574,074 as the rate base for CEI, $413,972,359 as the rate base for TE, and $1,251,251,538 as the rate base for OE for purposes of this proceeding.

Operating Income Summary

Based on our findings noted above, the Commission finds the Companies' operating revenues, operating expenses, and net operating incomes for the three months actual and nine months estimated during the test year to be as set forth below.

Adjusted Operating Income

	CEI	TE	OE
Operating Revenues	$ 435,968,832	$ 156,930,091	$ 508,093,230
Operating Expenses			
Operation and Maintenance	145,238,088	69,693,095	179,794,400
Depreciation	56,974,907	23,545,669	58,669,297
Regulatory Credits/Debits	8,837,535	3,941,287	36,452,590
Other Amortization	3,024,781	977,216	3,338,635
Taxes, Other Than Income	141,186,543	51,773,481	160,662,281
Income Taxes	16,581,466	(3,341,620)	8,876,896
Total Operating Expenses	371,843,320	146,589,128	447,794,098
Net Operating Income	$ 64,125,511	$ 10,340,963	$ 60,299,132

The Commission finds the Companies' operating revenues, operating expenses, and net operating incomes as determined herein to be reasonable and proper. The Commission will, therefore, adopt these figures for purposes of this proceeding.

A comparison of the Companies' total operating revenue of $435,968,832 for CEI, $156,930,091 for TE, and $508,093,230 for OE with total operating expenses of $371,843,320 for CEI, $146,589,128 for TE, and $447,794,098 for OE indicates that, under its existing rates, CEI, TE, and OE had net operating income of $64,125,511, $10,340,963, and $60,299,132, respectively. This net annual revenue, when applied to a rate base of $983,574,074 for CEI, $413,972,359 for TE, and $1,251,251,538 for OE, results in rates of return of 6.52, 2.50, and 4.82 percent for CEI, TE, and OE, respectively.

Rates of return of 6.52, 2.50, and 4.82 percent for CEI, TE, and OE, respectively, are insufficient to provide the Companies reasonable compensation for the service they provide.

RATE OF RETURN:

Capital Structure/Cost of Debt

FirstEnergy recommended a rate of return using FirstEnergy's combined Ohio electric distribution utilities capital structure of 51 percent long-term debt to 49 percent common equity (Co. Ex. 7 at 4-7). In the Staff Report, Staff used the consolidated parent

capital structure (Staff Exs. 1, 2, and 3 at 15). However, Staff witness Cahaan's testimony modified Staff's initial recommendation to agree with FirstEnergy (Staff Ex. 20 at 3-8, 20-21). Staff stated that, although their recommended capital structure is a departure from the traditional approach, it was a carefully vetted decision that arose from an industry rate of return workshop (Staff Br. at 33). OCC recommended using a parent consolidated capital structure, as of May 31, 2007, which consisted of 56.25 percent long term debt and 43.75 percent common equity (OCC Ex. 2 at 13). OCC argued, in its brief, that a departure from the traditional approach is unwarranted and unsubstantiated (OCC Br. at 81-84). OCC also claimed, in its reply brief, that the use of a combined capital structure of the three distribution Companies' was unlawful pursuant to Section 4909.15(D)(2)(a), Revised Code, which requires the inclusion of a "fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility" (OCC Reply Br. at 52). OCC asserted that a combined capital structure of the three distribution utilities amounts to a "hypothetical" capital structure, not based upon the "actual" embedded cost of debt (Id.).

FirstEnergy initially proposed to exclude the cost of debt of the pollution control bonds from the calculation of the embedded cost of debt for each respective Ohio electric distribution utility, stating that the pollution control bonds are not related to the financing of distribution assets (Co. Ex. 7-B at 11). However, through its supplemental testimony of FirstEnergy witness Pearson, FirstEnergy modified its original proposal to recommend blending or averaging the cost of debt for all three of the Companies, but still excluding the cost of pollution control bonds (Id. at 12-13). Accordingly, consistent with the capital structure proposals, FirstEnergy and Staff now agree that the embedded long-term cost of debt of the combined three Companies, exclusive of pollution control bonds, should be utilized (Id. at 12-13; Staff Ex. 20 at 9). Similarly, consistent with its capital structure proposal, OCC recommended using the parent company's embedded cost of long term debt (OCC Ex. 2 at 5).

Given the restructuring of the industry and the industry's rate of return workshop where numerous stakeholders participated, we are comfortable with the departure in the traditional capital structure approach and believe that it is appropriate to use FirstEnergy's and Staff's recommended combined Ohio electric distribution utilities capital structure. We also believe it is appropriate to be consistent with that capital structure and utilize the embedded long-term cost of debt of the combined three Companies, exclusive of pollution control bonds, as recommended by Staff and FirstEnergy. Furthermore, we believe that this is consistent with Section 4909.15(D)(2)(a), Revised Code, and that OCC's claim regarding the use of a hypothetical capital structure is misguided. The past practice was to use a parent-consolidated capital structure, which involved consolidating the Ohio operating companies with operating companies in other states and other, non-regulated, subsidiaries. The method proposed by FirstEnergy and Staff in this proceeding is to combine only the three regulated Ohio operating companies. The debt issuances of the

combined FirstEnergy operating companies are the actual debt issuances, and the cost rates derived from these issuances are the actual embedded cost rates.

Return on Equity

Based on the capital asset pricing model (CAPM) analysis, the comparable group of companies listed in the Staff Report, Staff's discounted cash flow (DCF) computations, Staff's equity flotation cost, and risk profile of the Companies, Staff concluded that a return on equity (ROE) of 10 to 11 percent is reasonable (Staff Ex. 20 at 10-19). Although OCC and FirstEnergy criticized varying components of Staff's methodology for calculating the ROE, neither offered alternative proposals that result in a substantial deviance from Staff's ROE range. Furthermore, FirstEnergy recommended the after-tax weighted-average cost of capital (ATWACC) approach that is unproven and, admittedly, never used by a state utility commission (Tr. Vol. IX at 16 or 62-63 (February 25, 2008)). FirstEnergy also proposed to adjust the comparable group's estimated ROE to account for FirstEnergy's financial risk. (Co. Ex. 8-B at 3-4). Given that the market value capital structure of the comparable group is not appreciably different from the current market value capital structure of FirstEnergy (Staff Ex. 20 at 27; Tr. Vol. VIII at 58-59), we agree with Staff and OCC that FirstEnergy has not adequately demonstrated how FirstEnergy's risk is significantly different from the comparable group to justify such adjustment (Staff Br. at 37-38; OCC Br. at 80-81).

Among other things, OCC disagreed with Staff's selection of the companies included in the comparable group (OCC Ex. 2 at 6-9). Specifically, OCC objected to the inclusion of natural gas distribution utilities and fully regulated electric utilities, and the exclusion of electric utilities operating in deregulated states (OCC Ex. 2 at 9-11). Similarly, FirstEnergy disagreed with Staff's selection, stating that some of these companies have different risk characteristics (Co. Ex. 8-B at 7-9). The comparable group is a sample group that may contain a variety of companies. We believe that, on balance, Staff's comparable group represents an appropriate proxy group. As explained previously, in this proceeding, we are establishing the rate of return for three distribution electric utilities, which are regulated entities under the Commission's jurisdiction.

Given the discussion above and the fact that the resulting analyses performed by FirstEnergy and OCC do not significantly deviate from Staff's ROE range, we believe that Staff's financial analysis is reasonable and Staff's proposed ROE range should be adopted.

Overall Rate of Return

Using the consolidated average capital structure of the three Companies, FirstEnergy proposed in its application an overall rate of return of 9.15 percent for CEI; 9.06 percent for OE; 8.95 percent for TE (Co. Ex. 7-A at 2). However, as stated above,

FirstEnergy modified its original proposal regarding the cost of debt, which resulted in a revised overall rate of return of 9.09 percent for all three Companies (Co. Ex. 7-B at 12-13). Also using the consolidated average capital structure of the three Companies, Staff recommended a rate of return between 8.24 and 8.72 percent for all three Companies, with a midpoint of 8.48 percent (Staff Ex. 20 at 4).

Using the consolidated parent capital structure, OCC recommended a rate of return of 7.55 percent, which was the lower bound of OCC's proposed range of 7.55 percent to 7.99 percent for all three Companies (OCC Ex. 2 at 61-62). As discussed below, OCC recommended the lower bound of its range due to reliability concerns on FirstEnergy's system.

Due to revenue stability created by the Companies' rate design proposed in this proceeding, OSC recommended a 50 basis point downward adjustment to FirstEnergy's rate of return (OSC Ex. 2 at 35; OSC Brief at 21). OSC offered no evidence to support this contention and, as FirstEnergy explained in its initial brief (FE Br. at 93-94, citing OSC Ex. 2 at 33), OSC's proposal seemed to be criticizing the Companies' proposed return on equity for its failure to consider the stability of the Companies' proposed rate design when calculating the return on equity, not the overall rate of return as referenced in OSC's testimony and brief (OSC Ex. 2 at 35; OSC Brief at 21). Therefore, we will defer further discussion of the Companies' rate design and proposals related thereto to the section below titled "Revenue Distribution and Rate Design."

Without record support, OPAE and Citizens Coalition also requested a reduction in the allowable rate of return "to ensure captive customers are not chained to high generation prices" (OPAE/Citizens Coalition Br. at 3).

Based on the circumstances of this proceeding, the Commission finds that the midpoint of Staff's recommended rate of return of 8.48 percent is fair and reasonable and, accordingly, we will authorize a rate of return of 8.48 percent for the Companies for purposes of this case.

A rate of return of 8.48 percent applied to the Non-RCP jurisdictional rate base of $930,132,892 for CEI, $377,913,435 for TE, and $1,119,652,040 for OE, and a debt return of 6.54 percent applied to RCP rate base items of $53,441,182 for CEI, $36,058,924 for TE, and $131,599,498 for OE, results in allowable net operating income of $82,370,322 for CEI, $34,405,313 for TE, and $103,553,100 for OE and income deficiencies of $18,244,811, $24,064,350, and $43,253,968, respectively. These income deficiencies, when applied to the gross revenue conversion factors and combined with their respective adjusted operating revenues, produces revenue requirements of $465,140,883 for CEI, $195,451,002 for TE, and $577,011,492 for OE. This represents an increase of $29,172,051 for CEI, $38,520,912 for TE,

and $69,918,262 for OE over the total revenues for the companies, an average increase of 6.69, 24.55, and 13.56 percent for CEI, TE, and OE, respectively.

Summary

	CEI	TE	OE
Rate Base as of Date Certain	$ 983,574,074	$ 413,972,359	$1,251,251,538
Rate Base - RCP Deferrals	53,441,182	36,058,924	131,599,498
Rate Base Excluding RCP Deferrals	930,132,892	377,913,435	1,119,652,040
Rate of Return - Non RCP	8.48%	8.48%	8.48%
Non RCP Operating Income	**78,875,269**	**32,047,059**	**94,946,493**
Rate Base - RCP Deferrals	53,441,182	36,058,924	131,599,498
Debt Return - RCP	6.54%	6.54%	6.54%
RCP Related Operating Income	**3,495,053**	**2,358,254**	**8,606,607**
Total Required Operating Income	**$ 82,370,322**	**$ 34,405,313**	**$ 103,553,100**

RATES AND TARIFFS:

As part of its investigation in this matter, Staff reviewed the Companies' various rates and charges contained in the tariff schedules, and the provisions governing the terms and conditions of service. The resulting Staff recommendations drew a number of objections. The issues raised are discussed below.

In general, FirstEnergy proposed to modify the electric service regulations, as well as the structure, of its distribution electric service schedules for all three Companies in order to make the tariff schedules consistent among the Companies. To this end, the Companies proposed to reduce the number of tariff schedules to eight:[1] Residential (RS), General Service-Secondary (GS), General Service-Primary (GP), General Service-Subtransmission (GSUB), General Service-Transmission (GT), Street Lighting (STL), Traffic Lighting (TL), and Private Outdoor Lighting (POL) (Staff Exs. 1, 2, and 3 at 30 and 31). The four proposed general service schedules are voltage based (Staff Ex. 1 at 23; Staff Ex. 2 at 23; Staff Ex. 3 at 24). It is important to mention that Staff and FirstEnergy have been informally discussing the need to reduce the number of schedules, simplify the rates, and have a consistent tariff format for the three FirstEnergy operating companies (Id.). Staff also explained that while this is a distribution rate case, due to the changes in the overall

1 We note that CEI, TE, and OE currently have 12, 13, and 7 residential tariff schedules in effect, respectively.

tariff structure, FirstEnergy has emphasized the proposed rate impacts on a total bill basis (including, generation and transmission) (Staff Ex. 1 at 26; Staff Ex. 2 at 25; Staff Ex. 3 at 25). In simplifying and reducing the number of tariff schedules that will be offered, the resulting bills of some customers on certain schedules will be drastically impacted. To mitigate the impact, FirstEnergy proposed a Residential Distribution Credit Rider (Rider RDC) and a Business Distribution Credit Rider (Rider BDC) (Co. Ex. 13 at 24).

Staff argued that the proposed new structure, as a whole, is a reasonable reflection of distribution-related costs and recommended approval of the new structure (Staff Ex. 1 at 23; Staff Ex. 2 at 23; Staff Ex. 3 at 24). In support of the theory of gradualism, Staff also recommended approval of Rider RDC and Rider BDC (Staff Exs. 1, 2, and 3 at 30-31).

Constellation and Integrys do not oppose Rider RDC or Rider BDC, but they request that the Commission clarify in its order that the credits are administered in a competitively neutral fashion between shopping and non-shopping customers, and thus the credits are available to all customers (Constellation/Integrys Br. at 6-7). Constellation and Integrys stated further that all parties appear to agree that the credits would in fact be available to all customers (Id. at 7, citing Tr. Vol. II at 91 and Staff Ex. 18 at 13).

The Commission agrees with FirstEnergy and Staff and finds that a restructuring of the tariff structure is warranted to simplify the tariffs and to ensure consistency among the three Companies. In order to mitigate the impacts of such restructuring, we also agree with FirstEnergy and Staff that Rider RDC and Rider BDC are necessary. Therefore, we approve the new tariff structure proposed by the Companies as approved herein, as well as Rider RDC and Rider BDC. Consistent with the understanding of the parties, we clarify that both Rider RDC and Rider BDC shall be administered in a competitively neutral fashion and be available to all customers.

Revenue Distribution and Rate Design

Cost of Service Study

With its application, the Companies filed an embedded fully allocated cost of service study (COSS) by rate class for the test period ending February 29, 2008, as adjusted. The Companies chose the Coincident Peak Demand method as the allocation methodology for their COSS submitted in this proceeding (Co. Ex. 12 at 2-3). The COSS proceeded as follows: (1) items, such as plant investment, operating expenses and taxes, were functionalized between the distribution function and to "all other;" (2) the costs were then classified as customer, demand, or energy related; (3) the costs that were determined to be distribution-related were then allocated to the various customer classes; and (4) a calculation of the revenue responsibility of each class occurred, which is required to generate the recommended rate of return (Staff Exs. 1, 2, 3 at 26). Staff analyzed the COSS

submitted by the Companies and concluded that FirstEnergy generally followed acceptable allocation guidelines (Staff Ex. 1 at 26; Staff Ex. 2 at 26; Staff Ex. 3 at 27). No other party offered an alternative COSS or submitted specific evidence opposing the methodology selected.[2] Accordingly, we agree with Staff and find that the Companies' COSS reasonably reflects the distribution system characteristics of the Companies (Staff Ex. 18 at 2).

Partial Stipulation

As explained previously, FirstEnergy, IEU, OCC, OEG, Kroger, and OPAE filed a partial stipulation that addresses revenue distribution and non-residential rate design issues. Although Staff was not a signatory to the stipulation, Staff witness Fortney supported the stipulation at the evidentiary hearing, stating that the stipulation was "very reasonable" (Tr. VII at 93; Staff Br. at 50). For reasons discussed below, OSC and Nucor opposed the settlement. Cleveland stated that it agreed with a substantial portion of the stipulation's proposals, including the revenue distribution; however, it could not support the stipulation because it failed to provide an accommodation for the schools located in CEI's territory (Cleveland Br. at 3). Cleveland added that the revenue distribution proposal contained in the stipulation appeared to be "fair, equitable and reasonable" (Id. at 4).

Summary of the Partial Stipulation

The stipulation in these cases provided, inter alia:

(1) Revenue distribution for the Companies will be allocated among the individual rate classifications pursuant to Schedule A attached to the stipulation.

(2) For each of the Companies, the class revenue requirement that results from Schedule A will be collected based upon the Companies' proposed rate design for the GS, GP, GSUB, and GT schedules.

(3) The testimony of Kevin M. Murray on behalf of IEU will not be offered in this proceeding.

(4) Objections 2 - 6, 8, 9, 11 - 14, 17 - 19, 21, 22, 24 - 27, 30 - 34, 36, 37, and 39 - 42 to the Staff Reports filed by IEU in this proceeding were withdrawn. IEU's

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2 While OSC witness Solganick seems to criticize the Companies' COSS throughout his testimony for not specifically analyzing the cost to serve schools (e.g., OSC Ex. 2 at 25-29, Tr. Vol. IV at 36-37), he does not offer an alternative COSS or evidence to demonstrate that the Companies' COSS is inappropriate.

withdrawal of objections 2, 4, 30 and 32 was contingent upon Commission approval of Company Revised Schedule B-6, as it pertains to those objections and as reflected in the Second Supplemental Testimony of Company witness Young.

(5) The testimony of Stephen J. Baron, Lane Kollen, and Richard A. Baudino on behalf of OEG will not be offered in this proceeding.

(6) All objections to the Staff Reports filed by the OEG in this proceeding were withdrawn.

(7) The testimony of Kevin C. Higgins on behalf of Kroger will not be offered in this proceeding.

(8) All objections to the Staff Reports filed by Kroger in this proceeding were withdrawn.

(9) The agreement of the Signatory Parties reflected in the stipulation was expressly conditioned on its acceptance in its entirety and without material alteration by the Commission.

(10) The Signatory Parties agreed that if the Commission or any court of competent jurisdiction rejects all or any material part of the stipulation, or otherwise materially modifies its terms, any adversely affected party has the right to file an application for rehearing or a motion for reconsideration. If such application or motion is filed, and if the Commission or court does not, on rehearing or reconsideration, accept the stipulation without material modification, the adversely affected party may withdraw from the stipulation by filing a notice with the Commission and the other Signatory Parties within ten (10) days of any such order; and the adversely affected party is entitled to reopen the hearings in these proceedings to submit the testimony and objections referenced in paragraphs 3-8 above.

Schools' Issues

By its terms, the E4E II Program, which provided a discounted rate to schools if they prepaid their electric bill, expires December 31, 2008. OSC further explained that the E4E II Program is an electricity prepayment program whereby schools arrange for the issuance of municipal bonds to prepay a lump sum amount to the Companies representing participating school districts' anticipated electric usage for the contract term in exchange for a negotiated discount off their total electric base rates (including generation) of 10 percent to participating school districts (OSC Ex. 4 at 2).

In addition to the expiring E4E II Program, FirstEnergy proposed to eliminate all CEI and TE tariff schedules specific to schools and treat the schools as GS customers, taking distribution service from rate schedules based upon their voltage. OSC opposed the elimination of the special school rate for CEI and TE customers, the elimination of the E4E II Program, and the placement of the schools on the GS rate schedules that are inherent in the rate design of the stipulation described below. OSC asserted that the "load characteristics of schools are substantially and materially different from the [GS] class peak," justifying special school rates (OSC Ex. 2 at 23). OSC explained that the Commission has recognized such differences in prior rate proceedings (OSC Br. at 4-5). FirstEnergy responded that any prior rate cases were decided before restructuring of the industry, on a bundled service basis, considering generation, distribution, and transmission services together (Co. Ex. 13 at 5-6; FE Reply Br. at 34). FirstEnergy added that the only difference described by OSC with regard to serving the schools is usage (peak demand), which is not relevant to the cost of providing distribution service (FE Reply Br. at 34). FirstEnergy further noted that even if usage should be considered, FirstEnergy witness Hussings' rebuttal testimony demonstrated that the average of the demands for the summer months was virtually identical to the average for the non-summer months and the average of all twelve months (Co. Ex. 13-C at 7). In defense of the stipulation, OCC, OEG, and IEU also support FirstEnergy's rationale to eliminate school tariff schedules (OCC Reply Br. at 65; OEG Reply Br. at 3-4; IEU Reply Br. at 6-7).

Nucor's Issues

Nucor opposed the elimination of FirstEnergy's bundled tariffed rates and implementation of distribution only rates for non-shopping customers without proposing new generation and transmission rates in this proceeding, or without having such rates already approved. (Nucor Br. at 2-3). Similarly, Nucor opposed the elimination of interruptible tariffs in the absence of the implementation of comparable or superior replacement interruptible tariffs (Id. at 2-3, 12-16). Nucor asserted that the lack of replacement generation and transmission rates shifts the burden from FirstEnergy to its retail customers and creates uncertainty (Id. at 7-10). FirstEnergy, Staff, and OCC responded that it would be inappropriate to establish generation rates as part of this distribution rate case, explaining that the Companies have separate proceedings pending that will establish generation rates (Co. Ex. 13 at 12; Staff Br. at 56-57 (citing Staff Ex. 18 at 12 and Tr. Vol. VII at 96); OCC Reply Br. at 65-66).

Moreover Nucor proposed modifications to the proposed rate design for the GT rate schedule, including the development of distribution-level interruptible rates. (Id. at 3, 16-19 (citing Nucor Ex. 1 at 13)). FirstEnergy contended that there is no benefit to creating a distribution-level interruptible rate given that the benefits of an interruptible rate are

reflected in generation pricing (Co. Ex. 13-C at 13). Staff concurred in this conclusion (Staff Ex. 18 at 12).

Nucor also asserted that FirstEnergy's billing demand provisions, incorporated into the stipulation, are outdated and incompatible with competitive retail markets (Nucor Ex. 1 at 14). IEU disagreed, and FirstEnergy noted that adopting Nucor witness Goins' suggestions move the Companies away from the industry norm and result in increased rates (IEU Reply Br. at 12; FirstEnergy Br. at 90-91, citing Co. Ex. 13-C at 14).

Evaluation of the Stipulation

Rule 4901-1-30, Ohio Administrative Code, 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 *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978).

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 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 Ohio 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.* (1994), 68 Ohio St.3d 559 (citing *Consumers' Counsel*, supra, at 126). The court stated in that case that the Commission may

place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission (Id.).

Based on our three-prong standard of review, we find that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties with regard to revenue distribution and non-residential rate design, is met. Numerous intervenors with diverse interests signed the stipulation. Additionally, counsel for the Companies and the intervenors have been involved in many cases before the Commission, including a number of prior cases involving rate issues. Further, a review of the terms of the stipulation shows that the parties engaged in comprehensive negotiations prior to signing the agreement, evidenced by the withdrawal of numerous objections and pre-filed testimony by the intervenors.

As a package, the stipulation advances that public interest by resolving issues raised in this proceeding with regard to revenue distribution and non-residential rate design while limiting the time and expense of extensive litigation. As evidenced by the stipulation terms, numerous objections and testimony have been withdrawn narrowing the scope of the hearing and reducing the length of the hearing. Additionally, although not a signatory party to the stipulation, Staff has expressed its support for the stipulation.

Nonetheless, to improve the overall package of the settlement, to assist in the transition to new tariff schedules, and based on the principle of gradualism,[3] we will modify the partial stipulation to the extent necessary to provide a discount to public primary and secondary schools via a School Distribution Credit Rider (Rider SDC) as suggested by OSC (OSC Br. at 18-19, 25). Establishing Rider SDC is consistent with the development of Rider RDC and Rider BDC proposed by FirstEnergy to mitigate the impact on customers due to the restructuring of the tariff schedules. Rider SDC should reflect a discount off FirstEnergy's approved distribution GS tariff schedules, including all applicable riders exclusive of the state kWh tax rider. Given that this is a distribution rate case, the level of the discount should be consistent with the current distribution discount provided for in the E4E II Program contract (which is 8.693%). Eligible schools would include the public school district buildings currently served under the E4E II Program plus the existing Cleveland Public School System buildings served by CEI. A school facility that is eligible for both Rider BDC (approved herein) and Rider SDC must elect which rider it wishes to apply to its facility. The difference in revenue created by Rider SDC

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3 While we agree with FirstEnergy that gradualism is not a dispositive factor when establishing rates, we also agree with FirstEnergy that it is a "useful tool in managing overall customer impacts resulting from incorporating" the Companies' new proposed rates and rate structure as we transfer from historic rate levels and structures (FE Reply Br. at 37-38; Co. Ex. 13 at 7). Staff witness Fortney also seemed to support the principle of gradualism (Tr. Vol. VII at 134).

should be shared in the same proportion as the overall revenue responsibility is shared as contained in Attachment A of the Stipulation.

Our review of the partial stipulation, with the modification specified herein, indicates that it is in the public interest and represents a reasonable disposition of the revenue distribution and non-residential rate design issues in this case. We will, therefore, adopt the partial stipulation, as modified herein.

Finally, the stipulation meets the third criterion because it does not violate any important regulatory principle or practice.

The Commission notes that, in its approval of the stipulation, the revenue distribution contained therein is generally consistent with the allocation of revenues resulting from the cost of service study submitted by the Companies and reviewed by Staff. With regard to Nucor's first issue identified above, we reiterate that this proceeding is a distribution rate case that will establish the terms and conditions of the Companies' distribution service. The Companies' generation and transmission rates and services will be established pursuant to subsequent proceedings.

Residential Rate Design

OCC supports the stipulation with regard to revenue distribution; however, the stipulation does not address the appropriate rate design for residential customers. FirstEnergy proposed a rate utilizing an inclining two-block structure for residential customers. FirstEnergy claimed that such a structure, together with the Rider RDC, would help mitigate customer impact from the many changes proposed by FirstEnergy's application (Co. Ex. 13 at 12; FE Brief at 91). Staff rejected FirstEnergy's proposed inclining rate block structure, and recommended a flat energy rate to best reflect costs (Staff Exs. 1-3 at 31). OCC agreed with Staff in its Reply Brief and thought that a flat energy rate for residential customers was preferable to the inverted block rate design proposed by the Companies (OCC Reply Br. at 66).

The Commission agrees with Staff and OCC, and finds that Staff's proposed flat energy rate better reflects costs, and thus, is reasonable and should be adopted.

Contract Demand

In FirstEnergy witness Hussing's rebuttal testimony, FirstEnergy recommended clarifying the contract demand language contained in its proposed GS tariffs to clarify that the contract demand will be specified in the contract for electric service for customers establishing service after December 31, 2008, and for customers requiring/requesting a significant change in service (Co. Ex. 13-C at 11). FirstEnergy specifies that the contract

demand should be 60 percent of the customer's expected, typical monthly peak load (Id.). Further, FirstEnergy stated that existing customers with a contract demand maintain their existing contract demand level, as it exists December 31, 2008, until the customer reestablishes service or requests or requires a significant change in service (Id.). OSC agreed with the revised language proposed by FirstEnergy as it applies to new customers; however, OSC offered two additional clarifications, including a requirement that allows an existing customer to request a reevaluation of its existing contract demand level and a definition of the term "expected, typical monthly peak load" (OSC Br. at Attachment A). Staff also agreed with FirstEnergy's revised language; however, Staff argued that new customers should be able to request that their contract demand level be reevaluated after the initial 12 months of service based upon their actual usage (Staff Br. at 56).

The Commission agrees with Staff and OSC that language should be included that affords customers with an opportunity to reevaluate a customer's contract demand level. It is appropriate to have an existing customer's contract demand level, as well as a new customer's contract demand level after the initial 12 months of service, reevaluated based on actual usage. Thus, FirstEnergy is directed to modify its contract demand language to incorporate the concept that, in addition to the reestablishment of service or a request/requirement for a significant change in service, a new or existing customer may request that the Companies reevaluate the customer's contract demand level based on actual usage as explained herein. The Commission also finds that including a definition for the term "expected, typical monthly peak load" would be redundant and is unnecessary.

RELIABILITY:

With respect to Ohio Edison's reliability, Staff made four recommendations in the Staff Report (Staff Ex. 2 at 76). OE agreed with two of the recommendations and Staff withdrew one of the recommendations at hearing (Staff Ex. 13 at 4). FirstEnergy maintains its objection to Staff's recommendation that OE perform a through investigation of all service interruptions coded "unknown" to determine the root cause. FirstEnergy is willing to continue its current practice of performing root cause analysis of service interruptions coded "unknown" on days that are not affected by storm conditions; however, FirstEnergy contended that it would be unduly burdensome to go back after a storm and perform a root cause analysis of each storm-related outage coded "unknown." Therefore, FirstEnergy proposes to modify Staff's recommendation to exclude outages coded "unknown" on days affected by storm conditions.

FirstEnergy also objected to Staff's recommendation that OE remove additional overhanging branches, limbs and other vegetation located outside of OE's right of way based upon the overhang's diameter and canopy (Staff Ex. 2 at 77). FirstEnergy noted that OE already removes overhang that is likely to interfere with lines or equipment regardless

of whether the tree is located inside or outside of the right of way (Co. Ex. 17-C at 25). FirstEnergy contended that there was no evidence that the removal of such vegetation will improve OE's SAIFI performance and that property owners tend to be passionate about their trees and vegetation.

First Energy also objected to recommendations in the Staff Report related to the assessment of CEI's reliability performed by UMS Group, Inc (UMS). During 2005, Staff and CEI agreed to a set of interim reliability targets for CEI. CEI agreed that if it missed any of the targets, it would hire an independent consultant to review and provide Staff with an assessment of CEI's infrastructure and operational practices; the independent consultant would also make recommendations to CEI to improve its CAIDI and SAIFI performance. CEI missed its interim targets in 2006 and UMS was hired as the independent consultant. UMS provided its findings in a report (UMS Report) issued on October 30, 2007 (Staff Ex. 1 at 76). FirstEnergy objected to Staff's recommendation that CEI seriously consider implementing three of the recommendations in the UMS Report and that CEI either submit a schedule or provide a detailed justification for why CEI does not plan to implement these recommendations (Staff Ex. 1 at 79). FirstEnergy argued that these three recommendations were not cost-effective considering the cost and the projected impact upon its SAIFI performance.

OCC argued that the Commission should order substantive consequences for the failures by the Companies to meet standards for the quality of service provided to customers. OCC recommended that the Commission order an additional investigation into the Companies alleged failure to meet the performance targets and their compliance with the Electric Service and Safety Standards contained in Chapter 4901:1-10, O.A.C. OCC also recommended that the Commission impose financial consequences upon FirstEnergy based upon its history of not meeting its performance targets.

In support of its recommendation for an additional investigation, OCC noted that the Commission has statutory authority to consider the management policies and practices of public utilities such as the Companies. *See* Section 4909.154, Revised Code. OCC claimed that the Staff Reports and the other evidence in the record in this proceeding revealed that the Companies have performed poorly as measured by several key reliability metrics and Chapter 4901:1-10, O.A.C. OCC argued that the Commission should recognize that poor service has resulted from the Companies' past failures and hold a separate hearing to consider the Companies service quality.

OCC believes that the UMS Report is a useful starting point for evaluating CEI's reliability issues. However, OCC believes that UMS recommendations do not go far enough to ensure sustained reliability actions by CEI. OCC claimed that neither FirstEnergy nor Staff conducted a thorough review of the UMS recommendations.

Therefore, OCC believes that a separate proceeding specifically related to reliability is warranted.

OCC claimed that CEI has under-invested in its distribution facilities. OCC argued that Staff's support the UMS recommendation that CEI maintain capital spending at $84.7 million, the planned 2008 level, for a minimum of five years was misguided. OCC believes that maintaining the planned capital spending for the intermediate term is not adequate and does not recognize past under-investment by CEI. OCC claimed that CEI's capital spending has been consistently lower than the average level of spending in the industry (OCC Ex. 20 at 21, 157). OCC also noted that CEI's capital spending on "Distribution Gross Plant Additions" only re-attained 1992 expenditure levels by 2005-2006 and that such spending was well below that level for a number of intervening years (OCC Ex. 20 at 155). OCC argued that CEI should not be rewarded for returning to adequate levels of expenditures on its distribution systems after nearly-two decades of under-investment. Therefore, OCC argued that an additional, comprehensive review should be conducted regarding spending on reliability and management direction regarding the reliability provided by FirstEnergy. Moreover, OCC believes that a separate proceeding would improve the transparency of review of service reliability.

In addition to its request for a separate investigation into the Companies' service reliability, OCC recommended that the Commission should impose financial consequences for the Companies' alleged ongoing failures to comply with Chapter 4901:1-10, O.A.C., and to meet their reliability performance targets. OCC noted that Staff and CEI had agreed upon an action plan due to CEI's failure to meet its reliability targets under which Staff and CEI agreed to an interim target for 2006. Under the action plan, CEI was required to hire an independent consultant to review its reliability program if it missed the interim target for 2006. CEI did miss the 2006 interim target and was required to hire UMS (Tr. VI at 113).

OCC further noted that CEI has missed its CAIDI reliability target for eight consecutive years and its SAIFI target for the past four years. OCC claimed that OE has also missed its SAIFI target. Therefore, OCC recommended that the Commission impose financial consequences for the repeated failures to meet the reliability targets. Specifically, OCC recommended that the Companies' rates of return should be adjusted to reflect the performance of the individual operating company with respect to reliability. OCC recommended that the rates of return for both CEI and OE be set at the lower bound of the reasonable range for the rate of return. OCC believes that this would reduce the authorized revenue increase for FirstEnergy by approximately $5 million.

FirstEnergy responded to OCC by arguing that OCC comments upon its reliability are misguided and unfounded. FirstEnergy claimed that OCC has failed to demonstrate a single issue that has actually affected customer reliability or that is a violation of Chapter

4901:1-10, O.A.C. Further, the Companies argued that OCC has not identified a reliability related issue or practice that the Companies have not already remedied or are not actively addressing.

FirstEnergy contended that no further Commission investigation regarding reliability is necessary. FirstEnergy claimed that the reliability of the operating companies is good and that its ongoing efforts to improve reliability are reasonable. FirstEnergy claimed that OCC ignores TE's record of consistently meeting or exceeding its SAIFI and CAIDI targets. FirstEnergy also argued that OCC failed to recognize that OE has experienced minimal issues with respect to meeting its reliability targets. FirstEnergy claimed that OE has consistently met or exceeded its CAIDI target. FirstEnergy acknowledges that OE failed to meet its SAIFI target for the period between 2004 and 2006, but FirstEnergy argued that the OE Staff Report demonstrated that OE has undertaken a number of steps to improve its SAIFI performance (Staff Ex. 2 at 72, 75-79). FirstEnergy noted that OE met its SAIFI and CAIDI targets for 2007 (Co. Ex. 17-C at 4-5) and argued that it would constitute an unnecessary step backward to penalize OE for limited reliability problems that have already been addressed.

With respect to CEI, FirstEnergy argued that CEI has been actively addressing its reliability issues through implementation of the recommendations contained in the UMS Report. FirstEnergy noted that the CEI Staff Report adopted 25 of the recommendations contained in the UMS Report (Staff Ex. 1 at 77-79). FirstEnergy claimed that CEI has implemented or will implement 22 of the recommendations adopted by Staff (Tr. III at 72).

Moreover, FirstEnergy claimed that OCC's proposal for a separate service reliability proceeding is tardy and unnecessarily duplicative of Staff's efforts. FirstEnergy noted that the Companies' reliability practices and performance have already been investigated by UMS (as to CEI) and Staff (as to all three operating companies). The Companies aver that the fact that OCC disagrees with Staff's conclusions and recommendations is not a basis to re-plow the same fields.

In addition, FirstEnergy argued that OCC's recommendation for financial consequences was unjustified. FirstEnergy argued that OE met its reliability targets for 2007 and that OE has taken numerous steps to correct the instances where it failed to meet its SAIDI target.

FirstEnergy also contended that financial penalties are inappropriate for CEI. FirstEnergy noted that the failure to meet a reliability target is not a violation of Rule 4901:1-10-10, O.A.C. *See In the Matter of the Commission's Review of Its Electric Service and Safety Standards,* Case No. 02-564-EL-ORD, Entry on Rehearing (March 18, 2003). FirstEnergy claimed that CEI submitted action plans to Staff for the years in which it did not meet targets and that CEI is aggressively pursuing practices to achieve top quartile

reliability performance through implementation of the majority of recommendations contained in the UMS Report. FirstEnergy noted that UMS acknowledged its efforts to improve CEI's reliability performance (OCC Ex. 20 at 11). FirstEnergy concluded that the punitive sanctions proposed by OCC would serve no purpose and would not contribute to improved reliability.

The Commission finds that FirstEnergy's requested modification to Staff's recommendation that OE perform a through investigation of all service interruptions coded "unknown" to determine the root cause should be adopted. The record in this case demonstrates that it would be unduly burdensome to require OE to perform a root cause analysis on days affected by storm conditions (Co. Ex. 17-C at 23). Therefore, the Commission will direct OE to perform a through investigation of all service interruptions coded "unknown" to determine the root cause except on those days which are affected by storm conditions.

The Commission also finds that Staff's recommendation that OE remove additional overhanging branches, limbs and other vegetation located outside of OE's right of way based upon the overhang's diameter and canopy should not be adopted. Staff has not demonstrated that this practice would actually improve OE's SAIFI performance, and OE met its SAIFI target for 2007 (Tr. VI at 77-78).

However, the Commission finds that Staff's recommendation that CEI either submit a schedule to implement the three remaining UMS recommendations or provide a detailed justification for why CEI does not plan to implement these recommendations should be adopted (Staff Ex. 1 at 79). Although FirstEnergy clearly stated its preference not to implement those three recommendations, further discussions between CEI and Staff are clearly necessary before Staff can agree that these recommendations are not cost effective.

With respect to OCC's recommendation for a separate proceeding to investigate the Companies' service quality and reliability, the Commission finds that such proceeding is unnecessary. In preparation of the Staff Reports for this proceeding, Staff thoroughly investigated the service quality and reliability of the Companies. A considerable portion of the Staff Report for each operating company is devoted to that investigation (Staff Ex. 1 at 57-81; Staff Ex. 2 at 55-80; Staff Ex. 3 at 60-81). Each intervenor had the opportunity to file objections to the conclusions contained in the Staff Report, and OCC filed multiple objections to the Staff Report related to service quality and reliability. The UMS Report was addressed in the Staff Report for CEI, and the UMS Report was received into the record of this proceeding. A substantial amount of testimony was received related to service quality and reliability, and the parties had the opportunity to make arguments related to service quality and reliability in their briefs. Although OCC may not agree with Staff's conclusions and recommendations in the Staff Report, OCC has not identified any factual issues which have not been thoroughly investigated and litigated in this

proceeding. Therefore, the Commission finds that further litigation on this issue is not necessary. Nonetheless, the Commission notes that OCC retains its right to file a complaint under Section 4905.26, Revised Code, raising any issues it has with respect to the Companies service quality and reliability.

The Commission finds that OCC's recommendation that the rates of return of OE and CEI should be set at the lower bound of a reasonable rate of return should not be adopted. With respect to OE, the record indicates that OE missed its CAIDI performance target only once between 2000 and 2006 and that preliminary information indicates that OE met its CAIDI performance target for 2007 (Staff Ex. 2 at 74; Tr. VI at 77-78). Moreover, the record indicates that, although OE missed its SAIFI performance target for the period between 2004 and 2006, preliminary information indicates that OE met its SAIFI performance target for 2007 (Staff Ex. 2 at 73; Tr. VI at 77-78). Based upon this record, there is no basis for reducing OE's rate of return due to reliability issues.

Further, the Commission finds that reducing CEI's rate of return due to reliability issues is premature in light of the actions taken thus far by Staff and CEI. There is no doubt that the failure of CEI to meet its CAIDI target for seven years is a matter of serious concern to this Commission (Staff Ex. 1 at 76). Likewise, the failure of CEI to meet its SAIFI target for four consecutive years is a matter of significant concern (Staff Ex. 1 at 75). However, CEI has agreed to implement 22 of the 25 recommendations of the UMS Report adopted by Staff. At the time of the hearing in this case, less than a year had passed since the issuance of the UMS Report on October 30, 2007. Thus, there had not been a sufficient period of time to assess the impact of those recommendations or whether CEI has properly implemented the recommendations.

Therefore, the Commission finds that, based upon the record of this proceeding, the remedial action plan agreed to by CEI and Staff, which led to the UMS Report, and the requirement that CEI implement those recommendations contained in the UMS Report were reasonable remedies to the failure of CEI to meet its performance targets as set forth in the agreed upon remedial action plan. Accordingly, we decline, at this time, to adopt OCC's recommendation to reduce CEI's rate of return. However, the Commission notes that a reduction in the rate of return may be an appropriate remedy for the failure to maintain reliable service, and the Commission is prepared to consider such remedy if CEI does not improve its service quality before its next distribution rate case or if CEI fails to properly implement the recommendations contained in the UMS Report.

In addition, the Commission must balance the performance of CEI with the need for CEI to invest in its distribution system. Reducing CEI's rate of return may have the unintended consequence of making it more difficult for CEI to obtain the capital needed to invest in its infrastructure. Accordingly, we will decline to adopt OCC's recommendation on this issue.

Maintenance and Inspection Programs

FirstEnergy objects to Staff's recommendations regarding the implementation of several issues contained in the Companies' maintenance and inspection program required by Rule 4901:1-10-27, O.A.C. Staff has identified several areas where Staff alleged FirstEnergy has not maintained sufficient records to documents its compliance with the Rule 4901:1-10-27, O.A.C., inspection program requirements or where Staff believes that the Companies' Rule 4901:1-10-27, O.A.C., inspection program is inadequate. These areas include quality control for certain equipment and right-of-way vegetation control. Staff recommended that the Commission direct FirstEnergy to remedy both the recordkeeping deficiencies and the substantive program requirements. OCC agreed with Staff's recommendations.

FirstEnergy also objected to Staff's findings in the Staff Report that FirstEnergy had committed a number of violations of the National Electric Safety Code. Staff noted that all deficiencies had been corrected and that no further action was needed. The Companies argued that Staff did not provide sufficient detail to determine if Staff was using the proper edition of the code for the particular equipment in question. FirstEnergy noted that the Staff Reports reference only the 2002 edition. Staff acknowledged at hearing that FirstEnergy's equipment was "grandfathered" (Tr. VI at 217).

The Commission notes Rule 4901:1-10-27(E)(2)(g), O.A.C., provides a process for utilities to request changes in their inspection programs, subject to Staff's approval. Many of the issues raised in this proceeding stem from an apparent failure of communication between the Companies and Staff and are better remedied by more discussion between FirstEnergy and Staff than further litigation. The Commission directs FirstEnergy to file amendments to its Rule 4901:1-10-27, O.A.C., inspection program to address both the recordkeeping and the substantive program raised by Staff under the Rule 4901:1-10-27(E)(2)(g), O.A.C., process. In the event that the Companies and Staff cannot reach a common understanding on an amended plan, there will be an opportunity for the parties to request a hearing to bring any disputes before the Commission.

With respect to the alleged violations of the National Electric Safety Code, the record demonstrates that the date of installation of the equipment determines which version of the code applies. The Commission agrees that the record is not clear whether Staff used the proper editions for the equipment in question (Tr. VI at 216-218). Although all of the alleged violations have been corrected, the Commission will not consider the alleged violations to have occurred in any future Commission proceedings.

OTHER TARIFF ISSUES:

Line Extensions

FirstEnergy proposed to continue the up-front payment concept established in Case No. 01-2708-EL-COI,[4] which included the following:

(1) Standard single family residential homes pay an up-front payment of $300.

(2) Residential geothermal homes pay an up-front payment of $100.

(3) Non-standard single family residential homes pay an up-front payment of $300 plus 100 percent of the cost differential of a line extension that exceeds $5000.

(4) Multi-family homes pay an up-front payment of $100 per unit.

(5) General Service customers pay an up-front payment equal to 40 percent of the estimated total cost of the line extension.

(6) Transmission customers pay an up-front payment equal to 100 percent of the estimated total cost of the line extension.

(Co. Ex. 16 at 4-5). Staff agreed with the up-front payment concept created in Case No. 01-2708-EL-COI, but recommended modifying the up-front payments proposed by FirstEnergy as follows:

(1) Standard single family residential homes pay an up-front payment of $100.

(2) Residential geothermal homes pay an up-front payment of $50.

(3) Non-standard single family residential homes pay an up-front payment of $200 plus 100 percent of the cost differential of a line extension that exceeds $5000. A monthly extended payment option (with interest) of up to four years should be offered when the line extension costs exceed $5000.

(4) Multi-family homes pay an up-front payment of $50 per unit.

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4 *In the Matter of the Commission' s Investigation into the Policies and Procedures of Ohio Power Company, Columbus Southern Power Company, The Cleveland Electric Illuminating Company, Ohio Edison Company, The Toledo Edison Company and Monongahela Power Company Regarding the Installation of New Line Extensions,* Case No. 01-2708-EL-COI, et al., Opinion and Order (November 7, 2002).

(5) General Service customers pay an up-front payment equal to 40 percent of the estimated total cost of the line extension.

(6) Transmission customers pay an up-front payment equal to 60 percent of the estimated total cost of the line extension.

(Staff Ex. 18 at 10-11; Staff Exs. 1, 2, and 3 at 21). OHBA argued that the settlements in Case No. 01-2708-EL-COI were "stop-gap" measures during the time that FirstEnergy's distribution rates were frozen, and that the appropriate method to recover line extension costs going forward is through distribution rates established in a distribution rate case (OHBA Br. at 3 and OHBA Reply Br. at 2, citing Staff Exs. 1, 2, and 3 at 20). OHBA also stated that if the Commission decides to approve the up-front concept, OHBA recommended approval of Staff's up-front payments, not the amounts proposed by the Companies (OHBA Br. at 4-5; OHBA Reply Br. at 4).

Per Am. Sub. Senate Bill 221 (SB 221), the Commission is required to adopt uniform, statewide line extension rules for nonresidential customers within six months of the effective date of the law. The Commission adopted such rules for nonresidential and residential customers on November 5, 2008.[5] Applications for rehearing were filed, which the Commission is still considering. Accordingly, the new line extension rules are not yet effective.

The Commission agrees with OHBA and finds that, in Case No. 01-2708-EL-COI, it approved line extension settlements that were scheduled to expire at the end of the distribution rate freeze. Therefore, FirstEnergy's request to continue the existing line extension policies regarding up-front payments is denied. Additionally, in light of the SB 221 mandate that the Commission adopt statewide line extension rules that will apply to FirstEnergy, we do not believe that it makes sense to adopt a unique policy for FirstEnergy at this time. FirstEnergy is, however, directed to include all line extension expenditures in rate base until the new line extension rules become effective.

Tariff Availability

The Companies have proposed deleting language providing that copies of its tariffs were "available for public inspection at the Company's business offices." OCC opposes this change. Staff also recommended that FirstEnergy keep this language.

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5 See *In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, and 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, Finding and Order (November 5, 2008).

The Commission finds that the Companies' proposed change is reasonable in light of the provision of Rule 4901:1-1, O.A.C., which requires all utilities to provide, upon a customer's request, a copy of the applicable tariff, and further requires that, if the utility does not maintain a copy in the county where the customer is served, the utility must provide the information in the format requested by the customer. These provisions ensure that the tariffs are available to customers. The existing tariff language is unnecessary and may be deleted.

Use of Service

The Companies have proposed that tariff language which will allow the Companies to require customers who want a parallel interconnection with the Companies' distribution system to pay for a dedicated telephone line. Staff recommended additional language excluding net metering customers from this requirement. Staff argued that the proposed language would grant FirstEnergy unfettered discretion in determining which net metering customers would need to install and pay for a dedicated telephone line. OCC argued that Staff's position comported with existing rules and that the rulemaking process, rather than a distribution rate case, was the appropriate forum to raise their concerns.

The Commission agrees that FirstEnergy should exclude net metering customers from this requirement. FirstEnergy has not provided any criteria as to which net metering customers should be required to install and pay for a telephone line and the Commission believes that such a requirement has the potential to be unduly burdensome to net metering customers.

Field Collection Charge

FirstEnergy has proposed a Field Collection Charge which would be assessed as a trip charge any time the field personnel attempted to collect a delinquent account. FirstEnergy included a limit of three charges per billing cycle. Staff recommended that the Field Collection Charge be limited to one charge per billing cycle. Staff is opposed to the imposition of the charge if another action is performed instead of collection of the delinquent account. OCC agrees with Staff's proposal to limit this charge to one field visit per billing cycle.

We agree with Staff's proposal to limit the charge to one charge per billing cycle. Although FirstEnergy argued that multiple charges furthered cost-causation policies, we believe that imposing multiple charges on customer accounts which are already delinquent has the potential to simply increase uncollectable expenses and PIPP arrearages, which will then be passed on to ratepayers.

Annual Escalator Adjustment

The Companies have proposed an annual escalator adjustment which would apply to certain miscellaneous charges. The Companies believe that these charges relate to specific customer-created situations that are very labor intensive and that the proposed escalator will serve as a proxy for labor increases and ensure timely recovery of increased costs (Co. Ex. 15-B at 12).

OCC argued that the proposed adjustment violates the test year principle codified in Section 4909.15(A)(4), Revised Code. Staff opposed the adjustment as well, arguing that the Commission has never approved such an adjustment without an audit and reconciliation component and that there is no need to adjust these charges more frequently than a comprehensive rate case in which all components of the revenue requirement are reviewed (Staff Ex. 18 at 8).

The Commission agrees that these proposed escalator adjustment should not be approved because it provides no provisions for audit and reconciliation and because a rate case, such as the instant proceeding, is the appropriate forum to adjust these miscellaneous charges.

Miscellaneous

FirstEnergy objected to Staff's recommendation that, in proceedings brought to gain access to premises, FirstEnergy be allowed to add court costs and attorney fees to a customer's bill only when a court issues FirstEnergy an order awarding such court costs or attorney fees. FirstEnergy argues that collection of court costs and attorney fees ensures that costs are charged to those customers who cause the costs to be incurred. OCC argued that, under Commission precedent, it is not appropriate to collect court costs and attorney fees through customers' bills. *See in re Cincinnati Gas & Electric Company*, Case No. 95-656-GA-AIR, Opinion and Order at 57 (December 12, 1996).

The Commission believes that this issue is a matter for the courts to determine on the basis of each individual case. We are unwilling to approve any tariff provision allowing FirstEnergy to collect court costs and attorney fees on customer bills irrespective of whether a court has awarded such costs or fees.

The Companies have included a number of instances where the tariffs simply cite to the Administrative Code, rather than quoting or paraphrasing the applicable rule. Staff believes that the tariffs should include the substance of the actual rule rather than a citation.

The Commission agrees with the Companies. FirstEnergy's proposal has the advantage of automatically incorporating certain future rule changes by reference, which ensures that there is no conflict between the Ohio Administrative Code and the Companies' tariffs. Accordingly, the Ohio Administrative Code would prevail in the absence of an approved waiver.

Staff recommended that the Companies change their existing tariff language in Section V(A) of the Companies' tariffs to ensure that the language comports with the Commission's decision in *White Plastics v. Columbus Southern Power*, Case No. 83-650-EL-CSS. The existing tariff language states "[n]o refund will be made representing the difference in charges under different rate schedules applicable to the same class of service." The Companies then recommended adding language stating "except as required by law" to the tariff to ensure that the tariffs do not conflict with *White Plastics*. OCC argued that this added language is insufficient in that it may intimidate customers who have legitimate claims against the utility by raising the prospect that a difficult legal process is involved.

The Commission notes that this issue concerns existing tariffs and that neither OCC nor Staff have demonstrated that any customer has been adversely impacted by the existing tariff provision. Nonetheless, the Commission agrees that the Companies' proposed additional language is appropriate and directs the Companies to make this change.

The Companies also proposed to delete certain tariff language in Section V(D) relating to the transfer of final bills in the case of a customer moving from one service location to another location (Co. Ex. 15-B at 4-5). The Commission agrees with the Companies that the language should be deleted.

The Companies also proposed language that references the billing cycles associated with changes in seasonal billing (Co. Ex. 15-B at 5). The Commission agrees that the Companies have included a reasonable level of specificity regarding when seasonal rates shall apply and will approve the proposed language.

OTHER ISSUES:

Storm Damage Deferral

FirstEnergy requested authority to defer expenses associated with storm damage for recovery in future rate cases (Co. Ex. 3 at 10-11). As proposed, the level of test year expenses would be used as a baseline. Actual storm damage expenses in excess of the baseline would be added to the deferred amount while actual storm damage expenses which are less than the deferred amount would be subtracted from the deferred amount.

OCC opposed this request on procedural grounds, claiming that this issue was not addressed in the Staff Report and that FirstEnergy failed to file a timely objection to Staff's failure to address the issue in the Staff Report. Thus, OCC claimed that this issue is not properly before the Commission.

The Commission notes that FirstEnergy filed the request for accounting authority in Case No. 07-553-EL-AAM. Because this is a request for accounting authority rather than a rate case issue, the requirement that FirstEnergy file an objection to an issue not addressed in the Staff Report does not apply.

The Commission finds that FirstEnergy's request for accounting authority is reasonable and should be granted. However, the Commission will not grant FirstEnergy authority to defer expenses related to storm damage indefinitely. This accounting authority shall expire the earlier of December 31, 2011, or upon the effective date of the Commission's order in FirstEnergy's next distribution rate case.

DSM Funding

OCC objected to the failure of FirstEnergy to include a significant increase in the funding of DSM programs in their application. OCC proposed an approach to DSM that contains multiple elements (OCC Ex. 3 at 3; OCC Ex. 3-A). OCC recommended that energy efficiency and DSM programs should be developed in a collaborative process involving interested stakeholders (OCC Ex. 3 at 17). OCC noted that the RCP Stipulation provided funding for DSM programs only through the end of 2008 with any unspent amounts providing funding for 2009. OCC urged the Commission to provide for continuation of the existing programs and the expansion of ratepayer funding for the low-income Community Connections Program to $5 million per year (OCC Ex. 3 at 11).

OPAE also seeks greater funding for low-income programs. OPAE contended that the testimony of its witness Smaltz supported an investment of $5.5 million in ratepayer funds to expand funding of the existing and successful Community Connections Program. In addition, OPAE supports the creation of a collaborative of interested stakeholders to establish a framework for expanded DSM.

At the hearing, Staff witness Rack agreed that a collaborative process is appropriate to develop DSM programs (Tr. VI at 40-41). However, Staff argued that increasing funding for this program is premature because there has not been sufficient time to evaluate the effectiveness of the program (Staff Ex. 12 at 2; Tr. VI at 43-44). FirstEnergy agreed that increasing funding at this time is premature (Co. Ex. 16-C at 2-3).

As codified in Section 4928.66, Revised Code, SB 221 requires electric distribution utilities to implement energy efficiency programs that will achieve energy savings and peak demand programs designed to reduce the utility's peak demand. Specifically, an electric utility must achieve energy savings in 2009, 2010, and 2011 of .3 percent, .5 percent, and .7 percent, respectively, of the normalized annual kWh sales of the utility during the preceding three calendar years. This savings continues to rise until the cumulative savings reach 22 percent by 2025. Peak demand must be reduced by one percent in 2009 and by .75 percent annually until 2018.

In light of these statutory mandates, the Commission cannot agree with the Companies and Staff that increased funding for DSM is premature. Significant investments in DSM programs will be required to meet the statutory requirements and the Commission agrees with OCC that an approach containing multiple elements will be necessary (OCC Ex. 3 at 3).

As one step of such an approach, the Commission finds that the existing DSM programs should be continued with ratepayer funding at current program levels and that OCC's proposal to increase funding for the Community Connections Program to $5 million per year should be adopted. Further, the Commission directs that a collaborative should be established to review the cost-effectiveness of these programs and to make such further recommendations to the Commission as are necessary to spend the funding authorized by this Opinion and Order in a cost-effective manner. FirstEnergy should file a revised DSM rider to recover the additional funding authorized by this Opinion and Order. However, the Commission notes that further actions will be necessary in future cases in order for FirstEnergy to meet the statutory mandates contained in Section 4928.66, Revised Code.

Advanced Metering Infrastructure (AMI)/Smart Metering/Modern Grid

The Commission believes that it is important that steps be taken by the electric utilities to explore and implement technologies, such as AMI, that will potentially provide benefits to customers in the long-run. As noted by Staff, a well designed AMI program could provide a road map for a wide range of operational utility benefits, as well as more difficult to quantify benefits (Staff Exs. 1 and 3 at 90-91; Staff Ex. 2 at 89-90).

To this end, Staff proposed that an AMI/Modern Grid rider be established as a placeholder mechanism for future recovery of related costs associated with the deployment of this technology (Id.). Staff recommended that the rider be set at a zero balance until the Staff and the Commission have had an opportunity to assess the costs and benefits associated with the rollout of a FirstEnergy AMI/Modern Grid project (Id.). Staff further recommended that the recovery of such costs through the AMI/Modern Grid rider be net of any utility benefits associated with AMI/Modern Grid deployment (Id.).

The Companies agreed with the establishment of the AMI/Modern Grid rider as a placeholder mechanism, but objected to the lack of specificity contained in the Staff Reports regarding the implementation of the rider, as well as the deployment of a cost effective AMI/Modern Grid (Co. Ex. 13-B at 5).

The Commission agrees with Staff's recommendation and finds that it is appropriate to establish an AMI/Modern Grid rider at this time that will be set at a zero balance until further evaluation of the costs and benefits of an AMI/Modern Grid project is completed. The Commission, therefore, directs the Companies to work with Staff to conduct a study of AMI/Modern Grid technology and deployment options at FirstEnergy. The study should include an assessment of potential advanced smart metering technology investments, open system architecture planning, large-scale AMI deployment, other cost-effective modern/smart grid applications, and a cost/benefit analysis of such programs. The assessment and proposed deployment strategy shall be filed by June 1, 2009, in *In the Matter of the Commission-Ordered Workshop Regarding Smart Metering Deployment*, Case No. 07-646-EL-UNC (see Staff Ex. 9 at 6).

Authorized Payment Stations

OPAE proposed that the Commission prohibit FirstEnergy from using payday lenders as authorized payment stations. OPAE contended that the collocation of these services encourages destructive borrowing practices which the Commission should not sanction. OCC agreed with OPAE's proposal.

The Commission believes that this issue is best addressed in the rulemaking process rather than a distribution rate case, and we note that we recently considered this issue in *In re Review of Chapters 4901:1-17 and 4901:1-18, Ohio Administrative Code, et al.*, Case No. 08-723-AU-ORD, Finding and Order (December 17, 2008). We will decline to adopt OPAE's proposal for the reasons set forth in that order.

EFFECTIVE DATE AND REQUIRED FILINGS:

FirstEnergy is hereby ordered to file revised tariff schedules in accordance with the terms of this opinion and order, as well as distribute a customer notice within 30 days of the effective date of the revised tariffs. The effective date of the increase for distribution electric service for TE and OE shall be for services rendered beginning on a date not earlier than the date of this opinion and order and the date upon which four complete copies of final tariffs are filed. The effective date of the increase for distribution electric service for CEI shall be for services rendered beginning on May 1, 2009.

FINDINGS OF FACT:

(1) CEI, TE, and OE are electric light companies within the meaning of Sections 4905.03(A)(4) and 4928.01(A)(7), Revised Code, and, as such, are public utilities as defined by Section 4905.02, Revised Code, subject to the jurisdiction and supervision of the Commission. CEI, TE, and OE are also electric distribution utilities within the meaning of Section 4928.01(A)(6), Revised Code.

(2) On May 8, 2007, the Companies filed a notice of intent to file an application for an increase in rates for electric distribution service for all of the Companies' service territories.

(3) Also on May 8, 2007, the Companies requested waivers of various standard filing requirements contained in Rule 4901-7-01, Appendix A, Chapter II, O.A.C., to the extent that the requirements require information related to generation service, which is now competitive and no longer owned and controlled by the Companies, or information that is sensitive, confidential, or would be unduly burdensome to provide. The Companies' waiver requests were granted on May 30, 2007 and June 6, 2007.

(4) FirstEnergy requested that the test year begin March 1, 2007, and end February 29, 2008, and that the date certain be May 31, 2007. By entry of May 30, 2007, the Commission approved the requested date certain and test year.

(5) On June 7, 2007, the Companies filed an application to increase their electric distribution rates, effective January 1, 2009, for TE and OE, and effective May 2009 for CEI.

(6) On August 1, 2007, the Commission issued an entry that accepted the application for filing as of June 7, 2007.

(7) On February 12, 2008, proofs of publication of the application were admitted into the record (Co. Ex. 18).

(8) On December 4, 2007, Staff filed its written reports of investigation with the Commission, one for each company.

(9) By entry dated December 21, 2007, persons wishing to file objections to the three Staff Reports were directed to file appropriate pleadings

by January 3, 2008, and those wishing to intervene were directed to file motions to intervene by January 15, 2008. This entry also scheduled a prehearing conference for January 22, 2008.

(10) Intervention was granted to OEG, Kroger, OCC, OHBA, NOAC, OPAE, Cleveland, OSC, OMA, CNE, Nucor, The Citizens Coalition, Integrys, and IEU.

(11) Motions to admit the following counsel to practice pro hac vice before the Commission in this proceeding were granted: David C. Rinebolt (OPAE), Cynthia A. Fonner (CNE), Garrett A. Stone (Nucor), and Micahel K. Lavanga (Nucor).

(12) On January 3, 2008, objections to the Staff Reports were filed by FirstEnergy, Cleveland, CNE, IEU, Kroger, Nucor, OCC, OEG, OHBA, OPAE, and OSC.

(13) A prehearing conference was held on January 22, 2008.

(14) The evidentiary hearing commenced on January 29, 2008.

(15) Twelve local public hearings were held at various locations from March 5, 2008, to March 24, 2008, pursuant to published notices. Approximately 654 members of the public attended the twelve public hearings and approximately 188 gave sworn testimony.

(16) A partial stipulation was filed on February 11, 2008, and admitted into evidence on February 25, 2008. The partial stipulation addressed revenue distribution and non-residential rate design issues and was opposed by Cleveland, OSC, and Nucor. Although not a signatory party to the partial stipulation, Staff supported the stipulation during the evidentiary hearing.

(17) The value of all of the Companies' jurisdictional property used and useful for the rendition of electric distribution service to their customers affected by this application, determined in accordance with Section 4909.15, Revised Code, is not less than $983,574,074 for CEI, $413,972,359 for TE, and $1,251,251,538 for OE.

(18) A comparison of the Companies' total operating revenue of $435,968,832 for CEI, $156,930,091 for TE, and $508,093,230 for OE with total operating expenses of $371,843,320 for CEI, $146,589,128 for TE, and $447,794,098 for OE indicates that, under its existing rates, CEI, TE, and OE had net operating income of $64,125,511,

$10,340,963, and $60,299,132, respectively. This net annual income, when applied to a rate base of $983,574,074 for CEI, $413,972,359 for TE, and $1,251,251,538 for OE, results in rates of return of 6.52 percent, 2.50 percent and 4.82 percent, respectively.

(19) Rates of return of 6.52 percent for CEI, 2.50 percent for TE and 4.82 percent for OE are insufficient to provide the Companies reasonable compensation for the service they provide.

(20) A rate of return of 8.48 percent is fair and reasonable under the circumstances presented by this case and is sufficient to provide the Companies just compensation and return on the value of their property used and useful in furnishing electric distribution service to their customers.

(21) A rate of return of 8.48 percent applied to the Non-RCP jurisdictional rate base of $930,132,892 for CEI, $377,913,435 for TE, and $1,119,652,040 for OE, and a debt return of 6.54 percent applied to RCP rate base items of $53,441,182 for CEI, $36,058,924 for TE, and $131,599,498 for OE, results in allowable net operating income of $82,370,322 for CEI, $34,405,313 for TE, and $103,553,100 for OE and income deficiencies of $18,244,811, $24,064,350, and $43,253,968, respectively.

(22) The income deficiencies, when applied to the gross revenue conversion factors and combined with their respective adjusted operating revenues, produces revenue requirements of $465,140,883 for CEI, $195,451,002 for TE, and $577,011,492 for OE.

(23) This represents an increase of $29,172,051 for CEI, $38,520,912 for TE, and $68,918,262 for OE over the total revenues for the companies, an average increase of 6.69, 24.55, and 13.56 percent for CEI, TE, and OE, respectively.

CONCLUSIONS OF LAW:

(1) The Companies' application was filed pursuant to, and this Commission has jurisdiction of the application under, the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code, and the application complies with the requirements of these statutes.

(2) A Staff investigation was conducted, reports of that investigation were duly filed and mailed, and public hearings were held, the written notice of which complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.

(3) The partial stipulation submitted by a majority of the parties, and supported by Staff, is reasonable and, as indicated herein, shall be adopted in its entirety.

(4) The existing rates and charges for electric distribution service are insufficient to provide the Companies with adequate net annual compensation and return on their property used and useful in the provision of electric distribution service.

(5) A rate of return of 8.48 percent is fair and reasonable under the circumstances of this case and is sufficient to provide the Companies just compensation and return on its property used and useful in the provision of electric distribution services to their customers.

(6) The Companies are authorized to withdraw their current tariffs and to file, in final form, revised tariffs as approved by the Commission herein.

ORDER:

It is, therefore,

ORDERED, That the application of the Companies for authority to increase its rates and charges for electric distribution service is granted to the extent provided in this opinion and order. It is, further,

ORDERED, That each company is authorized to file in final form four complete copies of its tariffs consistent with this opinion and order, and to cancel and withdraw its superseded tariffs upon the effective date of the revised tariffs. One copy shall be filed with this case docket, one copy shall be filed with each company's TRF docket, and the remaining two copies shall be designated for distribution to the rates and tariffs division of the Commission's utilities department. Each company shall also update its tariffs previously filed electronically with the Commission's docketing division. It is, further,

ORDERED, That the effective date of the revised tariffs for TE and OE shall be a date not earlier than the date of this opinion and order and the date upon which four complete copies of final tariffs are filed with the Commission. The revised tariffs shall be effective for services rendered on or after such effective date, contingent upon final review and approval by the Commission. It is, further,

ORDERED, That the effective date of the revised tariffs for CEI shall be a date not earlier than both May 1, 2009, and the date upon which four complete copies of final tariffs are filed and approved by the Commission. The revised tariffs shall be effective for services rendered on or after such effective date. It is, further,

ORDERED, That the Companies shall notify their customers of the changes to the tariffs via bill message or bill insert 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 a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

KWB/GAP:ct

Entered in the Journal
JAN 21 2009

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals.	)	Case No. 07-551-EL-AIR Case No. 07-552-EL-ATA Case No. 07-553-EL-AAM Case No. 07-554-EL-UNC

OPINION OF COMMISSIONERS CHERYL L. ROBERTO AND PAUL A. CENTOLELLA CONCURRING IN PART AND DISSENTING IN PART

We concur with our colleagues in every aspect of the Opinion and Order issued in this matter with the exception of the analysis, discussion, and resultant impact of the calculation for the Distribution Deferrals which, as calculated in the majority opinion, would permit the Companies to recover twice for a portion of distribution costs.

In Case No. 05-1125-EL-ATA, *In the Matter of the Application of Ohio Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals* (the "RCP case"), the Commission authorized the capitalization and deferral of up to $150 million distribution expenses in each of the three years, 2006 through 2008. The Commission recognized that this practice was a departure from generally recognized regulatory principles that ordinary expenses incurred by a public utility must be recovered, if at all, through annual revenues but determined that "both exigent circumstances and good reason" existed to "deviate in a controlled way" from this regulatory principle because "the Companies are clearly in need of significant and costly improvements to their infrastructure." Further the Commission stated that, "[w]e will approve the deferral concept in this case premised upon the understanding that the expenses related to infrastructure improvement and the increased expenses for maintenance of infrastructure and reliability will yield necessary improvements that otherwise would have been realized, for company financial reasons, over a much longer period of time." RCP case Opinion and Order at 8-9. The Commission emphasized that:

> We are mindful that such deferrals must be scrutinized to assure that the costs to be deferred are reasonable, appropriately incurred, clearly and directly related to specifically necessary infrastructure improvements and reliability needs of the Companies, *and in excess of expense amounts already included in the rate structures of each of the Companies.*

Emphasis added. RCP case Opinion and Order at 9. Thus, during the course of what amounted to a rate freeze, to promote the common interests of the Companies and the

public, the Commission permitted the extraordinary remedy of deferral for ordinary operating expenses but only to the degree to which those expenditures were in excess of the revenue amounts already available as included in the rate structures of each of the Companies. This limitation assured that the Companies would not recover twice for the same expenditures.

The Companies followed the Commission's Opinion and Order in the RCP case with a "Motion for Clarification" which sought explicit Commission sanction for the Companies' proposal that "the most appropriate method [to determine which distribution costs are excess of expense amounts already contained in the existing rate structure] would be to compare the level of distribution operation and maintenance expenses approved by the Commission in the Transition Plan proceeding, 99-1212-EL-ETP *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues* (ETP case"), to the Companies' 2006 distribution operation and maintenance expenses." Motion for Clarification at 4. The Commission, characterizing the Companies' Motion as rehearing request to "modify" its order, did not adopt this bright line test. Entry on Rehearing at 3-4. Rather it acknowledged that "there may be difficulty in determining the amounts of distribution O&M expense embedded in current rates that relate to the specific [approved] expense categories. It directed Companies as follows:

> (8) ...Therefore, using the information that is available, the test for what amounts may be included in future distribution deferrals under the O&O shall be:
>
> (A) If FirstEnergy spends more than the total amount of its distribution O&M expenses embedded in current rates, the;
>
> (B) FirstEnergy may defer up to $150 million or the excess amounts determined in 8(a) above, whichever is lower in expenses that are attributable to the expense categories listed in Attachment 2 of Joint Ex. 2.

Entry on Rehearing at 4.

In the instant matter, the Companies seek to recover all distribution O&M expenses over the ETP case baseline, as it proposed to do in its Motion for Clarification in the RCP case and which the Commission, given the opportunity to adopt, did not. The Majority Opinion used this baseline to calculate deferrals. However, by the time the Commission approved the deferrals in the RCP case, the Companies' distribution revenues had increased. Using as the baseline expenses or revenue requirements from the Companies'

earlier transition case permit the Companies to recover its expenditures once through an increase in revenues under its existing rates and a second time by calculating deferrals from baseline which did not reflect what the Company was recovering at the time the deferrals were approved.

We believe that an appropriate calculation of the baseline should begin by looking at what was embedded in the Companies' rates, not what was in its revenue requirements. Taking this approach, we would calculate the percentage of the Companies rates that were being used to recover the expenses identified in the Staff's baseline calculation and apply that percentage to the Companies' 2006 through 2008 annual revenues to calculate the baseline for these deferrals.

Cheryl L. Roberto, Commissioner

Paul A. Centolella, Commissioner

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals.	)	Case No. 07-551-EL-AIR Case No. 07-552-EL-ATA Case No. 07-553-EL-AAM Case No. 07-554-EL-UNC

CONCURRING OPINION

Distribution Deferrals

As stated in the Opinion and Order, the Companies were authorized to defer up to $150 million per year in distribution expenses for 2006, 2007, and 2008 as a result of the RCP Stipulation. In this case, the Commission finds that the amount of the 2007 distribution deferrals included in the rate base should be the balance as of the date certain. We further find that Staff has properly calculated the amount of the distribution deferrals in accordance with the RCP Stipulation and our order adopting the RCP Stipulation. Based on a review of the record in this case and the RCP proceeding, which includes a stipulation signed by the OCC, the most reasonable interpretation and resultant conclusion is to utilize as the baseline for the distribution O&M expenses currently in base rates, the distribution O&M expenses established in the FirstEnergy electric transition plan proceeding, Case No. 99-1212-EL-ETP. Any recommended adjustment to that calculation fails to recognize that distribution rates were frozen during this period and that reallocations of revenues or expenses should not be preformed without considering all factors contemplated by the distribution rate formula.

Alan R. Schriber, Chairman

2505.12 No supersedeas bond required for certain appeals.

An appellant is not required to give a supersedeas bond in connection with any of the following:

(A) An appeal by any of the following:

(1) An executor, administrator, guardian, receiver, trustee, or trustee in bankruptcy who is acting in that person's trust capacity and who has given bond in this state, with surety according to law;

(2) The state or any political subdivision of the state;

(3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer.

(B) An administrative-related appeal of a final order that is not for the payment of money.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 07-11-2001

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

4903.16 Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Effective Date: 10-01-1953

4909.15 Fixation of reasonable rate.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress

from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C)

(1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas, water-works, or sewage disposal system company, not later than the end of the test period.

(D) A natural gas, water-works, or sewage disposal system company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas, water-works, or sewage disposal system company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service

to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

Amended by 129th General AssemblyFile No.199, HB 379, §1, eff. 3/27/2013.

Amended by 129th General AssemblyFile No.20, HB 95, §1, eff. 9/9/2011.

Effective Date: 11-24-1999

4911.02 Consumers' counsel - powers and duties.

(A) The consumers' counsel shall be appointed by the consumers' counsel governing board, and shall hold office at the pleasure of the board.

(B)

(1) The counsel may sue or be sued and has the powers and duties granted the counsel under this chapter, and all necessary powers to carry out the purposes of this chapter.

(2) Without limitation because of enumeration, the counsel:

(a) Shall have all the rights and powers of any party in interest appearing before the public utilities commission regarding examination and cross-examination of witnesses, presentation of evidence, and other matters;

(b) May take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission;

(c) May institute, intervene in, or otherwise participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission;

(d) May conduct long range studies concerning various topics relevant to the rates charged to residential consumers.

(C) The counsel shall follow the policies of the state as set forth in Chapter 4929. of the Revised Code that involve supporting retail natural gas competition.

Amended by 129th General AssemblyFile No.28, HB 153, §101.01, eff. 9/29/2011.

Effective Date: 09-01-1976

4911.06 Consumers' counsel considered state officer.

The consumers' counsel shall be considered a state officer for the purpose of section 24 of Article II, Ohio constitution.

Effective Date: 09-01-1976

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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 Gas 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

SECOND JOINT APPLICATION FOR REHEARING BY OFFICE OF THE OHIO CONSUMERS' COUNSEL, KROGER COMPANY, OHIO MANUFACTURERS' ASSOCIATION, AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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OHIO PARTNERS FOR AFFORDABLE ENERGY

March 21, 2014

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas 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
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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

SECOND JOINT APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL,
KROGER COMPANY,
OHIO MANUFACTURERS' ASSOCIATION, AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

For the purpose of protecting the 420,000 natural gas customers of Duke Energy Ohio, Inc. ("Duke" or "Utility"), the Office of the Ohio Consumers' Counsel ("OCC"), Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA") and Ohio Partners for Affordable Energy ("OPAE") (collectively, "Joint Consumer Advocates") respectively apply for rehearing of the Entry ("Entry") issued on a 3-2 vote by the Public Utilities Commission of Ohio ("PUCO") on February 19, 2014 in the above-captioned cases. The Joint Consumer Advocates respectively submit that the PUCO's Entry is unreasonable and unlawful in the following particulars:

A. The PUCO Erred By Approving Duke's Tariffs That Unjustly, Unreasonably And Unlawfully Impose MGP[1]-Related Environmental Investigation And Remediation Costs On Customers.

B. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because Its Order That Denies The Joint Consumer Advocates' Motion To Stay Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons For The Denial Of The Motion To Stay Based Upon Said Findings Of Fact.

C. If The PUCO Denied The Joint Consumer Advocates' Motion For Stay Because Of A Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Bond Requirement In R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine.

D. To The Extent That The PUCO Denied OCC's[2] Request For A Stay Because Of The Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Public Office Exemption To The Bond Requirement (R.C. 2505.12) Applies To OCC And; Therefore, No Bond Will Be Necessary To Effect The Stay That OCC Seeks.

E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because Its Order That Denies The Request For Duke To Collect The MGP Rider Revenues Subject To Refund Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons For The Denial Of The Joint Consumer Advocates Request That Duke's Collection Of The Rate Increase Be Subject To Refund Based Upon Said Findings Of Fact.

The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

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[1] MGP stands for manufactured gas plant.

[2] Kroger. OMA and OPAE are not participating in this assignment of error included in the Second Joint Application for Rehearing.

Respectfully submitted,

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OHIO PARTNERS FOR AFFORDABLE ENERGY

TABLE OF CONTENTS

Page

I. INTRODUCTION AND GENERAL SUPPORT FOR CLAIMS OF ERROR 1

II. HISTORY OF THE CASES 2

III. STANDARD OF REVIEW 3

IV. ARGUMENTS ON ASSIGNMENTS OF ERROR 4

A. The PUCO Erred By Approving Duke's Tariffs That Unjustly, Unreasonably And Unlawfully Impose MGP-Related Environmental Investigation And Remediation Costs On Customers. 4

B. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because Its Order That Denies The Joint Consumer Advocates' Motion To Stay Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons For The Denial Of The Motion To Stay Based Upon Said Findings Of Fact. 5

C. If The PUCO Denied The Joint Consumer Advocates' Motion For Stay Because Of A Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Bond Requirement In R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine 9

D. To The Extent That The PUCO Denied OCC's Request For A Stay Because Of The Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Public Office Exemption To The Bond Requirement (R.C. 2505.12) Applies To OCC And; Therefore, No Bond Will Be Necessary To Effect The Stay That OCC Seeks 10

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V. CONCLUSION 13

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.	)))	Case No. 12-1685-GA-AIR
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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

MEMORANDUM IN SUPPORT

I. INTRODUCTION AND GENERAL SUPPORT FOR CLAIMS OF ERROR

Each of the Joint Consumer Advocates respectively files this Application for Rehearing asking the PUCO to modify or reverse its Entry that was adopted by a vote of three to two. On February 19, 2014, the PUCO issued its Entry authorizing Duke to collect from customers $55.5 million, through its proposed tariffs, in environmental investigation and remediation costs for two MGP sites that began service in the 1800's and that have not been used and useful in providing utility service in over 50 years.[3]

The Joint Consumer Advocates had asked the PUCO on December 2, 2013, to Stay its November 18, 2013 Opinion and Order.

[3] The West End site is located on the west side of downtown Cincinnati and it was constructed by the Cincinnati Gas Light and Coke Company in 1841. Gas for lighting was first produced at the plant in 1843, and the manufacture of gas ceased in 1928. The East End site is located about four miles east of downtown Cincinnati. Construction of the East End site began in 1882 and commercial operations began in 1884, with the manufacture of gas ceasing in 1963. Duke Ex. No. 20(A) (Supplemental Testimony of Andrew Middleton at 25 (February 25, 2013); See also Tr. Vol. I at 183 (April 29, 2013).

II. HISTORY OF THE CASES

On August 10, 2009, Duke filed an Application with the PUCO to defer environmental investigation and remediation costs.[4] The Commission granted Duke's Application on November 12, 2009.[5]

On June 7, 2012, Duke filed its Prefiling Notice for its request to increase natural gas distribution rates. As part of its Rate Case Application, subsequently filed on July 9, 2012, Duke sought the authority to collect from its customers investigation, remediation and carrying costs associated with Duke's environmental remediation efforts at its MGP sites.[6]

On January 4, 2013, the PUCO Staff filed its Staff Report of Investigation ("Staff Report"). On February 4, 2013, OCC, Kroger, OPAE, as well as other interested parties, filed Objections to the Staff Report as required by R.C. 4909.19. On February 25, 2013, interested parties filed testimony of their expert witnesses in support of Objections to the Staff Report of Investigation.

On April 2, 2013, a Stipulation and Recommendation ("Stipulation") was entered into among Duke, the PUCO Staff, OCC, OPAE, Kroger and OMA **for all of the issues except for MGP-related cost recovery**. As part of the Stipulation, the Signatory Parties bifurcated the issue of MGP-related cost recovery and collection, and instead agreed to litigate the MGP issues.[7]

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[4] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM (August 10, 2009). ("Duke Deferral Case").

[5] Duke Deferral Case, Entry at 3-4 (November 12, 2009).

[6] Duke Ex. No. 2 (Application, Schedule) at C-3.2 (July 9, 2012).

[7] Joint Ex. No. 1 (Stipulation and Recommendation) at 8 (April 2, 2013).

On November 13, 2013, the PUCO issued its Order that authorized Duke to collect approximately $55.5 million of previously deferred MGP-related environmental investigation and remediation costs from customers. On November 27, 2013, Duke filed proposed tariffs that included the MGP Rider for the collection of authorized MGP-related investigation and remediation expenses from customers.

On December 2, 2013, the Joint Consumer Advocates filed a Motion for a Stay to prevent Duke from charging MGP-related clean-up costs pending rehearing and any appeals, or in the alternative, a Motion to make Duke's impending rates charging manufactured gas plant clean-up costs to customers be collected subject to refund.

On February 19, 2014, an Entry was issued that approved the Utility's proposed tariffs that were filed on November 27, 2013, and included the MGP Rider intended for the collection of MGP-related investigation and remediation costs from customers. In that Entry, the PUCO also denied the Motion for Stay and the request to require Duke to collect revenues through the MGP Rider subject to refund.

III. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after the PUCO issues an order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[8] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[9]

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[8] R.C. 4903.10.

[9] Id.

In considering an application for rehearing, Ohio law provides that the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[10] Furthermore, if the PUCO grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same * * *."[11]

Joint Consumer Advocates meet the statutory requirements applicable to applications for rehearing pursuant to R.C. 4903.10. Accordingly, Joint Consumer Advocates respectfully request the PUCO grant rehearing on the matters specified below.

IV. ARGUMENTS ON ASSIGNMENTS OF ERROR

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

The PUCO approved the proposed tariffs filed by Duke on November 27, 2013. The PUCO stated:

> 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.[12]

These tariffs included the MGP Rider tariff that is intended to permit Duke to collect the MGP-related investigation and remediation expenses from customers. Two Commissioners dissented from the Order, in part stating:

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[10] Id.

[11] Id.

[12] Entry at 6 (February 19, 2014).

> 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.**[13] (Emphasis added).

As argued by Joint Consumer Advocates in this case, there is no legal basis for collecting these charges under the PUCO's rate-making law -- R.C. 4909.15 and 4909.18.[14] The Joint Consumer Advocates also argued that these costs are unjust and unreasonable because the Utility failed to meet its burden of proof that the MGP-related investigation and remediation expenses were prudently incurred.[15] Joint Consumer Advocates have appealed these issues to the Supreme Court of Ohio.[16]

For these reasons, the PUCO should not have authorized Duke to commence collection of the unjust, unreasonable and unlawful MGP-related investigation and remediation costs from Duke's customers.

B. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because Its Order That Denies The Joint Consumer Advocates' Motion To Stay Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons For The Denial Of The Motion To Stay Based Upon Said Findings Of Fact.

The Entry denied the Joint Consumer Advocate's Motion for Stay. However, the rationale for denying the Stay is not articulated. Instead, the PUCO repeats Duke's argument against granting the Stay. The PUCO states:

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[13] Entry at Concurring and Dissenting Opinion (February 19, 2014).

[14] See OCC and OPAE Initial Brief at 11-49 (June 6, 2013). See Kroger Initial Brief at 10-11 (June 6, 2013). See OCC and OPAE Reply Brief at 2-29 (June 20, 2013). See Kroger Reply Brief at 4-14 (June 20, 2013). See OMA Reply Brief at 3-5 (June 20, 2013). See OCC, Kroger, OMA and OPAE Application for Rehearing at 5-25 (December 13, 2013).

[15] See OCC and OPAE Initial Brief at 50-91 (June 6, 2013). See Kroger Initial Brief at 11-12 (June 6, 2013). See OCC and OPAE Reply Brief at 39-64 (June 20, 2013). See Kroger Reply Brief at 14-16 (June 20, 2013). See OCC, Kroger, OMA and OPAE Application for Rehearing at 27-39, 48-52 (December 13, 2013).

[16] OPAE Notice of Appeal, S. Ct. Case No. 2014-0328 (March 5, 2014); OCC and OMA Second Notice of Appeal, S. Ct. Case No. 2014-0328 (March 10, 2014); Kroger Third Notice of Appeal, S. Ct. Case No. 2014-0328 (March 10, 2014).

> 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.

In stating its decision, the PUCO fails to explain why granting the request for Stay should be considered antithetical to the PUCO's decision and why it was inappropriate for the PUCO to entertain the motion for stay. It is understood that the PUCO believes its Order will be upheld on appeal. However, the PUCO failed to explain its decision in light of the irreparable harm to Duke's customers if the Order is upheld.

The Joint Consumer Advocates argued their Motion for Stay should be granted because the articulated four-factor test for a stay could be satisfied. The PUCO disagreed, stating:

> 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.[17]

Contrary to the requirements of R.C. 4903.09, the PUCO reached the conclusion on the four-factor test without any explanation of the findings of fact that support the conclusion.

Regarding the first factor, it should be pointed out that the Order was not unanimous. The dissent provides a good reason as to why the Joint Applicants should prevail. The PUCO did not consider the likelihood of the Joint Consumer Advocates' success on appeal.

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[17] Entry at 6 (February 19, 2014).

The other three factors for a stay are absolutely satisfied. The second factor relates to irreparable harm to customers without the stay. Under the Order, Duke's consumers will be required to pay higher utility bills to finance $55.5 million in costs that Duke expended to remediate two manufactured gas plant sites. Should the Supreme Court of Ohio reverse the PUCO's Order in consideration of the Joint Consumer Advocates' appeals, Ohioans who have paid for the MGP remediation costs during the pendency of the appeals will be left without a remedy to recover those payments. Ohioans would be irreparably harmed as they would not be able to recover their money, and Duke will benefit from the windfall. Surely the Commission would not support this unintended consequence should its Order be reversed.

The third factor for granting a stay is that the stay will not cause harm to other parties. If the PUCO issues a stay of its Order and the Court eventually reverses the PUCO, then the Utility will not be harmed. In the case which authorized Duke to defer the MGP-related investigation and remediation costs, the PUCO issued a Finding and Order that established the constraints under which Duke was authorized to accrue carrying charges on the MGP deferrals. The PUCO stated:

> Duke is further authorized to accrue carrying charges on all deferred amounts between the dates the expenditures were made and the date recovery commences.[18]

In a 1974 U.S. Supreme Court Case, Justice Rehnquist observed "the temporary loss of income, **ultimately to be recovered**, does not usually constitute irreparable injury,"[19] Duke will, in this case, if the appeals are unsuccessful, ultimately recover the $55.5 million MGP-related investigation and remediation expenses from customers plus

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[18] Id., Finding and Order at 3.

[19] *Sampson v. Murray* (1974), 415 U.S. 61, 90. (Emphasis added.); *See, e.g., Tilberry v. Body* (1986), 24 Ohio St. 3d 117; *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St.3d 158, 161.

carrying charges accrued during the pendency of the appeals. Therefore, Duke will not suffer any damages or economic harm, let alone irreparable harm. The PUCO failed to explain how Duke would be harmed under this circumstance.

The PUCO also found granting a stay to be against the public interest. This conclusion was reached without explanation or discussion of the findings of fact that support it. It cannot be in the public interest to allow a public utility to retain revenues that are subsequently determined to be unjust or unlawful; however, that is exactly what could happen if the stay is not granted in this case.

Unfortunately for customers, it is likely that any money collected -- even though later found to be unlawfully collected -- will not be returned to customers. This is an outcome that was recently experienced in an appeal of the electric security plan ("ESP") of Columbus Southern Power Company and Ohio Power Company (collectively "AEP").[20] In regard to unlawful charges paid by AEP's customers, the Supreme Court of Ohio found that $368 million in unjustified provider of last resort revenues collected by AEP could not be returned to customers because of the rule against retroactive ratemaking.[21]

The precedent surrounding retroactive ratemaking has worked against customer interests in a number of cases. The general rule is that once the utility collects its costs from customers, even if later that collection is determined to be unlawful, those collections cannot be returned to customers. In *AEP,* Justice Pfeifer in his dissenting opinion reacted harshly to this outcome. Justice Pfeifer stated: "[i]t is unconscionable that a public utility should be able to retain $368 million that it collected from customers based on assumptions that are unjustified." Yet the only way to avoid such an unjustified outcome is to grant the requested stay. In *AEP,* the Court noted that Appellants had not

[20] *In re Application of Columbus S. Power Co.*, Slip Op 2014-Ohio-462 at ¶ 54 (February 13. 2014).
[21] *Id.*

requested a stay.[22] Therefore, the requested stay in this case should be granted to protect Duke's customers in the event that the PUCO's Order and Entries are found unlawful.

C. If The PUCO Denied The Joint Consumer Advocates' Motion For Stay Because Of A Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Bond Requirement In R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine.

The PUCO discusses in its Entry the bond requirement at the Court. The PUCO states:

> 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.[23]

The PUCO failed to explain its rationale for denying the Stay based on the bond requirement. However, if the PUCO's relied upon the bond requirement, this would be unreasonable and unlawful because the bond requirement is unconstitutional.

When the Ohio General Assembly enacted R.C. 4903.16, it unconstitutionally encroached upon the Supreme Court of Ohio's authority. R.C. 4903.16 is unconstitutional because the bond requirement restricts the Court's ability to exercise its inherent authority to issue stays, thereby violating the separation of powers doctrine. The Ohio Constitution inherently embraces the separation of powers doctrine.[24] The statute prevents the Court from averting irreparable injury to the public pending the outcome of an appeal. For these reasons, the Joint Consumer Advocates have requested that the Court declare the bond requirement in R.C.4903.16 unconstitutional. Appellants' Motion for Stay, Ohio Supreme Court Case No. 2014-0328 (March 17, 2014).

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[22] *In re Application of Columbus S. Power Co.*, Slip Op. 2014-Ohio-462 at ¶ 56-57 (February 13, 2014).

[23] Entry at 4 (February 19, 2014).

[24] *State v. Bodyke*, 126 Ohio St.3d 266, 275, 2010-Ohio-2424, 933 N.E.2d 753; *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115; *State v. Hochhausler*, 76 Ohio St.3d 455, 668 N.E.2d 457 (1996).

While the PUCO cannot resolve constitutional issues, to the extent that the PUCO relied on Duke's argument that the Joint Consumer Advocates' request for Stay should be denied because of the bonding requirement, that reasoning cannot stand up to scrutiny. Moreover, the Entry fails to address specifically the findings of fact that are relied upon in denying the Stay, and the PUCO should therefore grant rehearing on this issue. The PUCO should grant rehearing, and grant the request for a Stay.

D. To The Extent That The PUCO Denied OCC's[25] Request For A Stay Because Of The Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Public Office Exemption To The Bond Requirement (R.C. 2505.12) Applies To OCC And; Therefore, No Bond Will Be Necessary To Effect The Stay That OCC Seeks.

Ohio law provides for an exemption that relieves the OCC from having to post a bond -- or "execute an undertaking" as bonding is referred to in R.C. 4903.16 -- in furtherance of a requested stay. A public officer is not required to post a supersedeas bond when acting in a representative capacity for the State.[26] R.C. 2505.12 provides:

> An appellant is *not required to give a supersedeas bond* in connection with any of the following:
>
> (A) An appeal by any of the following:
>
> * * *
>
> (3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer. R.C. 2505.12. (Emphasis added.)

[25] Kroger, OMA and OPAE are not participating in this assignment of error included in the Second Joint Application for Rehearing.

[26] It is easy to understand why the Ohio General Assembly has exempted state public officers from having to post a bond to effect a stay pending an appeal. In this case. Duke's collection of $55 million from its customers is the subject of this appeal. If OCC were required to post a $55 million bond in order to obtain a stay. OCC understands that it would have to pay an annual premium for the bond of approximately $832,500 during the first year the appeal is pending plus a pro-rated amount for increments of a year after the first year that the appeal remains pending. In addition to this cost that is not affordable for OCC. in order to get a bond OCC would be subject to an indemnification provision that would put the OCC (or possibly the State) at risk of having to pay up to $55 million in the event the bond was forfeited. R.C. 2505.12 removes that cost and potential liability to the state when a stay is sought during an appeal.

According to R.C. 4911.06, the Consumers' Counsel "shall be considered a state officer * * *." R.C. 4911.06. Furthermore, according to R.C. 4911.02, the Consumers' Counsel may "institute, intervene in, or otherwise participate in proceedings in both state and federal courts * * * on behalf of the residential consumers." R.C. 4911.02. Thus, in filing a request for a stay of execution, the Consumers' Counsel acts in a representative capacity and, as a public officer, is not required to post a supersedeas bond. In fact, the Supreme Court of Ohio has even granted a stay for an entity other than a public officer without requiring that a bond be posted by the appellant. In *MCI Telecommunications Corp. v. PUCO*, (1987), a stay was granted in a utility case by the Court without the posting of a bond despite the fact that the appellant was not a public entity. 31 Ohio St.3d 604, 605, 510 N.E.2d 806 (1987) (Douglas, J., dissenting). Similarly, the PUCO should grant OCC's request for stay of execution in this case.

R.C. 2505.12 should be read in pari materia with R.C. 4903.16 as noted by Justice Herbert in his dissent in *Columbus v. Pub. Util. Comm. of Ohio,* 170 Ohio St. 105, 111 (1959) (Herbert, J., dissenting). There, Justice Herbert concluded that the City of Columbus, as a political subdivision of the state of Ohio, should not be required to post a bond to obtain a stay, or that a nominal bond should be sufficient.[27] Thus, the PUCO should stay the operation of its Order and Entries pending final decision, without regard to the bond requirement on the OCC.[28] Justice Herbert wrote, "It is the view of the writer * * * that the Legislature never intended to handicap in this manner a municipality seeking to protect its citizens who are consumers of public utility products."[29]

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[27] *Columbus v. Pub. Util. Comm. of Ohio,* 170 Ohio St. 105, 111 (1959).

[28] *Id.* at 111.

[29] *Id.* at 112.

If the PUCO denied the request for a Stay because of the requirement to post a bond that denial is unjust and unreasonable because OCC is not required to post a supersedeas bond in that OCC is acting in a representative capacity as a public officer of the State. Accordingly, no bond will be necessary to affect a stay.

E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because Its Order That Denies The Request For Duke To Collect The MGP Rider Revenues Subject To Refund Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons For The Denial of The Joint Consumer Advocates' Request That Duke's Collection of The Rate Increase Be Subject to Refund Based Upon Said Findings Of Fact.

The Entry also fails to adequately set forth the reasons for denying the request for Duke to collect MGP Rider revenues subject to refund. The Entry dismisses this request in a single sentence. The PUCO states:

> 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.[30]

The PUCO did not explain the relevance of its statement that granting the alternative proposal would be contrary to its decision. Again, it is understood that the PUCO believes its Order will be upheld on appeal. However, in considering a request for a stay, the PUCO needed to consider the circumstance that its Order is not upheld.

The appeal process could take two years or more, and the authorized $55.5 million MGP-related investigation and remediation costs will be collected over three years. The Entry denies Duke's customers an opportunity to recoup unjust and unreasonable charges in the event of a reversal at the Court.[31] It should be considered unconscionable for a utility to retain revenues collected from customers that are

[30] Entry at 6 (February 19. 2014).

[31] *In re Keco Industries* 166 Ohio St. 25. (The rule against retroactive ratemaking would preclude subsequent recovery of previously collected revenues under a PUCO approved tariff.)

subsequently found to be unreasonable or unlawful. Unfortunately, that is what would happen under Ohio law if a stay is not granted.[32] The PUCO has the authority[33] and should take steps to prevent that unconscionable eventuality from occurring in this case. The PUCO should grant rehearing, and order the MGP Rider revenues be collected subject to refund.

V. CONCLUSION

For all the reasons stated above, the PUCO should grant rehearing in these cases and grant the Joint Consumer Advocates' Motion for A Stay.

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[32] *In re Application of Columbus S. Power Co.*, Slip Op. 2014-Ohio-462 at ¶ 54 (February 13, 2014).

[33] *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise Its Depreciation Accrual Rates and Reserves*. Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

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OHIO PARTNERS FOR AFFORDABLE ENERGY

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I hereby certify that a copy of this *Second Joint Application for Rehearing* was served on the persons stated below, electronically this 21st day of March, 2014.

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in

Case No(s). 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, 12-1688-GA-AAM

Summary: App for Rehearing Second Joint Application for Rehearing by the Office of the Ohio Consumers' Counsel, Kroger Company, Ohio Manufacturers' Association and Ohio Partners for Affordable Energy electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas 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

APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL,
KROGER COMPANY,
OHIO MANUFACTURERS' ASSOCIATION
OHIO PARTNERS FOR AFFORDABLE ENERGY

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OHIO PARTNERS FOR AFFORDABLE ENERGY

December 13, 2013

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas 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

APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
KROGER COMPANY,
OHIO MANUFACTURERS' ASSOCIATION
OHIO PARTNERS FOR AFFORDABLE ENERGY

For the purpose of protecting the 420,000 natural gas customers of Duke Energy Ohio, Inc. ("Duke" or "Utility"), the Office of the Ohio Consumers' Counsel ("OCC"), Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA") and Ohio Partners for Affordable Energy ("OPAE") (collectively, "Joint Consumer Advocates") respectively apply for rehearing of the Opinion and Order ("Order") issued on a 3-2 vote by the Public Utilities Commission of Ohio ("PUCO") on November 13, 2013 in the above-captioned cases. The Joint Consumer Advocates submit that the PUCO's Order is unreasonable and unlawful in the following particulars:

A. The PUCO Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants That Are Not Used And Useful, In Violation Of Ohio Law Including But Not Limited To O.R.C. 4909.15.

1. The PUCO erred when it disregarded Ohio law that mandates only costs incurred from plant that is "used and useful" in rendering utility service may be collected from customers.

2. The PUCO erred when it 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 to Duke's customers as of March 31, 2012.

B. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are 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).

C. 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 ORC 4909.15(A)(4).

D. 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 (And Contrary To The Opinion Of The Dissenting Commissioners).

E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, For Providing Specific Findings Of Fact And Written Opinions That Are Supported By Record Evidence.

1. The record evidence did not support the PUCO's Order that the used and useful standard under R.C. 4909.15(A)(1) is not applicable.

2. The record evidence did not support the PUCO's Order that the MGP-related investigation and remediation costs were costs of rendering public utility service under R.C. 4909.15(A)(4).

3. The record evidence did not support the PUCO's Finding that strict liability for Duke under CERCLA means Duke's Customers should be responsible for paying the MGP-related investigation and remediation expenses.

F. The PUCO Erred By Making The Remedy For The Utility's Pollution Of MGP Sites The Financial Responsibility Of Duke's Customers Instead Of Duke's Responsibility To Pay To Remediate Its Pollution.

G. The PUCO Erred In Finding That Duke Met Its Burden Of Proof To Show That It Was Necessary For It To Spend Approximately $55.5 Million In MGP Remediation Costs To Meet Applicable Standards And To Protect Human Health And The Environment, A Finding That Was Unreasonable And Unlawful And Against The Manifest Weight Of The Evidence.

1. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving recovery of $55.5 million in MGP remediation costs when 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.

2. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's mere "consideration" of remediation alternatives and incorporation of "various engineering and institutional control measures mentioned by the intervenors," independent of a detailed analysis of far less costly remediation alternatives, made Duke's environmental remediation plan reasonable and prudent.

3. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's use of Ohio EPA's Voluntary Action Program (VAP), which "does not specify or prescribe remedial options" was a sufficient basis for the PUCO to find that Duke's selected remediation was reasonable and prudent for customers to pay.

4. The PUCO's 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 of what Duke sought to charge to its customers.

5. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in relying upon the fact that Duke's expert witnesses were "subject to discovery, as well as extensive, and at times pointed, cross-examination" without examining whether their opinions regarding the prudence of Duke's expenditure of $55.5 million in MGP costs were reasonable, when their opinions lacked foundation and, in fact, did not stand up to cross-examination.

6. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving $55.5 million in charges to customers for MGP investigation and remediation when Duke is required by law to minimize charges to customers and when OCC produced uncontradicted evidence of a $7.1 million MGP remediation alternative (to Duke's expending of $55.5 million or more) that would also meet applicable standards.

7. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in disregarding the evidence that excavating to 2 feet and then applying a surface cap would have met applicable standards and protected human health and the environment across most of the MGP sites, rather than the 20 – 40 feet uniformly excavated by Duke, which resulted in significantly greater costs to Duke (and thus to customers that the PUCO has authorized Duke to charge for the remediation).

H. The 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 Utility Witnesses And Effectively Created A Presumption That A Utility's Actions Were Prudent, Contravening PUCO And Ohio Supreme Court Precedent.[1] The PUCO's Finding Was

[1] *Northeast and Orwell*. Order at 4 (November 13, 2013); See also *In re Duke Storm Damage Case*, 131Ohio St.3d 487, *CG&E v. PUCO*, 86 Ohio St.3d 53, citing *CG&E v. PUCO 67 Ohio St.3d 523;* and *Syracuse Home Util. Cos. v. PUCO*, Case No. 86-12-GA-GCR.

So Clearly Unsupported By The Record As To Show Misapprehension, Mistake Or A Willful Disregard Of Duty By The PUCO.

I. The PUCO Erred In Finding That Duke's Need To Investigate And Remediate The East End MGP Site Was A Result Of Changes In The Use Of The Property And Adjacent Properties When Such Changes In Use May Not Have Occurred But For Duke's Decision To Sell A Portion Of The East End Site To Adjacent Owner(s), A Decision Which Was Unreasonable And Imprudent.

J. The PUCO Erred By Failing To Comply With R.C. 4909.19, Which Required The PUCO Staff's Report Of Investigation To Include A Determination Of The Prudence Of The MGP-Related Investigation And Remediation Costs To The Utility.

K. The PUCO Erred In Finding That Duke Has Taken Reasonable And Prudent Actions To Pursue Recovery Of Investigation And Remediation Costs From Other Potentially Responsible Third Parties And Insurers, So As To Reduce What Customers Would Be Charged.

L. The PUCO Erred By Authorizing Duke To Collect The Deferred MGP Investigation And Remediation Costs From Customers Over An Unreasonably Short Five-Year Period.

M. The PUCO Erred By Unreasonably Granting The Utility The Authority To Collect (From Customers) MGP-Related Investigation And Remediation Costs Incurred By Duke After December 31, 2012 Through A Rider.

The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

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OHIO PARTNERS FOR AFFORDABLE ENERGY

TABLE OF CONTENTS

I. INTRODUCTION AND GENERAL SUPPORT FOR CLAIMS OF ERROR 1

II. HISTORY OF THE CASES 3

III. STANDARD OF REVIEW 4

IV. ARGUMENTS ON ASSIGNMENTS OF ERROR 5

A. The PUCO Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants That Are Not Used And Useful, In Violation Of Ohio Law Including But Not Limited To ORC 4909.15 5

1. The PUCO erred when it disregarded Ohio law that mandates only costs incurred from plant that is "used and useful" in rendering utility service may be collected from customers. 5

2. The PUCO erred when it 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 to Duke's customers as of March 31, 2012 12

B. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are 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). 15

C. 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 O.R.C. 4909.15(A)(4). 16

D. 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 (and Contrary To The Opinion Of The Dissenting Commissioners). 18

E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, For Providing Specific Findings Of Fact And Written Opinions That Are Supported By Record Evidence. 19

1. The record evidence did not support the PUCO's Order that the used and useful standard under R.C. 4909.15(A)(1) is not applicable. 20

2. The record evidence did not support the PUCO's Order that the MGP-related investigation and remediation costs were costs of rendering public utility service under R.C. 4909.15(A)(4). 22

3. The record evidence did not support the PUCO's Finding that strict liability for Duke under CERCLA means Duke's Customers should be responsible for paying the MGP-related investigation and remediation expenses. 23

F. The PUCO Erred By Making The Remedy For The Utility's Pollution Of MGP Sites The Financial Responsibility Of Duke's Customers Instead Of Duke's Responsibility To Pay To Remediate Its Pollution. 26

G. The PUCO Erred In Finding That Duke Met Its Burden Of Proof To Show That It Was Necessary For It To Spend Approximately $55.5 Million In MGP Remediation Costs To Meet Applicable Standards And To Protect Human Health And The Environment, A Finding That Was Unreasonable And Unlawful And Against The Manifest Weight Of The Evidence. 27

1. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving recovery of $55.5 million in MGP remediation costs when 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. 29

2. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's mere "consideration" of remediation alternatives and incorporation of "various engineering and institutional control measures mentioned by the intervenors," independent of a detailed analysis of far less costly remediation alternatives, made Duke's environmental remediation plan reasonable and prudent. 30

3. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's use of Ohio EPA's Voluntary Action Program (VAP), which "does not specify or prescribe

remedial options" was a sufficient basis for the PUCO to find that Duke's selected remediation was reasonable and prudent for customers to pay.....31

4. The PUCO's 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 of what Duke sought to charge to its customers. 33

5. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in relying upon the fact that Duke's expert witnesses were "subject to discovery, as well as extensive, and at times pointed, cross-examination" without examining whether their opinions regarding the prudence of Duke's expenditure of $55.5 million in MGP costs were reasonable, when their opinions lacked foundation and, in fact, did not stand up to cross-examination. 35

6. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving $55.5 million in charges to customers for MGP investigation and remediation when Duke is required by law to minimize charges to customers and when OCC produced uncontradicted evidence of a $7.1 million MGP remediation alternative (to Duke's expending of $55.5 million or more) that would also meet applicable standards. 37

7. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in disregarding the evidence that excavating to 2 feet and then applying a surface cap would have met applicable standards and protected human health and the environment across most of the MGP sites, rather than the 20 – 40 feet uniformly excavated by Duke, which resulted in significantly greater costs to Duke (and thus to customers that the PUCO has authorized Duke to Charge for the remediation). 38

H. The 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 Utility Witnesses And Effectively Created A Presumption That A Utility's Actions

Were Prudent, Contravening PUCO And Ohio Supreme Court Precedent. The PUCO's Finding Was So Clearly Unsupported By The Record As To Show Misapprehension, Mistake Or A Willful Disregard Of Duty By The PUCO. 40

I. The PUCO Erred In Finding That Duke's Need To Investigate And Remediate The East End MGP Site Was A Result Of Changes In The Use Of The Property And Adjacent Properties When Such Changes In Use May Not Have Occurred But For Duke's Decision To Sell A Portion Of The East End Site To Adjacent Owner(s), A Decision Which Was Unreasonable And Imprudent. 48

J. The PUCO Erred By Failing To Comply With R.C. 4909.19 Which Required The PUCO Staff's Report Of Investigation To Include A Determination Of The Prudence Of The MGP-Related Investigation And Remediation Costs To The Utility. 49

K. The PUCO Erred In Finding That Duke Has Taken Reasonable And Prudent Actions To Pursue Recovery Of Investigation And Remediation Costs From Other Potentially Responsible Third Parties And Insurers, So As To Reduce What Customers Would Be Charged. 53

L. The PUCO Erred By Authorizing Duke To Collect The Deferred MGP Investigation And Remediation Costs From Customers Over An Unreasonably Short Five-Year Period. 55

M. The PUCO Erred By Unreasonably Granting The Utility The Authority To Collect (From Customers) MGP-Related Investigation And Remediation Costs Incurred By Duke After December 31, 2012 Through A Rider. 58

V. CONCLUSION 61

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas 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

MEMORANDUM IN SUPPORT

I. INTRODUCTION AND GENERAL SUPPORT FOR CLAIMS OF ERROR

Each of the Joint Consumer Advocates respectively files this Application for Rehearing asking the PUCO to modify or reverse its Opinion and Order that was adopted by a vote of three to two. On November 13, 2013, the PUCO issued its Opinion and Order authorizing Duke to collect from customers $55.5 million in environmental investigation and remediation costs for two MGP sites that began service in the 1800's and that have not been used and useful in providing utility service in over 50 years.[2]

[2] The West End site is located on the west side of downtown Cincinnati and it was constructed by the Cincinnati Gas Light and Coke Company in 1841. Gas for lighting was first produced at the plant in 1843, and the manufacture of gas ceased in 1928. The East End site is located about four miles east of downtown Cincinnati. Construction of the East End site began in 1882 and commercial operations began in 1884, with the manufacture of gas ceasing in 1963. Duke Ex. No. 20(A) (Supplemental Testimony of Andrew Middleton at 25 (February 25, 2013); See also Tr. Vol. I at 183 (April 29, 2013).

In reaching the decision to authorize this collection from customers, the PUCO contravened established Ohio ratemaking law as set forth in R.C. 4909.15[3] and in court decisions interpreting that law. Since public utility regulation in Ohio commenced in 1911, the ratemaking statute has protected consumers from paying test-year expenses that are associated with facilities that are not used and useful in the provision of current service to customers.[4] In addition, the PUCO went beyond its statutory authority by creating exceptions that do not exist in the law. The PUCO created an unlawful exception to authorize collection of expenses associated with plant that is not used and useful in rendering utility service to Duke's customers.

In reaching its decision, the PUCO failed to conduct a proper evidentiary review or to hold Duke to its burden of proof to show the prudence of its environmental investigation and remediation expenditures in accordance with R.C. 4909.154. The PUCO also unreasonably burdened customers with paying for these significant costs over only a five-year period when the presumed environmental liability causing those costs has accrued over nearly two centuries.

Finally, the PUCO improperly allowed the continuing deferral of MGP investigation and remediation expenses, only limiting such deferrals to the ten-year period from the date on which the PUCO incorrectly determined that Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") mandated their clean-up.[5] Such a continuing deferral and the ongoing collection of those future deferrals

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[3] R.C. 4909.15(A); See also R.C. 4909.15(A)(4).

[4] 1911 vol. 102 549 1911(House Bill 325: Changing the name of the Railroad Commission of Ohio to that of the Public Service Commission of Ohio defining the powers and duties of the latter commission with respect to public utilities. and to amend sections 501, 502 and 606 of the General Code). General Code Section 606. Section 25 (1911).

[5] Order at 72-73.

from customers, for costs that cannot be properly charged to customers, is unreasonable and unlawful.

II. HISTORY OF THE CASES

On August 10, 2009, Duke filed an Application with the PUCO to defer environmental investigation and remediation costs.[6] The Commission granted Duke's Application on November 12, 2009.[7]

On June 7, 2012, Duke filed its Prefiling Notice for its request to increase natural gas distribution rates. As part of its Rate Case Application, subsequently filed on July 9, 2012, Duke sought the authority to collect from its customers investigation, remediation and carrying costs associated with the Utility's environmental concerns at its MGP sites.[8]

On January 4, 2013, the PUCO Staff filed its Staff Report of Investigation ("Staff Report"). On February 4, 2013, OCC, as well as other interested parties, filed Objections to the Staff Report as required by R.C. 4909.19. On February 25, 2013, interested parties filed testimony of its expert witnesses in support of Objections to the Staff Report of Investigation.

On April 2, 2013, a Stipulation and Recommendation ("Stipulation") was entered into among Duke, the PUCO Staff, OCC, OPAE, Kroger and OMA **for all of the issues except for MGP-related cost recovery**. As part of the Stipulation, the Signatory Parties bifurcated the issue of MGP-related cost recovery and collection, and instead agreed to litigate the MGP issues.[9]

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[6] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM (August 10, 2009). ("Duke Deferral Case").

[7] Duke Deferral Case, Entry at 3-4 (November 12, 2009).

[8] Duke Ex. No. 2 (Application, Schedule) at C-3.2 (July 9, 2012).

[9] Joint Ex. No. 1 (Stipulation and Recommendation) at 8 (April 2, 2013).

The evidentiary hearing was conducted on April 29 through May 2, 2013. And, as discussed above, the November 13, 2013 Order authorized Duke to collect approximately $55.5 million of previously deferred MGP-related environmental investigation and remediation costs from customers.

On December 2, 2013, the Joint Consumer Advocates filed a Motion for a stay to prevent Duke from charging MGP-related clean-up costs pending rehearing and any appeals, or in the alternative, a Motion to make Duke's impending rates charging manufactured gas plant clean-up costs to customers be collected subject to refund.

III. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after the PUCO issues an order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[10] Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[11]

In considering an application for rehearing, Ohio law provides that the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[12] Furthermore, if the PUCO grants a rehearing and determines that "the original order or any part thereof is in any

[10] R.C. 4903.10.

[11] Id.

[12] Id.

respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same * * *."[13]

Joint Consumer Advocates meet the statutory requirements applicable to applicants for rehearing pursuant to R.C. 4903.10. Accordingly, Joint Consumer Advocates respectfully requests the PUCO grant rehearing on the matters specified below.

IV. ARGUMENTS ON ASSIGNMENTS OF ERROR

A. The PUCO Erred By Authorizing Duke To Charge Customers For Investigation And Remediation Expenses Related To Manufactured Gas Plants That Are Not Used And Useful, In Violation Of Ohio Law Including But Not Limited To ORC 4909.15.

1. The PUCO erred when it disregarded Ohio law that mandates only costs incurred from plant that is "used and useful" in rendering utility service may be collected from customers.

The Ohio Supreme Court has on numerous occasions reiterated the axiom that the PUCO is a creature of statute, and as such may only exercise the authority specifically set forth by statute.[14]

R.C. 4909.15(A)(1) specifically sets forth the mandatory criteria to be used in the establishment of valuation of utility property at date certain for the purposes of the fixation of reasonable rates that a utility may charge customers:

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[13] Id.

[14] *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 330 N.E.2d 1, 1975 Ohio LEXIS 510, 71 Ohio Op.2d 33; *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 65 Ohio St.2d 302, 307 [18 O.O.3d 478]; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 166 [O.O.3d 96]. *Montgomery County Bd. of Comm'rs v. Pub. Util. Comm.* (1986), 28 Ohio St.3d 171; 503 N.E.2d 167; 1986 Ohio LEXIS 818. See also. *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Werlin Corp. v. Pub. Util. Comm.* (1978), 53 Ohio St.2d 76, 7 O.O.3d 152, 372 N.E.2d 592; *Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm.* (1975), 43 Ohio St.2d 175, 72 O.O.2d 98, 331 N.E.2d 730.

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, **shall determine**:
>
> (1) **The valuation as of the date certain** of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, **in rendering the public utility service for which rates are to be fixed and determined.** The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

R.C. 4909.15 provides **no exceptions** to the applicability of the used and useful standard in Ohio ratemaking. Instead, R.C. 4909.15(A)(1) sets forth the mandatory steps the PUCO is required to take when establishing a utility's property value. The statute requires the PUCO to determine valuation of utility property at a date certain, and that the property has to be used and useful in rendering public utility service. There is no question that the MPG sites are not used and useful in rendering public utility service.[15]

The statute does not list any exceptions to these requirements. Despite the fact that there is no exception in the statute, the PUCO created an exception, to allow Duke to collect from customers $55.5 million in MGP site investigation and remediation costs. In doing so, the PUCO exceeded its authority. The PUCO stated:

> 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

[15] During the pendency of this case, there was an amendment pending in the general assembly (ASC34689X1 for H.B. 59) that, in some cases, would excuse natural gas utilities from time-honored regulatory law, including R.C. 4909.15(A), that has protected Ohio utility consumers in the ratemaking process over the past hundred years. If indeed the used and useful standard is not applicable to the PUCO decision in these cases, this begs the question then as to why there would be legislation to change the law.

> Duke may recover the costs associated with its investigation and remediation of the MGP sites.[16]

The PUCO is wrong. While the used and useful standard has no applicability in the determination of a return on the MGP facilities, the used and useful requirement for 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.

The PUCO rejected the statutory arguments presented by the Joint Consumer Advocates, other intervenors and even the PUCO's own Staff, that the used and useful standard is applicable to the recovery of expenses associated with plant that is not used and useful. The PUCO stated its view that a determination of the collection of MGP-related investigation and remediation costs from customers 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."[17]

The PUCO's effort to disregard the "used and useful" standard of R.C. 4909.15(A)(1) as a "separate and unique" issue is unsupported by statute, case law or the evidence in the record. There is no question that the MGP-related investigation and remediation costs at issue in this case were presented to the PUCO as part of a rate case application, and that the ratemaking formula under R.C. 4909.15 is applicable to the PUCO's decision making in this rate case.

In addition, in creating this exception for MGP-related expenses, the PUCO did not consistently disregard the "used and useful" standard in these cases. As part of its investigation, the PUCO Staff excluded the costs associated with leasehold improvements for a portion of the Holiday Park building. The PUCO Staff indicated that parts of that

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[16] Order at 54. (Emphasis added).

[17] Order at 53.

building which contained the vestibule, the customer service section and the Atrium II building "were no longer being occupied nor leased by the Company."[18] The expenses associated with this plant that was not used and useful were NOT included in test-year expenses. The key to the PUCO Staff's disallowing the Atrium II building was that the parts of the building were no longer used and useful in rendering utility service.[19] In adopting the Stipulation without modification, the PUCO accepted the PUCO Staff's position of excluding from test-year expenses the costs associated with the Atrium II building.

The PUCO's rationale that federal and state rules and regulations require remediation does not over-ride or change Ohio's ratemaking law that facilities must be used and useful for a utility to collect from customers the costs associated with those facilities from customers. There is no basis in R.C. 4909.15 that permits the PUCO to create an exception and set aside the used and useful standard when the utility's expenses are not associated with plant that is used and useful. This is true even if the utility is under a statutory mandate to perform environmental remediation.

If there were such a mandate under CERCLA, then that mandate would pertain to the owner/operator of a site where contamination release occurred. But the customers of the utility do not fall within the categories of liable parties.[20]

Moreover, despite the PUCO's claims to the contrary, there was no specific statutory mandate that required Duke to undertake the level of MGP-investigation and remediation that Duke undertook. In fact, there is no finding by any environmental agency requiring or directing Duke to engage in remediation efforts at the MGP sites. If

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[18] Staff Ex. No. 1 (Staff Report of Investigation) (January 4, 2013) at 5-6. (Emphasis added).

[19] Id.

[20] OCC/OPAE Initial Brief at 12-13 (June 6, 2013).

there were, then Duke could not have participated in the Voluntary Action Program. Instead, as noted throughout the proceeding, Duke entered into a voluntary program to address the issue.[21] Thus, the PUCO's reliance on this circumstance is in error.

The application of the used and useful standard in R.C. 4909.15 is not discretionary. Rather, it is mandatory, as evidenced by the use of the word "shall."[22] Thus it is clear that the legislature intended the used and useful standard to be applied to all property that a utility seeks to include as part of its rate base. The Ohio Supreme Court has held that:

> When interpreting a statute, a court must first look to its language and apply it as written if the meaning is unambiguous. *State v. Lowe*, 112 Ohio St.3d 507, 2007 Ohio 606, 861 N.E.2d 512, ¶ 9. "[T]he word "shall" shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive construction other than [its] ordinary usage. *Ohio Civ. Rights Comm. v. Countrywide Home Loans, Inc.*, 99 Ohio St.3d 522, 2003 Ohio 4358, 794 N.E.2d 56, ¶4, quoting *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus.[23]

Inasmuch as there is no "unequivocal legislative intent" for a different construction, the PUCO lacks the authority to disregard the "used and useful" requirement for expenses associated with plant that is not "used and useful" and to create an exception for the MGP-related investigation and remediation expenses.

The Ohio Supreme Court has reversed the PUCO's actions in numerous instances when the PUCO exceeded its statutory authority. In *Montgomery County*, the Court rejected an attempt by the PUCO to use its emergency powers in R.C. 4909.16 to permit the recovery of Percentage of Income Payment ("PIP") arrearages through the Electric

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[21] Duke Ex. No. 21 (Direct Testimony of Jessica Bednarcik) at 6-7 (July 20, 2013).

[22] R.C. 4905 (A)(1).

[23] *State v. Smith* (2011), 131 Ohio St.3d 297, 299-300, 2012-Ohio-781, 964 N.E.2d 423, 2012 Ohio LEXIS 542.

Fuel Component ("EFC") because the PIP arrearages did not fall within the defined costs permitted for recovery under the EFC statute, R.C. 4909.191.[24] Given that the PUCO could not act beyond the limit of the statute even where it claimed emergency powers in a situation affecting the health, safety or general welfare of the general public,[25] the PUCO certainly cannot extend its authority beyond the statute in this case where there is not even a claim of emergency.

In *Columbus Southern Power Co.,* the Court reversed a PUCO decision to implement a phase-in of a rate increase over a two-year period because R.C. 4909.15 did not permit the PUCO to disregard the ratemaking formula simply because the PUCO simply did not agree with a result.[26] The Court pointed out that "R.C. 4909.15(A) requires the PUCO to make a series of determinations," including "the valuation of the utility's property in service as of date certain (R.C. 4909.15(A)(1)."[27] The Court noted that the ratemaking formula under R.C. 4909.15 has been construed by the Court as being a mandatory formula[28] that was meant to protect the interests of the public utility and their ratepayers alike.[29]

The Court also specifically noted that "the General Assembly undoubtedly did not intend to build into its recently revised [1976] ratemaking formula a means by which the

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[24] *Montgomery County Bd. of Comm'rs v. Pub. Util. Comm.* (1986), 28 Ohio St.3d 171; 503 N.E.2d 167; 1986 Ohio LEXIS 818.

[25] Id. at 177.

[26] *Columbus Southern Power Co. v. Pub. Util. Comm.* (1975), 67 Ohio St.2d 535, 540, 620 N.E.2d 835, 1993 Ohio LEXIS 2265, citing *Gen. Motors Corp. v. Pub. Util. Comm.* (1976), 47 Ohio St.2d 58, 1 O.O.3d 35, 351 N.E. 2d 183.

[27] *Columbus Southern Power* at 536.

[28] *Columbus Southern Power Co. v. Pub. Util. Comm.* (1975), 67 Ohio St.2d 535, 620 N.E.2d 835, 1993 Ohio LEXIS 2265, citing *Gen. Motors Corp. v. Pub. Util. Comm.* (1976), 47 Ohio St.2d 58, 1 O.O.3d 35, 351 N.E.2d 183.

[29] *Columbus Southern Power* at 540.

PUCO may effortlessly abrogate that very formula."[30] Even in a situation where customers may have benefitted from the PUCO's actions, the Court held firm that the PUCO could not act beyond the jurisdiction and authority permitted by the statute. In the current proceedings, the PUCO did exactly that, as it abrogated the intent of R.C. 4909.15(A)(1) by creating an exception that would allow it to disregard the "used and useful" standard that MGP sites and their related expenses could not meet.

In *Cleveland Electric Illuminating Co. v. Pub. Util. Com.* (1975), 42 Ohio St.2d 403, 330 N.E.2d 1, 1975 Ohio LEXIS 510, 71 Ohio Op.2d 393, the Court noted that the PUCO erred when it extended its order to those matters not put in issue by the application for a rate increase.[31] In that case, the PUCO ordered changes in the Cleveland Electric Illuminating Company ("CEI") tariffs that went beyond the items included in the utility's application. Again, the Ohio Supreme Court concluded that the PUCO could not act beyond the parameters set forth by the General Assembly in the statute and could only review the issues that were the subject of the application.[32]

Based on the above precedent, the PUCO improperly exceeded its statutory authority in the Duke case by creating an exception that would permit it to disregard the "used and useful" requirement of R.C. 4909.15. The PUCO should reverse its decision and find that because the MGP-sites were not used and useful in the provision of utility

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[30] *Columbus Southern Power* at 540, citing *Consumers' Counsel*, 67 Ohio St.3d. at 165.

[31] *Cleveland Electric Illuminating* at 420.

[32] *Cleveland Electric Illuminating* at 420.

service to customers, the associated MGP investigation and remediation expenses cannot be recovered from customers.[33]

2. The PUCO erred when it 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 to Duke's customers as of March 31, 2012.

In this case, through an Entry, the PUCO approved Duke's requested test year of January 1, 2012 ending December 31, 2012 with a date certain of March 31, 2012.[34] Thus, in order to meet the initial threshold, under the ratemaking statute, Duke must prove that the properties in question (in this case the Manufactured Gas Plant facilities) were used and useful in the provision of natural gas service to customers as of March 31, 2012. As discussed above, the PUCO unlawfully created an exception to support its decision that it was unnecessary to make such a finding for Duke to recover expenses associated with the property that was not used and useful.

In changing the statutory standard, the PUCO also turned the requisite burden of proof on its head. Duke had the burden to demonstrate that MGP-related environmental investigation and remediation costs were matched to or related to Manufactured Gas Plant facilities utilized in rendering public utility service during the test period. But Duke did not.

Instead, the PUCO attempts to justify its decision by making a comparison to the PUCO's rulings in two Ohio Edison cases, stating:

> 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

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[33] *Indus. Energy Users-Ohio v. PUC* (2008), 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, 2008 LEXIS 559, where the Court held that the PUCO could not assert authority over the utility's application because the application did not include electric generation which had been removed from PUCO regulation.

[34] Entry at 2-3 (July 2, 2012).

> 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.[35]

The PUCO's comparison between the instant case and *Ohio Edison I* and *Ohio Edison II* cases, however, reflects distinctions without the asserted differences. There is no material distinction to be made. The PUCO's cited court precedents involved costs associated with utility plant that had never been used and useful (*Ohio Edison I*).[36] and utility plant that was no longer used and useful (*Ohio Edison II*).[37]

In both those cases, the associated expenses were disallowed because those expenses could not be matched with utility plant that was used and useful in the provision of utility service as of date certain. This is **exactly** the factual circumstances the PUCO was presented with in the current Duke MGP case. While the nature of the expenses (environmental cleanup costs) is different than the decommissioning costs in *Ohio Edison I* and security costs for a retired electric generating plant in *Ohio Edison II*, the nature of the expenses makes no difference. It is the fact that the property related to those costs was not used and useful that aligns the Ohio Edison cases with the current case, and doesn't distinguish it. Indeed, it is hard to imagine how the PUCO could have cited two cases that better support the opposing conclusion from the conclusion that it reached.

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[35] Order at 53-54.

[36] *In the Matter of the Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR, (August 16, 1990) 1990 Ohio PUC Lexis 912 *("Ohio Edison I")*.

[37] *In the Matter of the Application Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rate for Distribution Service*. Case No. 07-551-EL-AIR, et al. Opinion and Order (January 21, 2009) *("Ohio Edison II")*.

Additionally, under the PUCO's interpretation of R.C. 4909.15, subsections (A)(1) and (A)(4) are not connected and are treated as two completely separate sections of the Revised Code.[38] Such an approach to statutory construction is contrary to how the PUCO has long viewed R.C. 4909.15 and contradicts how the Supreme Court has directed that statutes are constructed and to be interpreted.[39]

In *Seaman v. The State of Ohio* (1922), 106 Ohio St. 177, 183, the Supreme Court stated, "In giving construction to a statute all its provisions must be considered together." The Court further emphasized this point in *The State, Ex Rel. Cunningham v. Industrial Commission of Ohio* (1987), 30 Ohio St.3d 73, 79 where it stated, "On the contrary, the rule of *in pari materia* requires that individual sections of a statute or rule on the same subject should be reconciled and harmonized if at all possible." More recently, the Court ruled:

> It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law. *Wooster Republican Printing Co. v. Wooster* (1978), 56 Ohio St.2d 126, 132, 10 Ohio Op.3d 312, 315, 383 N.E.2d 124, 128. Statutes which relate to the same subject are *in pari materia*. Although [* * *6] enacted at different times and making no reference to each other, they should be read together to ascertain and effectuate the legislative intent.[40]

When these principles of statutory construction are applied to R.C. 4909.15(A)(1) and R.C. 4909.15(A)(4), it is clear that the two sections should be read together and not as separate provisions. The appropriateness of this statutory construction for R.C. 4909.15 (A)(1) and R.C. 4909.15(A)(4), is most evident because those two subparts were enacted

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[38] Duke Brief at 4-5, 7 (June 6, 2013).

[39] See *In the Matter of the Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR, (August 16, 1990) 1990 Ohio PUC Lexis 912; see also *In the Matter of the Application Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rate for Distribution Service*, Case No. 07-551-EL-AIR, et al. Opinion and Order (January 21, 2009).

[40] *The State of Ohio v. Moaning* (1996), 76 Ohio St.3d 126, 196 Ohio 413, 666 N.E.2d 1115, 1996 Ohio LEXIS 440.

at the same time and the various subparts of R.C. 4909.15 reference each other. Even if these statutory provisions were not part of the same section of the Revised Code, the inter-related subject matter would require a harmonized reading which is consistent with the PUCO's matching principle, as discussed by PUCO Staff.[41]

The linkage between expenses for rendering public utility service and facilities that are used and useful during the test period was an important factor in the PUCO's disallowance in *Ohio Edison II*. This important linkage is completely missing in the PUCO's authorization of Duke's collection of $55.5 million from customers for MGP-related investigation and remediation expenses for facilities that were not used and useful as of the date certain.

For all the above reasons, the PUCO should determine that Duke failed to meet its burden of proving that the environmental investigation and remediation costs in this case are recoverable as 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). The PUCO should grant rehearing and reject Duke's proposal to charge MGP-related expenses to customers.

B. The PUCO Erred By Authorizing Duke To Charge Customers For Manufactured Gas Plant Investigation And Remediation Expenses That Are 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).

According to Ohio ratemaking law, the utility has the burden in these cases to prove that the costs that have been incurred and deferred are costs that were incurred for rendering utility service.[42]

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[41] PUCO Staff Brief at 8-13 (June 6, 2013).

[42] Order at 58.

R.C. 4909.15(A)(4) states that:

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:
>
> > (4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

The critical component of this ratemaking formula is that the costs reviewed during that ratemaking process must be costs incurred to render public utility service. Also, the underlying property that gave rise to the costs must be used and useful in providing service for customers on the date certain. The MGP-related investigation and remediation costs did not meet this requirement; therefore, the PUCO should not have authorized the collection of these costs from Duke's customers.

C. 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 O.R.C. 4909.15(A)(4).

In determining whether to include certain costs in customers' rates, the PUCO must determine whether the costs in question are "the cost to the utility of rendering the public utility service for the test period."[43] In addition, the Ohio Supreme Court has held 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."[44]

The PUCO disregarded arguments in this case that the MGP-related investigation and remediation costs were not a normal and recurring expense.[45] In fact, the Applicant, Duke, did not argue that the MGP-related investigation and remediation costs were

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[43] R.C. 4909.15(A)(4).

[44] *Consumers' Counsel* at 164.

[45] OCC/OPAE Initial Brief at 24 (June 6, 2012).

normal and recurring. An Amicus, Columbia Gas of Ohio, Inc., did make such argument.[46] The PUCO's Order did not adopt such argument and did not conclude that the MGP-related investigation and remediation costs were recurring expenses which is one of the requirements of R.C. 4909.15(A)(4) for recovery in a base rate proceeding. Because there is no finding that the MGP-related investigation and remediation costs are normal or recurring, the costs are not recoverable.

Moreover, not all costs incurred by a public utility are current or recoverable from customers. The PUCO has stated that the MGP remediation costs are business costs; however, the mere fact that the PUCO has classified remediation costs as "business costs" does not mean that they can be collected from customers. For example, charitable contributions are considered business costs, but they are not costs recoverable from customers.[47] Similarly, promotional and institutional advertising are business costs to the utility, but in *Cleveland,* the Ohio Supreme Court held:

> This court is of the opinion that this same presumption must be applied by appellee, if operating expenses are truly to reflect "the cost of rendering the public utility service." Therefore, institutional and promotional advertising expenses are to be disallowed, unless the utility can clearly demonstrate a direct, primary benefit to its customers from such ads.[48]

Likewise the MGP-related investigation and remediation costs should not be considered costs of rendering current public utility service merely by the PUCO's classification of them as business costs. The classification alone does not overcome the

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[46] Order at 55.

[47] *Cleveland v. Pub. Util. Comm.* (1980) 63 Ohio St.2d 62, 1980 Ohio Lexis 773, ("Applying this same standard to charitable contributions, this court finds that this item also cannot be sustained as a proper operating expense. While we recognize that this holding deviates from our decision in *Cincinnati v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 168, 173, this court is persuaded by the record in the instant cause and by Justice Locher's well-reasoned dissent in *Cincinnati, supra,* **that such contributions are not a cost of rendering the public utility service.**") (Emphasis added).

[48] Id. at 72-73.

fact that these costs do not provide a direct and primary benefit to Duke's current utility customers.

The PUCO has failed to comply with the requirements of R.C. 4903.09, as more fully explained below. In this regard, the PUCO failed to provide specific findings of fact and written opinions that were supported by record evidence on very critical aspects of the PUCO's Order. Therefore, the PUCO should grant the Joint Consumer Advocates' Application for Rehearing on this issue.

D. 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 (and Contrary To The Opinion Of The Dissenting Commissioners).

These cases were an application for a distribution base rate increase as noted by the Utility's pre-filing notice filed on June 7, 2012.[49] As such a base rate case is governed by R.C. 4909.15, which requires a report of the Utility's property used and useful in rendering public utility serve for customers. In these cases, the MGP-related investigation and remediation costs had nothing to do with Duke's provision of distribution utility service. In fact, Duke failed to meet its burden of proving that there was any nexus between the MGP-related investigation and remediation costs and the provision of natural gas distribution service. Two Commissioners expressly noted this fact, stating:

> 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

[49] Duke. Pre-Filing Notice (June 7. 2012).

> 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.**[50]

The dissent does not disagree with the majority on issues of discretion or weight of the evidence arguments, but rather reflects a fundamental disagreement about ratemaking law. The dissenting opinion is consistent with the Joint Consumer Advocates' interpretation of Ohio's ratemaking law. The MGP-related investigation and remediation costs were not shown to be related to the provision of distribution utility service. This is a distribution rate case, yet the costs in question, have no relationship to Duke's provision of distribution utility service to current distribution customers.

The PUCO's Order erroneously applied the ratemaking law in Ohio in order to authorize Duke to collect $55.5 million from its customers. For all the reasons discussed above, under R.C. 4909.15(A)(4) and 4909.15(C)(1), the MGP-related investigation and remediation costs should not have been considered by the PUCO to be a cost of providing current distribution utility service. Therefore, the PUCO should grant rehearing on this issue.

E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, For Providing Specific Findings Of Fact And Written Opinions That Are Supported By Record Evidence.

The PUCO is required by R.C. 4903.09, to make decisions based on the record before it and based on Ohio law. R.C. 4903.09 states:

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and

[50] Order at Dissenting Opinion (Emphasis added).

> written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

The PUCO failed to meet this obligation under the law, because its findings and opinions were not supported by record evidence in these cases.

The record evidence shows that Duke is not under a statutory mandate to remediate the MGP sites. Duke acknowledges that it faces strict liability for remediating contamination at both the East End and West End MGP sites under CERCLA.[51] CERCLA is the federal statute that authorizes the EPA to respond to releases, or threatened releases, of hazardous substances that may endanger public health, welfare, or the environment.[52] CERCLA also enables the EPA to force parties responsible for environmental contamination to clean it up or to reimburse Superfund for response or remediation costs incurred by the EPA. However, in these proceedings, Duke is not under an order from any environmental agency or Court and instead is voluntarily undertaking the remediation actions at the two MGP Sites.[53] Duke has not faced an enforcement action from the U.S. EPA or the Ohio EPA.[54] That is a critical fact that is misconstrued in the very key portions of the PUCO's Order.

1. The record evidence did not support the PUCO's Order that the used and useful standard under R.C. 4909.15(A)(1) is not applicable.

There has been no ruling by any environmental agency or Court ordering Duke to act with regard to the MGP sites. Although Duke has liability to remediate these MGP sites, the PUCO has over-stated Duke's reliance on CERCLA liability in an effort to circumvent Ohio's ratemaking statute. For example, the PUCO unjustly and

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[51] Duke Ex. No. 21A (Supplemental Direct Testimony Jessica Bednarcik) at 4 (February 25, 2013). See also Tr. Vol. I at 183 (Bednarcik) (April 29, 2013).

[52] 42 USCS § 9607 (a)(1)-(4).

[53] Duke Ex. No. 21 (Jessica Bednarcik) at 6-7 (July 20, 2012).

[54] Tr. Vol. I at 139 (Margolis) (April 29, 2013).

unreasonably determined that an exception to the used and useful standard under R.C. 4909.15(A)(1) exists. In explaining why it is not necessary to apply the used and useful standard in these cases, the PUCO stated:

> 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.[55]

This language from the PUCO Order above is internally inconsistent with the record in these cases, and also cannot be reconciled with current law. First, the PUCO has failed to specify the exact "circumstances" that the Commission is relying upon to support its decision that Duke may recover the costs associated with its investigation and remediation of the MGP sites. Second, the PUCO's statement that "the fact that Duke is under a statutory mandate to remediate the former MGP residuals * * *,"[56] is unsupported by the record. The Joint Consumer Advocates noted that Duke has not faced an enforcement action from the U.S. EPA, so liability has not attached under CERCLA. Furthermore, the PUCO Order quotes Duke's own witness Mr. Fiore who admitted that

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[55] Order at 54 (Emphasis added).

[56] Order at 54.

the remediation activities are not being done pursuant to CERCLA.[57] Duke is not facing an enforcement action, but rather is cleaning up the MGP sites voluntarily under the Ohio VAP. Therefore, contrary to the PUCO Order, there is a 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.

Based upon the above arguments refuting the findings of fact that the PUCO relied upon, it was unjust and unreasonable for the PUCO to determine that "R.C. 4909.15(A)(1) and the used and useful standard" was not necessary to be applied to the MGP sites in these cases 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."[58] By doing so, the PUCO has created an exception that does not exist under the law, and incorrectly dismissed the used and useful legal arguments made by the PUCO's Staff and other intervenors in these cases.[59]

2. The record evidence did not support the PUCO's Order that the MGP-related investigation and remediation costs were costs of rendering public utility service under R.C. 4909.15(A)(4).

The PUCO incorrectly agreed with Duke's claim that because CERCLA imposes liability, the remediation costs for the MGP sites are "necessary" costs of rendering public utility service under R.C. 4909.15(A)(4). The PUCO's Order stated:

> Duke has substantiated, on the record, that the remediation costs were a necessary cost of doing business as a public utility in

[57] Order at 31 ("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.")

[58] Order at 54 (Emphasis added).

[59] See Staff Initial Brief.

> response to a federal law, CERCLA, that imposes liability on Duke and its predecessors for the remediation of the MGP sites.[60]

The PUCO also found that Duke's "societal obligation to clean up these sites for the safety and prosperity of the communities" surrounding the sites makes MGP remediation costs "a current cost of doing business."[61]

But these findings are contrary to Ohio law. The facilities to which this clean-up relates have not been used for 50 years or longer. Current customers receive no benefit from operation of any facilities that caused the coal tar discharges being addressed. If the PUCO's position were correct, there would be no point in time at which a utility would be precluded from claiming that costs incurred related to the provision of service in the past. The law is clear that the costs claimed must be related to the rendering of current public utility service.[62] These MGP clean-up costs were not caused by, and do not relate to, facilities that are being used for current distribution service, and cannot properly be charged to customers.

3. The record evidence did not support the PUCO's Finding that strict liability for Duke under CERCLA means Duke's Customers should be responsible for paying the MGP-related investigation and remediation expenses.

The Strict liability provisions of CERCLA apply to owners and operators but not customers. However, the PUCO in its Order stated:

> 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

[60] Order at 58-59.

[61] Order at 58-59 (Emphasis added).

[62] *In the Matter of the Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR. (August 16. 1990) 1990 Ohio PUC Lexis 912; See also. *In the Matter of the Application Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rate for Distribution Service*. Case No. 07-551-EL-AIR, et al. Opinion and Order (January 21. 2009).

> 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.[63]

The PUCO is wrong. Duke acknowledges that it faces strict liability for remediating contamination at both the East End and West End MGP sites under CERCLA.[64] CERCLA is the federal statute that authorizes the EPA to respond to releases, or threatened releases, of hazardous substances that may endanger public health, welfare, or the environment.[65] CERCLA also enables the EPA to force parties responsible for environmental contamination to clean it up or to reimburse Superfund for response or remediation costs incurred by the EPA. However, in these proceedings, Duke is voluntarily undertaking the remediation actions at the MGP Sites.[66] Duke has not faced an enforcement action from the U.S. EPA or the Ohio EPA.[67]

CERCLA identifies four categories of actors upon whom it imposes liability. None of the four categories extend liability to actors uninvolved with the property. Under CERCLA, liable parties include 1) the owner or operator of a site where the contamination release occurred, 2) past owners or operators at the time of the release, 3) "arrangers" which are actors, who were often the generator of the hazardous substance, that arranged for the transportation and disposal of the waste at the site where the release occurred, and finally 4) transporters who selected the site for disposal where the

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[63] Order at 58-59.

[64] Duke Ex. No. 21A (Supplemental Direct Testimony Jessica Bednarcik) at 4 (February 25, 2013). See also Tr. Vol. I at 183 (Bednarcik) (April 29, 2013).

[65] 42 USCS § 9607 (a)(1)-(4).

[66] Duke Ex. No. 21 (Jessica Bednarcik) at 6-7 (July 20, 2012).

[67] Tr. Vol. I at 139 (Margolis) (April 29, 2013).

hazardous release occurred.[68] The customers of a utility do not fall within any of the four above-listed categories, and are not liable for these costs.

Under these categories there is no dispute that Duke is the current owner or operator of the site where the contamination releases occurred. There is also no dispute that Duke's predecessor was the past owner or operator of the site where the contamination releases occurred. However, according to Duke, Columbia Gas of Ohio, Inc. ("Columbia") may also have been the owner or operator of the sites at the time of the contamination release from 1909 to 1946.[69] With regard to the third category of liable parties -- arrangers -- the generator of the hazardous substance that arranged for disposal and release of the contamination – this is also Duke and possibly Columbia. Finally, under category four -- the transporter who selected the site for disposal of the hazardous material -- again this is Duke and possibly Columbia. Duke's customers do not fall under any of the four CERCLA categories of liable parties.

In addition to the CERCLA categories not applying to Duke's customers, the legislative intent of CERCLA points to Duke as the party responsible for the release of hazardous substances and thus the party that should pay the costs associated with a clean-up or remediation, and not the taxpayers.[70] The legislative history of CERCLA also shows that forcing taxpayers to pay for the cleanup of contaminated sites was thought to "unfairly force those most likely to suffer personal health and property damage to bear the additional cost of removal" and that Congress did not want to "allow the responsible parties to evade the costs of cleanup at the expense of the taxpayers."[71] In this case, the

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[68] 42 USCS § 9607 (a)(1)-(4).

[69] OCC Ex. No. 7 (OCC INT No. 15-577).

[70] 96 Cong. House Debates 1980; CERCLA Leg. Hist. 17. (Statement of National Association of Attorney Generals) (Statement of Mr. Jeffords).

[71] Id.

Utility's customers are analogous to taxpayers and should not be held responsible for the costs of cleanup, and thus allow Duke to evade liability.

F. The PUCO Erred By Making The Remedy For The Utility's Pollution Of MGP Sites The Financial Responsibility Of Duke's Customers Instead Of Duke's Responsibility To Pay To Remediate Its Pollution.

The PUCO has accepted Duke's argument that it has strict liability under CERCLA, and; therefore, the MGP-related investigation and remediation expenses are a business cost that should be paid by customers, that is mistaken.[72] However, long before CERCLA, there was an anti-dumping statute in Ohio as far back as 1896 intended to protect the environment from the dangers of MGP operations. Sec. 6925 states:

> Whoever intentionally throws or deposits or permits to be thrown or deposited, any coal dirt, coal slack, coal screenings,, or coal refuse from coal mines, or any refuse or filth from any coal oil refinery **or gas works,** * * * upon or into any of the rivers, lakes, ponds or streams of this state or upon or into any place from which the same will wash into any such river, lake, pond or stream; * * *.[73]

In light of the location of Duke's MGPs, along the Ohio River, the above law would have had applicability for the operations of those plants. Duke's predecessors operated these facilities in contravention to the existing law at their own risk, and despite the historical awareness of the dangers associated with the MGP plants operations, the Utility shuttered them with minimal remediation at most.

Now in excess of 50 years after the MGP plants dating to the 1800's, ceased operations Duke recognizes its obligation to cleanup these sites. It is unjust and unreasonable for the PUCO to consider these costs to be a necessary cost of doing

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[72] Order at 58-59.

[73] Ohio General and Local Acts Sec. 6925 (January 6, 1896). Attached hereto as Exhibit A; See also The Annotated Revised Statutes Sec. 6925 (January 1, 1904). See OCC/OPAE Reply Brief at Exhibit B; (Legislation that preceded R.C.3767.14). See also Allen W. Hatheway. Remediation of Former Manufactured Gas Plants and Other Coal-Tar Sites at 551, CRC Press. 2012.

business for purposes of holding Duke's customers responsible. Instead, these MGP-related investigation and remediation expenses 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. Duke's current customers should have no more responsibility for paying these costs resulting from Duke's violation of the anti-dumping law than Duke's past customers (those taking service during the time the MGP plants were operating) should have had for cleanup of unacceptable pollution.

G. The PUCO Erred In Finding That Duke Met Its Burden Of Proof To Show That It Was Necessary For It To Spend Approximately $55.5 Million In MGP Remediation Costs To Meet Applicable Standards And To Protect Human Health And The Environment, A Finding That Was Unreasonable And Unlawful And Against The Manifest Weight Of The Evidence.

The PUCO recognized that, under R.C. 4909.154, in fixing rates, it may not allow Operational and Maintenance ("O&M") expenses to be collected by the utility through management practices or administrative practices that are imprudent.[74] The burden of proof is on public utilities to show that their expenses are prudently incurred.[75] The utility must prove a "positive point" -- that its expenses had been prudently incurred.[76] Whether other parties demonstrate imprudence is "irrelevant" until the utility meets that prudence burden.[77]

Duke did not sustain its burden of proof in the record of the case. It did not make the most basic showing that the costs it has incurred have been reasonable and necessary to protect human health and the environment from the impact of the coal tar residues at its former manufactured gas plant sites. Instead, assuming that its costs would be

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[74] Order at 63.

[75] *In re Duke Energy Ohio, Inc.* (2012), 131 Ohio St.3d 487, 488.

[76] *In re Duke Energy Ohio, Inc.* (2012), 131 Ohio St.3d 487, 489.

[77] *In re Duke Energy Ohio, Inc.* (2012), 131 Ohio St.3d 487, 489.

approved for recovery because they were allowed to be deferred, Duke engaged in mismanagement of its remediation effort. "Gold plating" is what expenditures of this magnitude are appropriately termed. A remediation could have met applicable standards and protected human health and the environment for a fraction of the cost Duke incurred. The PUCO's determination was error that Duke was prudent in its expenditure for MGP remediation of $55.5 million.

The PUCO erred first in its conclusion that Duke's lack of documentation -- or proof -- that it had appropriately assessed alternative remedial options[78] was not a fundamental shortcoming in meeting its burden. And its conclusion that Duke's witnesses had "provided ample information on the process to support a conclusion on prudency in these cases"[79] is at odds with the evidence.

The process Duke used did not include assessing and costing out alternative remedial options.[80] If an assessment of alternative remedial options, including costing out such options, was not part of its "process," then that process was simply inadequate and does not support a conclusion that Duke acted prudently. Duke's statements that it considered alternatives and that its selected remedy was the "presumptive remedy" is self-serving and lacks any sound factual premise, basis or support. Essentially, this Duke position is we did evaluate alternatives; just trust us. The PUCO should recognize this faulty premise and reverse its decision on this issue.

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[78] Order at 64.

[79] Order at 64.

[80] Post-Hearing Brief of OCC/OPAE at 25-43 (June 6, 2013); Reply Brief of OCC/OPAE at 39-52 (June 20, 2013).

1. **The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving recovery of $55.5 million in MGP remediation costs when 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.**

The PUCO found Duke's MGP investigation and remediation to be prudent even though Duke did not produce any documentation of its consideration of MGP remediation alternatives and their associated costs. The PUCO's determination in this regard was unreasonable and unlawful.

Duke's witnesses alleged that Duke had assessed alternative remedial options. Despite claims of assessing options by Duke Witness Bednarcik, Duke's "consideration" of alternative remedial options happened **without a single document evidencing this effort and without any pricing of alternative remedial options.**[81] This lack of documentation is even more befuddling given the significant amount of costs involved. Costs spent to date have been $55.5 million and there are significant expenditures yet to be made, as Duke's witnesses have acknowledged.[82] **There are no documents available to be reviewed** of Duke's purported analysis and selection of remedial alternatives at the East End or West End sites.[83] Customers have a right to expect that if a utility hopes to pass the costs of extraordinary expenditures of this nature on to customers, the prudence of such expenditures will be properly documented and the costs and benefits of different options will be assessed. This is especially important in the case of the MGP expenditures, where the evidence demonstrates that there were alternative approaches to

[81] Tr. Vol. I at 212, 215 (Bednarcik) (April 29, 2013).

[82] Tr. Vol. II at 573-574 (Fiore) (April 30, 2013). Duke witness Fiore testified that remediation could well cost twice the sum spent to date.

[83] Tr. Vol. I at 212, 215 (Bednarcik) (April 29, 2013).

MGP remediation that could have been taken that were significantly less costly than the approach used by Duke.[84]

In addition, Ms. Bednarcik was dismissive of the merits of examining alternative remedial options, arguing that spending $250,000 for a feasibility study would have been imprudent.[85] But a feasibility study, or at least a detailed alternatives analysis with pricing of alternative remedial options, even if it would have cost $250,000, was absolutely necessary for MGP remediation projects of this size - a price tag of $55.5 million and growing. It is difficult to imagine a scenario in which the utility would have spent $55.5 million in shareholder dollars without such review and documentation. It was imprudent for Duke to take so little action to protect customers from such excessive expenditures, that it did not even document alternative considerations or actions.

The PUCO erred in finding that Duke gave sufficient consideration to remediation alternatives and that Duke witnesses "provided ample information on the process to support a conclusion on prudency."

2. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's mere "consideration" of remediation alternatives and incorporation of "various engineering and institutional control measures mentioned by the intervenors," independent of a detailed analysis of far less costly remediation alternatives, made Duke's environmental remediation plan reasonable and prudent.

The PUCO found Duke's mere "consideration" of remedial alternatives and incorporation of some of the remediation measures "mentioned by the intervenors" sufficient to make Duke's remediation prudent. The PUCO erred in this finding, as mere "consideration" and incorporation of some lower-cost remediation activities does not

[84] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 38 (Table 2) (February 25, 2013).
[85] Tr. Vol. I at 215-17 (Bednarcik) (April 29, 2013).

make a $55 million endeavor reasonable when it can meet requirements for $7 million. Moreover, even though some undocumented consideration of remedial alternatives was claimed by Ms. Bednarcik, the burden of proof requires more than undocumented "consideration."

Meeting the burden of proof requires consideration sufficient to determine that there were not alternatives that were significantly more cost-effective. Absent a requirement for sufficient documentation, a utility could sponsor a witness who could make any claim necessary to "support" a burden of proof question and presumably meet the burden. This would make a mockery of the burden of proof requirement. Further, as both the range and level of potential remediation costs increase, greater consideration must be given to the evaluation of remediation alternatives. Duke's alleged and undocumented "consideration" was simply insufficient to prove prudence for the scope of the MGP remediation at either the East End or West End sites.

The PUCO erred in suggesting that Duke's piecemeal use of institutional and engineering controls, while excavating far beyond what was necessary, was prudent. The PUCO should reverse its finding that Duke met its burden of proof that its remediation expenditures were prudent.

3. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in finding that Duke's use of Ohio EPA's Voluntary Action Program (VAP), which "does not specify or prescribe remedial options" was a sufficient basis for the PUCO to find that Duke's selected remediation was reasonable and prudent for customers to pay.

The PUCO says that "utilizing the Ohio EPA's VAP in a proactive manner" was a reasonable and prudent decision.[86] The VAP does provide a flexible means to remediate

[86] Order at 64.

and, thereby, control costs more effectively. However, Duke's failure to use that flexibility appropriately in order to implement a cost-effective remedial plan undermined the value of its decision to use the VAP program. The PUCO erred in finding that the use of the VAP program constituted a cost-effective remedial plan and met the standards provided for prudent management expenditures set forth in R.C. 4909.15.

Indeed, Duke witness Fiore recognized the potential flexibility, since "**VAP does not specify or prescribe remedial options.**"[87] Rather, "[i]t is up to the remediating party to determine how best to achieve those standards following the VAP regulations."[88] He acknowledged that "different approaches carry with them different costs."[89] Thus, remediating parties have a range of options to protect human health and the environment.[90] It is "up to the remediating party to determine how best to achieve" applicable standards.[91]

As discussed above, Mr. Fiore did not assess alternative remedial options or the cost associated with them. In the absence of such assessment, and Mr. Fiore's recognition that VAP does not **prescribe** a specific prudent remedial action plan, Duke did not show -- and the PUCO could not reasonably conclude -- that Duke's high-cost remedy was reasonable and prudent. This is true simply from a burden of proof standpoint even if evidence did not exist to the contrary. Intervenors provided a specific cost-effective remedial action plan that met applicable standards, protected human health and the environment (consistent with VAP standards), Duke still did not meet its burden

[87] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013) (Emphasis added).

[88] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013).

[89] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 23 (April 22, 2013).

[90] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 22-23 (April 22, 2013).

[91] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 23 (April 22, 2013).

of proving prudence. Based upon information known at the time -- that would have been many times less costly than the remedy Duke undertook.

4. The PUCO's 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 of what Duke sought to charge to its customers.

The PUCO relied almost entirely on the testimony of Duke witness Fiore, even though Mr. Fiore never evaluated, documented, or priced out, alternative remedial options[92] and his testimony therefore could not satisfy this burden. Therefore, the evidence does not support the PUCO's finding of prudence.

Mr. Fiore testified that Duke's site assessment and remediation activities were "prudent and reasonable, and in conformance with VAP regulations" at both sites,[93] as discussed above But Mr. Fiore could not reasonably make such a judgment in the absence of evaluation of alternative remedial options, and their associated costs. Indeed, he testified that he was never asked to examine the reasonableness of costs at the MGP sites.[94] It is difficult to understand how Mr. Fiore could testify as to prudence and reasonableness in the absence of such an evaluation. In the absence of such an analysis, the PUCO must reject his testimony. Ohio Rule of Evidence 702(c) specifically requires an expert witness's testimony to be "based on reliable scientific, technical or other specialized information." Expert testimony requires a reliable scientific methodology be

[92] Post-Hearing Brief of OCC/OPAE at 39, 56-57 (June 6, 2013); Post-Hearing Reply Brief of OCC/OPAE (June 20, 2013) at 39-41, 52; Tr. Vol. II at 553, 556 (Fiore) (April 30, 2013); Tr. Vol. III at 639-40 (Fiore) (May 1, 2013).

[93] Duke Ex. No. 26 (Direct Testimony of Shawn S. Fiore) at 20 (April 22, 2013).

[94] Tr. Vol. II at 555 (Fiore) (April 30, 2013).

employed in formulating an opinion.[95] Because expert opinion based on nebulous methodology is unhelpful to the trier of fact, it has no place in courts of law.[96]

Mr. Fiore lacked an appropriate basis for this testimony in that he did not perform any analysis of alternative remedial options. He did not review any "documentation that showed an analysis of different options that Duke had available as far as remediation techniques" and he was unaware of any "sufficient documentation" of such options.[97]

Moreover, Mr. Fiore testified beyond the scope of his knowledge. Ohio Rule of Evidence 703 states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." The facts are that Duke did not document any examination of alternative remedial options or their associated costs[98] and that Mr. Fiore conducted no such independent examination on his own, but relied entirely upon Ms. Bednarcik's representations to support his opinion. And, as discussed above, Ms. Bednarcik acknowledged that no detailed alternatives analysis was performed. Thus, Mr. Fiore's determination that Duke's remediation was reasonable and prudent lacked an appropriate basis or methodology. Consequently, the PUCO should have rejected Mr. Fiore's testimony.

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[95] *Valentine v. Conrad*, 110 Ohio St.3d 42, 45 (Ohio 2006).

[96] *Id.* The Supreme Court of Ohio, quoting the U.S. Supreme Court, stated:
"Experts often base their opinions on data and research from within their field of study. Evid.R. 702(C) requires not only that those underlying resources are scientifically valid, but also that they support the opinion. Although scientists certainly may draw inferences from a body of work, trial courts must ensure that any such extrapolation accords with scientific principles and methods. In this respect, we find persuasive *Gen. Elec. Co. v. Joiner*. In *Joiner*, the United States Supreme Court, in discussing the reliability requirements of Fed.R.Evid. 702, stated, "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. *Gen. Elec. Co. v. Joiner*, 522 U.S. at 146, 118 S.Ct. 512, 139 L.Ed.2d 508." *Valentine v. Conrad*, 110 Ohio St.3d 42, 45 (Ohio 2006).

[97] Tr. Vol. II at 553 (Fiore) (April 30, 2013).

[98] Post-Hearing Brief of OCC/OPAE at 39, 56-57; Post-Hearing Reply Brief of OCC/OPAE at 39-41, 52; Tr. Vol. II at 553, 556 (Fiore) (April 30, 2013); Tr. Vol. III at 639-40 (Fiore) (May 1, 2013).

5. **The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in relying upon the fact that Duke's expert witnesses were "subject to discovery, as well as extensive, and at times pointed, cross-examination" without examining whether their opinions regarding the prudence of Duke's expenditure of $55.5 million in MGP costs were reasonable, when their opinions lacked foundation and, in fact, did not stand up to cross-examination.**

The PUCO concluded that the testimony of Duke's expert witnesses was meritorious, in the absence of any documented analysis of alternative remedial options. The PUCO emphasized that Duke's witnesses were "subject to discovery, as well as extensive, and at times, pointed cross-examination."[99]

This is a curious finding by the PUCO. The failure of Duke to document consideration of alternative remedial options and their associated costs cannot be remedied by exposing Duke and its witnesses to "discovery" and "cross-examination." In fact the "discovery" and "cross-examination" of Joint Consumer Advocates and other parties revealed just how little Duke and its experts had done to assess cost-effective alternative remedial options.[100] While noting the "extensive, and at times pointed cross-examination" performed by intervenors, the Order makes no mention of just how poorly Duke's witnesses responded.

It was error for the PUCO to have concluded that Duke's failure to document its analysis of alternative remedial options was acceptable simply because Duke's witnesses were "subject to discovery" and "cross-examination." There was no citation in the PUCO's Order to support the legal standard in the PUCO's conclusion. Rather, the

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[99] Order at 64.

[100] Post-Hearing Brief of OCC/OPAE at 28, 39, 56-57 (June 6, 2013); Post-Hearing Reply Brief of OCC/OPAE at 39-41, 52 (June 20, 2013); Tr. Vol. I at 212, 215 (Bednarcik) (April 29, 2013); Tr. Vol. II at 553, 556 (Fiore) (April 30, 2013); Tr. Vol. III at 639-(May 1, 2013).

PUCO should have concluded that, despite Duke's numerous opportunities to remedy its documentation shortcomings, Duke failed to do so. Instead, time and again Duke demonstrated imprudent management and oversight of these costly remediation projects.

In contrast, a correct conclusion was reached by the PUCO in another Opinion and Order it issued the same day as the Duke Order. In a Gas Cost Recovery ("GCR") case, involving Northeast Ohio Natural Gas Corporation ("Northeast") and Orwell Natural Gas Company ("Orwell"),[101] the PUCO found that Northeast and Orwell failed to meet their burden of proof. The utilities failed to provide proof or documentation to support their claims, despite a utility witness on the witness stand who claimed that costs were reasonable. Nevertheless, the PUCO determined that certain costs were unreasonable, because it was not reasonable for ratepayers to pay twice for the same activities.[102]

There appears to be no consistency between the burden of proof requirement the PUCO applied to Northeast and Orwell and to Duke in this case. Whereas the PUCO disallowed costs for Northeast and Orwell because the utilities failed to provide proof or documentation to justify charging customers twice for the same activities, Duke's failure to document any analysis of consideration of MGP remediation alternatives, despite its significant resources, was found to be acceptable by the PUCO. Indeed, Duke was rewarded for its failure to document its actions by the PUCO's decision that Duke's undocumented "consideration" was adequate to meet its burden of proof in these cases.

The PUCO should grant rehearing on this issue.

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[101] *In the Matter of the Regulation of the Purchased Gas Adjustment clauses Contained Within the Rate Schedules of Northeast Natural Gas Corporation and Orwell Natural Gas Company*. Case Nos. 12-209-GA-GCR and 12-212-GA-GCR, Opinion and Order (November 13, 2013).

[102] *Northeast and Orwell*, Order at 42 (November 13, 2013).

6. **The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in approving $55.5 million in charges to customers for MGP investigation and remediation when Duke is required by law to minimize charges to customers and when OCC produced uncontradicted evidence of a $7.1 million MGP remediation alternative (to Duke's expending of $55.5 million or more) that would also meet applicable standards.**

The PUCO approved Duke's $55.5 million remediation approach despite OCC's uncontradicted evidence of a $7.1 million MGP remediation alternative for both sites. OCC disputes that changes in use of the two MGP sites triggered a need to remediate the properties. And as discussed below, it was Duke's own actions -- the sale of portions of the East End site - that triggered the need for remediation there. Once the need to investigate and remediate the sites was triggered, however, Duke, as a public utility, had two obligations. First, it was required to investigate and remediate consistent with applicable utility laws and regulations, i.e. to meet applicable standards and protect human health and the environment. Second, if Duke intended to seek cost recovery from utility distribution customers, it was required to determine the most cost-effective way to investigate and remediate these sites consistent with applicable standards and the protection of human health and the environment, at the time of the discovery of the need.

Upon review of Duke's remediation, OCC witness Dr. Campbell detailed a path for remediation that would have met these requirements and thus should have been followed by Duke. Dr. Campbell demonstrated that a reasonable and prudent remediation, meeting applicable standards and protective of human health and the environment, could have been completed on both MGP sites for only approximately $7.1 million. But Dr. Campbell's assessment was disregarded by the PUCO.[103]

[103] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 38 (Table 2) (February 25, 2013).

It was unreasonable and unlawful for the PUCO to approve charges for $55.5 million -- to date -- for this remediation when remediation meeting applicable standards could have been completed for $7.1 million. The PUCO erred in disregarding the evidence that investigation and remediation, consistent with environmental laws and regulations, could have been completed at this substantially lower amount.

7. The PUCO's Opinion and Order was unreasonable and unlawful and against the manifest weight of the evidence in disregarding the evidence that excavating to 2 feet and then applying a surface cap would have met applicable standards and protected human health and the environment across most of the MGP sites, rather than the 20 – 40 feet uniformly excavated by Duke, which resulted in significantly greater costs to Duke (and thus to customers that the PUCO has authorized Duke to Charge for the remediation).

The PUCO's decision was unreasonable and unlawful in disregarding the testimony of Dr. Campbell that Duke's costly excavation to 20 – 40 feet below ground surface (BGS) across a large portion of both the East End and West End sites was unreasonable. Excavation to 20 – 40 feet BGS requires costly excavation shoring, water management and disposal, off-site disposal of soil, site security, and air and vibration monitoring that is not needed at shallower depths. [104]

As Dr. Campbell testified VAP rules only require excavation to two (2) feet BGS where institutional controls are applied in a non-residential setting except, "when it is reasonably anticipated that exposure to soil will occur through excavation, grading or utilities maintenance."[105] For the Duke MGP sites, effective institutional controls -- land

[104] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 11, n.12 (February 25, 2013).

[105] Post-Hearing Brief of OCC/OPAE at 50-51 (June 6, 2013); OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 10, *citing* VAP Rule 3745-300-07 (Phase 2 Property Assessments) (February 25, 2013).

use restrictions, City Ordinances, or similar measures -- that prohibit use of groundwater in the area are extant and serve to prevent exposures below 2 feet BGS in most locations.

Similarly, the PUCO disregarded the evidence that groundwater remediation, beyond institutional and engineering controls, and monitoring, was not necessary.[106] Dr. Campbell carefully assessed Duke's groundwater test results and VAP rules to determine groundwater remediation was not necessary, and this analysis is detailed in OCC's Post-Hearing Brief.[107] Groundwater, and the leaching to groundwater exposure pathways, can only be protected if groundwater is not already contaminated.[108] But because groundwater at the Duke MGP sites is already contaminated, these exposure pathways re not applicable under the VAP.[109]

The PUCO also improperly disregarded the evidence that Duke's excavation below 2 feet BGS was not necessary to protect workers, who could have been protected through an appropriate soil management plan, without excessive expenditures.[110]

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[106] Post-Hearing Brief of OCC/OPAE at 63-71 (June 6, 2013).

[107] Post-Hearing Brief of OCC/OPAE at 63-71 (June 6, 2013).

[108] Post-Hearing Brief of OCC/OPAE at 63 (June 6, 2013).

[109] Post-Hearing Brief of OCC/OPAE at 63 (June 6, 2013).

[110] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at JRC-16 DEO-MGP 001261-001262 (February 25, 2013).

H. The 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 Utility Witnesses And Effectively Created A Presumption That A Utility's Actions Were Prudent, Contravening PUCO And Ohio Supreme Court Precedent.[111] The PUCO's Finding Was So Clearly Unsupported By The Record As To Show Misapprehension, Mistake Or A Willful Disregard Of Duty By The PUCO.

Although Duke neither performed, nor presented, any alternatives analysis or feasibility study of remediation alternatives, the PUCO appears to reach the conclusion (without saying so) that there were not less costly remediation alternatives available to Duke that could have been implemented consistent with legal and regulatory requirements.[112] Duke could not meet its burden of proof without having performed, or presented, an analysis of remediation alternatives. As discussed above, the PUCO's conclusion to allow Duke rate recovery of its MGP costs fails to hold Duke to its burden of proof.

Instead, the PUCO shifted the burden of proof to opposing parties to show "less costly remediation alternatives," stating that intervenors "question the level of remediation employed by Duke" and make "an effort to illustrate potentially less costly remediation alternatives."[113] The PUCO then rejected the evidence presented by intervenors that MGP remediation of these sites could have been completed within legal and regulatory requirements for a fraction of Duke's expenditures to date -- let alone what it is yet to spend.[114] In particular, the PUCO rejected the testimony of OCC's expert environmental engineer, Dr. James Campbell, who determined that a reasonable

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[111] *Northeast and Orwell*, Order at 4 (November 13, 2013); See also *In re Duke Storm Damage Case*, 131Ohio St.3d 487, *CG&E v. PUCO*, 86 Ohio St.3d 53, citing *CG&E v. PUCO 67 Ohio St.3d 523;* and *Syracuse Home Util. Cos. v. PUCO*, Case No. 86-12-GA-GCR.

[112] Order at 64.

[113] Order at 64.

[114] Order at 64.

and prudent remediation consistent with Ohio EPA's VAP for both sites would have cost $7.1 million[115] -- not the $55.5 million approved by the PUCO. The PUCO rejects Dr. Campbell's testimony, stating that intervenors' witnesses "did not have expertise with regard to the Ohio's 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."[116]

The PUCO's mischaracterization of Dr. Campbell's testimony, its attack on his expertise, and its suggestion that only those working a remediation site have the "firsthand knowledge" necessary to critique it are all wrong. The PUCO's findings are not supported by the record.

First, Dr. Campbell does not simply "question the level of remediation employed by Duke" or make an "effort to illustrate" less costly remediation alternatives. Rather, he rigorously critiques Duke's remediation, methodically assessing what is necessary to meet VAP requirements and the extent to which Duke's remediation plan goes beyond those requirements. Dr. Campbell does not merely make an "effort to illustrate" less costly remediation; he provided a detailed estimate of a remediation alternative consistent with VAP requirements. All of these details were laid out, with appropriate citations to Dr. Campbell's testimony, in OCC's Initial Post-Hearing Brief.[117]

Second, the PUCO's attack on Dr. Campbell's expertise is simply contrary to legal standards. The PUCO states that Dr. Campbell "did not have expertise with regard to Ohio EPA's VAP and the associated rules and regulations."[118] But the PUCO's

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[115] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) at 38 (Table 2) (February 25, 2013).

[116] Order at 64.

[117] Post-Hearing Brief of OCC/OPAE at 54-89 (June 6, 2013).

[118] Order at 64.

finding in this respect is in error. Although Dr. Campbell is not a VAP CP, as shown throughout his testimony,[119] he is an environmental engineer who reviews and addresses varying federal and state regulations throughout his work as experts typically do. Specifically, Dr. Campbell studied and was extensively versed in VAP rules and regulations at the time he submitted his testimony.[120] He specifically testified as follows (and no effort was made by any parties to strike his testimony there or object to its admission):

> Q. How much time did you spend reviewing Ohio VAP requirements and related documentation associated with the expert opinions you provided in this matter?
>
> A. I don't remember the exact number but I spent a significant amount of time reviewing this information and I had been familiar with the VAP and my other work under compliance programs in Ohio. We had referenced the VAP from time to time as a reference point and so I was familiar with portions of the VAP through my other work.[121]

Furthermore, environmental engineers such as Dr. Campbell have to review and address varying federal and state regulations throughout their work. While there are differences between environmental regulations in every jurisdiction that have to be taken into account, the fact that rules and regulations are different from one jurisdiction to another cannot fairly be viewed as an impediment to an expert's review of an environmental remediation. For example, it is well-established that medical doctors can testify as experts throughout the country, and throughout the world, even though they have a medical license in a single jurisdiction.[122] Similarly, engineers need not have

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[119] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) (February 25, 2013).

[120] OCC Ex. No. 15.1 (Direct Testimony of James R. Campbell, Ph.D.) (February 25, 2013); Tr. Vol. IV at 995-96 (Testimony of James R. Campbell, Ph.D.) (May 2, 2013).

[121] Id.

[122] Indeed, to testify as a medical expert in Ohio "against a physician, podiatrist or hospital" as a result of "diagnosis, care or treatment of any person by a physician or podiatrist," Ohio Rule of Evidence 601only

licensing in a particular state to testify within the scope of their expertise.[123] As Dr. Campbell testified, the VAP rules are nothing new to the practice of an environmental engineer:

> A. * * * But as I read through the VAP rules, what was written therein was very familiar to me. They didn't reinvent the rule when they wrote the VAP in the early '90s. **It reflects the basic environmental regulatory practice across the country.** There are some differences here and there, but everything I read there looked very familiar to me.[124]

Moreover, the PUCO's Attorney Examiners specifically denied Duke's written Motion to Strike Dr. Campbell's testimony (and Motion to Clarify Scope of Proceeding) with respect to VAP requirements.[125] Although the Attorney Examiners indicated that they would entertain further motions at the time of presentation of Dr. Campbell, no motion was forthcoming. OCC expert witness Dr. Campbell was allowed to and did express expert opinions on the record, including those pertaining to VAP investigation and remediation of Duke's MGP sites, consistent with the Ohio Rules of Evidence. Those opinions were admitted into the record without further objection.

The PUCO had no reasonable basis to discount the testimony of Dr. Campbell on the grounds that he is not a VAP CP, when he demonstrated significant familiarity with VAP rules and regulations. Indeed, Dr. Campbell's knowledge of these rules and regulations was not effectively challenged by any party by discounting Dr. Campbell's testimony, the PUCO would undermine the basic standards applicable to qualification of

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requires that an appropriate medical expert be licensed by the relevant licensing authority "of any state." Evid. Rule 601. For engineers testifying as experts, there is not even a "licensing" requirement as there is for doctors.

[123] *State v. Tillman*, 2004-Ohio-6240 (Ohio Ct. App., Butler County Nov. 22, 2004).

[124] Tr. Vol. IV at 993-94 (Testimony of James R. Campbell) (May 2, 2013) (Emphasis added).

[125] Tr. Vol. I at 11-12 (April 29, 2013).

an expert by requiring licensing with respect to every jurisdiction and agency regarding which an expert testifies. The PUCO's advancement of such a rule is not proper and is inconsistent with the requirements of Ohio Rule of Evidence 702 and precedent.

Ohio Rule of Evidence 702(B) provides that a witness is "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony."[126] Further, Ohio courts have long held that "[t]he fact that a witness is not licensed to practice under the laws of a jurisdiction is immaterial insofar as concerns his competency to testify as an expert, which is based upon his specialized training, knowledge and experience."[127] A "witness need not have special certification or licensing in order to qualify as an expert as long as his knowledge will aid the trier of fact in understanding the evidence or determining a fact in issue."[128]

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. Nor is there any proscription for environmental engineers to testify as experts in Ohio with respect to the prudence of an environmental clean-up project because they are not certified under Ohio EPA's VAP.

It is well-established in Ohio law that "expert opinion 'may not be arbitrarily ignored, and some reason must be objectively present for ignoring expert opinion testimony.'"[129] And a court or agency abuses its discretion when it "disregards credible

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[126] Evid. Rule 702(B).

[127] *Reed v. Hodge*. 1975 Ohio App. LEXIS 6967 (Ohio Ct. App.. February 27. 1975).

[128] *State v. Tillman*. 2004-Ohio-6240 (Ohio Ct. App.. Butler County Nov. 22. 2004), *citing State v. Baston*. 85 Ohio St.3d 418. 423. 1999 Ohio 280. 709 N.E.2d 128.

[129] *Lagway v. Dallman* (N.D Ohio 1992). 806 F.Supp. 1322. 1340; *State v. White*. 118 Ohio St 3d 12. 885 N.E.2d 905. 2008-Ohio-1623. ¶¶71-74.

and uncontradicted expert testimony."[130] Objective reasons for ignoring an expert report include: (1) the correctness or adequacy of the factual assumptions on which the expert opinion is based; (2) possible bias in the expert's appraisal of the defendant's condition; (3) inconsistencies in the expert's testimony, or material variations between experts; and (4) the relevance and strength of the contrary lay testimony."[131] In this case, there was no objective reason to ignore Dr. Campbell's expert testimony. Dr. Campbell clearly had the qualifications to offer the opinions that he offered and the testimony he offered regarding the availability and cost of MGP remediation alternatives at the East End and West End MGP sites was not contradicted by any witness. The PUCO abused its discretion in disregarding his testimony regarding cost-effective MGP remediation alternatives.

Moreover, while critiquing Dr. Campbell, the Order ignores the fact that neither Ms. Bednarcik nor Dr. Middleton, two of Duke's three environmental engineering experts, were not Ohio VAP CPs. Further, none of Duke's other witnesses demonstrated the level of familiarity with VAP Rules and Regulations demonstrated by Dr. Campbell. This double standard for utility and intervenor experts is unjustified.

The PUCO also disregarded the minimal qualifications for a VAP CP detailed in OCC/OPAE's Reply Brief.[132] At no point did Duke claim that Dr. Campbell did not meet the qualifications for a VAP CP, other than that he had not taken the 8-hour training

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[130] *Lagway v. Dallman* (N.D.Ohio 1992), 806 F.Supp. 1322, 1340; *see also State v. White*, 2005-Ohio-6990 ¶20 (Ohio Ct. App., Summit County Dec. 30, 2005), *rev'd on other grounds State v. White*, 118 Ohio St.3d 12, 885 N.E.2d 905, 2008-Ohio-1623.

[131] *Id.*

[132] Post-Hearing Reply Brief of OCC/OPAE at 62 (June 6, 2013). VAP provides educational, experiential, and code of conduct requirements, all of which are met or exceeded by Dr. Campbell, plus an 8-hour training course and the payment of a $2,500 annual fee. Duke Ex. 26, Direct Testimony of Shawn S. Fiore at 9-11 (April 22, 2013); Transcript Vol. II at 564-70 (discussing CP qualifications, including educational, experiential, training, and code of conduct requirements) (April 30, 2013); Tr. Vol. III at 655 (discussing fees applicable to CP) (May 1, 2013).

course and paid the $2,500 fee. His extensive familiarity with VAP is well-reflected in his testimony in this proceeding.

Joint Consumer Advocates would also emphasize Dr. Campbell's significant experience, which in terms of length and breadth exceeds that of Duke witness Fiore. Dr. Campbell received a Civil Engineering Degree from Youngstown State University, and an M.S. and Ph.D. from Carnegie Mellon University in environmental engineering.[133] Since 1991, he has been a Registered Professional Engineer and holds that licensing in both Michigan and Pennsylvania.[134] He has significant experience addressing environmental issues associated with MGP and coal tar industry sites spanning more than three decades.[135] Dr. Campbell worked on more than 50 MGP/coal tar sites for Koppers Company, which designed and built many of the MGP plants in North America, from 1984-1990.

In 1992, Dr. Campbell started Engineering Management, Inc. ("EMI") to provide project management and expert services related to environmental liabilities.[136] During his career, he has worked on the analysis and/or environmental assessment and cleanup of over 100 sites.[137] He has provided expert analysis in approximately 20 Superfund cases, 12 of which were MGP sites.[138] His experience includes "working with, and interpreting, many federal and state environmental regulations."[139]

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[133] OCC Ex. No. 15.1. (Direct Testimony of James R. Campbell. Ph.D.) at 1-3 & Attachment JRC-1 (February 25. 2013).

[134] Id. Dr. Campbell also was previously a licensed professional engineer in Ohio. (Tr.Vol. IV at 950.

[135] Id.

[136] Id. at 2.

[137] Id.

[138] Id.

[139] Id.

Finally, the PUCO's suggestion that only those working at a remediation site have the "firsthand knowledge" necessary to critique it is contrary to any reasonable standard. Such a standard would disqualify everyone -- including PUCO Staff witnesses -- other than the utility's witnesses from offering expert testimony regarding an environmental investigation and remediation. But even under this standard, the PUCO could not rely on Duke witness Fiore regarding the issues in this case since he was not involved in the selection of the remedial options for either the East End or West End sites and relied entirely upon Ms. Bednarcik for information regarding the different options considered.[140] Mr. Fiore had no more "in-depth firsthand knowledge" of remedial option selection than OCC's witness Dr. Campbell.

This standard for expert witness testimony that the PUCO applied in these cases is contrary to Ohio's Rules of Evidence and is untenable. Such a standard would effectively give a utility a presumption of prudence since only the utility's witnesses could testify -- firsthand -- about prudence. But the Supreme Court of Ohio has made clear that there is no presumption of prudence and that the Utility must **prove** the prudence of its actions:

> Duke Energy Ohio, Inc. (Duke) sought reimbursement for roughly $30.7 million in costs associated with damages caused by Hurricane Ike and the Commission had limited Duke's recovery to only $14.1 million. In its appeal to the Court, Duke argued that "other parties did not conclusively prove that the claimed expenses were unreasonable or imprudent." In upholding the Commission's decision, the Court established that it is the utility that has to "prove a positive point: that its expenses had been prudently incurred and that the Commission did not have to find the negative: that the expenses were imprudent" **and it rejected any presumption of prudence on the part of the utility.**[141]

[140] Tr. Vol. II at 553 (Fiore) (April 30, 2013); Tr. Vol. III at 663-64 (Fiore) (May 1, 2013).

[141] *Northeast and Orwell*, Order at 4 (November 13, 2013) (Emphasis added).

The PUCO's decision in these cases would turn expert qualification standards and the utility's burden of proof on their head. The PUCO's decisions to disregard Dr. Campbell's expert testimony and to rely entirely on the Utility's expert because of "firsthand" knowledge is contrary to the law and the evidence in this proceeding. By taking this approach, the PUCO has erred in presuming that the actions Duke took to remediate the MGP sites are prudent. This presumption was unwarranted and unlawful. Therefore, the Joint Consumer Advocates' Application for Rehearing should be granted on this issue.

I. The PUCO Erred In Finding That Duke's Need To Investigate And Remediate The East End MGP Site Was A Result Of Changes In The Use Of The Property And Adjacent Properties When Such Changes In Use May Not Have Occurred But For Duke's Decision To Sell A Portion Of The East End Site To Adjacent Owner(s), A Decision Which Was Unreasonable And Imprudent.

The PUCO's decision indicates that Duke made a reasonable and prudent decision by "acknowledging the changes in the use of the properties and adjacent properties in a timely manner."[142] But the change in use with respect to the East End MGP site was brought about by Duke's own non-utility actions. Duke initially sold the western parcel of the East End MGP site to a residential developer, and granted an ingress-egress and landscape easement across the western parcel.[143] Duke witness Bednarcik recognized that these actions "altered the 'limited accessibility' engineering control" that had previously prevented Duke from having to remediate the site.[144] Without Duke's sale of the western parcel to a real estate developer or the granting of an easement, there would not have been a change in use that triggered the need to take remediation actions.

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[142] Order at 64.

[143] Duke Ex. No. 21A (Supplemental Direct Testimony of Jessica Bednarcik) at 17-19 (February 25, 2013); Duke Ex. No. 17 (Supplemental Direct Testimony of Andrew C. Middleton, Ph.D.) at 11-12 (February 25, 2013); Tr. Vol. I at 2 (Margolis) (April 29, 2013).

[144] Duke Ex. No. 21A (Supplemental Direct Testimony of Jessica Bednarcik) at 18 (February 25, 2013).

Thus, even though Duke properly acknowledged that the change in use triggered an environmental liability, it can hardly be said that Duke's actions to sell the western parcel and to grant a use easement were utility activities. Nor can Duke contend that the actions were reasonable and prudent. Indeed, Duke should have known that its actions would trigger its need to remediate -- and could impose costs on customers.

The Duke sale of the western parcel was designed to benefit shareholders alone. The PUCO's decision was unreasonable and unlawful in finding that this shareholder-benefiting transaction was reasonable and prudent for purposes of cost recovery from ratepayers. Instead, the PUCO should have found that the sale of the western parcel disqualified Duke from charging customers for any costs of remediation resulting from the site's change in use.

J. The PUCO Erred By Failing To Comply With R.C. 4909.19 Which Required The PUCO Staff's Report Of Investigation To Include A Determination Of The Prudence Of The MGP-Related Investigation And Remediation Costs To The Utility.

The Staff Report of Investigation is an important part of the rate case process under R.C. 4909.19. R.C. 4909.19 states:

> The commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, * * *. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

However, in these cases, the PUCO Staff did not investigate the prudence of Duke's remediation activities -- a $55.5 million issue in these cases. The Supreme Court of Ohio

defers to the PUCO, because the PUCO, with its expert Staff, can best resolve technical utility factual claims.[145] In the Order, the PUCO accepted not only the PUCO Staff's decision not to investigate the prudence issue but also the Utility's opinion in these cases. The PUCO stated:

> 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).[146]

If the PUCO Staff lacks expertise, the PUCO Staff could (and often does) pursue hiring a consultant with the appropriate expertise to investigate the facts. The PUCO has permitted the hiring of outside consultants to conduct prudence or financial reviews.[147] As required under R.C. 4909.19, OCC noted in its Objections to the Staff Report of Investigation the limited scope of the PUCO Staff's investigation with regard to the prudence of the MGP-related investigation and remediation costs.[148] However, other than noting in the record OCC's objection, the PUCO did not address the merits of this OCC objection in any detail in the Order.[149] It was contrary to Ohio law and PUCO Rules for the PUCO to tacitly accept the PUCO Staff's decision not to investigate the

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[145] *See State ex rel. Columbia Gas of Ohio, Inc. v. Henson* (2004), 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶26 (service violation claims are within the exclusive jurisdiction of the Commission).

[146] Order at 28 (Emphasis added).

[147] *See e.g.* O.A.C. Ann. 4901:1-35-09(D); 4901:1-35-08(C); 4901:1-35-11(B)(5); and 4901:1-36-03(C).

[148] OCC Objections to the Staff Report of Investigation at 12-13 (February 4, 2013).

[149] Order at 28.

prudence of the investigation and remediation costs, and to defer to the Utility's expert on this important issue.

Under R.C. 4909.19, the PUCO's Staff must investigate the facts in Duke's application and exhibits.[150] The Ohio Supreme Court emphasized the importance of the PUCO Staff's investigation:

> The purpose of a Staff report 'is * * * to facilitate meaningful contest of rate increase applications by providing interested parties with materials necessary for an informed challenge."[151]

In an Ohio Edison case, the PUCO refused to include property in the rate base, because the utility did not provide the PUCO Staff enough time to independently verify information.[152] The utility did not provide the information requested by PUCO Staff until three weeks after the commencement of the hearings. The Court found that the utility's actions prevented Staff from performing its statutory duty. Even though the utility insisted that the PUCO Staff's independent verification is not required, the Court found that the PUCO's exclusion of the plant was reasonable. The Court noted that "to hold otherwise * * * invite[s] the future circumvention of R.C.4909.19."[153]

In *Consumers' Counsel*, the PUCO Staff's investigation of four terminated nuclear plants was addressed in a subsequent report and not in the original report, because the decision to cancel the plants was announced too late to include the issue in the original report. A party objected to the adequacy of PUCO Staff's investigation and

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[150] O.R.C. 4909.19; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 418 (Sec. 4909.19 does not authorize the Commission to investigate "matters not put in issue by the applicant and not related to the rates which are the subject of the application."); *In the Matter of the Application for Waiver of Certain Portions of The Standard Filing Requirements Required Prior to a Filing of a Complaint and Appeal of The Cleveland Electric Illuminating Company from Ordinance No. 21-1994 of the Council of The City of Garfield Heights, Ohio*, Case No. 94-578-EL-CMR, 1994 Ohio PUC LEXIS 284, *4 (Apr. 7, 1994) (Substantial costs for the Staff's investigation and hearings are expected.)

[151] *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 160-161.

[152] *Ohio Edison Co. v. Pub. Util. Comm.* (1991), 63 Ohio St.3d 555, 558, 589 N.E.2d 1292.

[153] *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 160-161.

report, arguing that the investigation and report in regards to the terminated nuclear plants denied the party an adequate opportunity to review the PUCO Staff's findings and prepare for hearings. The Court determined that the Commission's investigation and report complied with R.C. 4909.19. The Court noted that the appealing party benefited from the PUCO Staff's investigation and had adequate opportunity to examine experts at the hearings.[154]

In these cases, even though the PUCO Staff conducted an investigation and prepared a report on Duke's application, the PUCO Staff's Report failed to address an important aspect of Duke's application to recover remediation costs -- the necessity and scope of the remediation efforts. The prudence of remediation costs is a contentious and significant issue clearly raised by Duke's request. The PUCO Staff was statutorily obligated to investigate the necessity and scope of Duke's remediation efforts.

Moreover, PUCO Staff did not hire a consultant with the appropriate expertise to investigate the MGP remediation cost issues. Instead, PUCO Staff deferred to Duke's expert witness that the costs were necessary and the scope of the remediation work performed was reasonable. Unlike *Consumers' Counsel*, the only party in these cases to benefit from the lack of an investigation on the prudence issue in the Staff's Report was Duke. Other parties (and all of Dukes' customers) were denied the benefits of an impartial investigation. The PUCO Staff's Report did not fulfill its purpose, because it did not provide parties with materials necessary for an informed challenge. The PUCO Staff failed to comply with R.C. 4909.19, and the Commission unlawfully endorsed its Staff's failure.

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[154] Id. at 160.

Finally, the PUCO's decision in these cases is inconsistent with other recent decisions where the PUCO has rejected the concept that the utility is entitled to a presumption of prudence. In an Order issued by the PUCO on the same day as the Order in these cases, the PUCO stated:

> In upholding the Commission's decision, the Court established that it is the utility that has to "prove a positive point: that its expenses had been prudently incurred and that the Commission did not have to find the negative: that the expenses were imprudent" **and it rejected any presumption of prudence on the part of the utility.**[155]

By deferring to Duke's expert witnesses on the prudence of the Utility's remediation activities, the PUCO is providing Duke a presumption of prudence. On the question of whether Duke was prudent in spending $55.5 million for MGP investigation and remediation -- of course the Utility's expert witnesses are going to state that Duke's actions and expenditures were prudent. It was up to the PUCO Staff to address the prudence of Duke's costs as part of the investigation and Staff Report so as to provide interested parties with materials necessary for an informed challenge and to assist the PUCO in making an informed decision. Therefore, the PUCO should grant rehearing on this issue.

K. The PUCO Erred In Finding That Duke Has Taken Reasonable And Prudent Actions To Pursue Recovery Of Investigation And Remediation Costs From Other Potentially Responsible Third Parties And Insurers, So As To Reduce What Customers Would Be Charged.

The PUCO's decision indicates that Duke made a reasonable and prudent decision by "pursuing recovery of remediation costs by other potentially responsible third parties and insurers."[156] Joint Consumer Advocates agree with the PUCO's decision that Duke

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[155] *Northeast and Orwell*. Order at 4 (November 13, 2013) (Emphasis added).

[156] Order at 64.

should "pursue recovery of costs" from third parties and insurers.[157] Joint Consumer Advocates also agree with the PUCO that these funds should be first used to reimburse customers for any amounts for which customers are responsible, net of costs to achieve those proceeds.[158] To the extent amounts collected from third parties and insurers exceed the amount recoverable from customers, Duke should be permitted to retain such amounts.[159]

However, Duke's efforts to collect amounts of MGP costs from third parties and insurers are just beginning. It is premature for the PUCO to conclude that Duke's limited actions to date have been reasonable and prudent when not a single dollar has been recovered from third parties or insurers. Indeed, OCC/OPAE recommended that, only after Duke's efforts to collect these amounts from third parties and insurers are exhausted, should the PUCO permit any recovery from customers.[160]

The PUCO should carefully 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.[161] The PUCO should vacate its finding that Duke's actions have been reasonable and prudent when not a single dollar has been collected from third parties and insurers, and the PUCO should avoid any pre-approval of future efforts as prudent.[162]

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[157] Order at 67.

[158] Order at 67.

[159] Order at 67.

[160] Post-Hearing Brief of OCC/OPAE at 94-96 (June 6, 2013).

[161] *See* Post Hearing Brief of OCC at 94-96 (June 6, 2013); OCC Ex. 14 at 39-40 (Direct Testimony of OCC witness Bruce Hayes) (February 25, 2013).

[162] Tr. Vol. II at 380 (Bednarcik) (April 30, 2013)

L. The PUCO Erred By Authorizing Duke To Collect The Deferred MGP Investigation And Remediation Costs From Customers Over An Unreasonably Short Five-Year Period.

The PUCO established an unreasonably short five-year amortization period. The PUCO stated:

> 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.**[163]

Consumer Advocates provided testimony supporting a longer amortization period of ten-years,[164] and the PUCO Staff agreed with the ten-year amortization period.[165] The longer amortization period will mitigate rate impacts on customers who did not receive benefits from the operation of the MGP Plants, and should have no responsibility for their cleanup.[166]

Duke argued against the longer amortization period because of the constraints the PUCO placed on Duke's ability to accrue carrying charges on the MGP deferrals. The PUCO stated:

> Duke is further authorized to accrue carrying charges on all deferred amounts between the dates the expenditures were made and the date recovery commences.[167]

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[163] Order at 68 (Emphasis added).

[164] OCC Ex. No. 22 (Direct Testimony of David Effron) at 11; See also OCC Ex. No. 13 (Additional Direct Testimony of Kathy Hagans.); See also Kroger Ex. No. 1 (Direct Testimony of Neal Townsend) at 7 (April 22, 2013).

[165] Order at 67.

[166] Kroger Ex. No. 1 (Direct Testimony of Neal Townsend) at 7 (April 22, 2013); See also Kroger Initial Brief at 14 (June 6, 2013).

[167] *Id.*, Finding and Order at 3.

As a result of the deferral case order, the accrual of carrying charges was to cease with the commencement of recovery. However, in the Order in these cases, the PUCO disallowed the collection from customers of any carrying charges on the remediation costs. The PUCO stated:

> **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.** * * *, 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.[168]

The stated rationale for denying the Utility collection of carrying charges, would also present legitimate arguments for extending the amortization period longer than the five-years authorized -- (1) the shareholders should bear some responsibility for the remediation costs, and (2) the recovery should minimize the ultimate rate burden on customers. The combination of the two stated rationales supports a ten- year amortization period rather than the minimal five-year period authorized by the PUCO.

The PUCO should reconsider and provide a longer and more reasonable 10-year amortization period. The incremental burden on shareholders of the foregone carrying charges between years five and ten would better balance the interests of shareholders and customers if the PUCO should find that customers should bear responsibility under the law for these costs.

Joint Consumer Advocates would emphasize that Duke's customers are already substantially burdened by Duke's distribution charges. Specifically, a residential customer is levied a fixed delivery service charge per month of $33.03 ($396.36 per

[168] Order at 59-60 (Emphasis added).

year);[169] Rider AMRP has a fixed monthly charge of $1.00 ($12.00 annually);[170] Advanced Utility Rider has a fixed monthly charge of $1.07 ($12.84 annually);[171] and all delivered gas is subject to a per hundred cubic feet ("CCF") charge for a variety of riders.[172] In addition to the previously listed charges, Duke's customers are asked to pay for the manufactured gas plant cleanup. For a residential customer, these MGP costs would be $1.62 per month ($19.44 annually) and $97.20 over the five-year amortization period.[173]

In light of the significant distribution-related charges that Duke's customers already pay, and the fact that Duke has not finished remediating the two MGP sites (and cannot estimate what the future investigation and remediation costs will be),[174] the amortization period for any authorized MGP-related charges should be extended to at least 10-years, in order to minimize the ultimate rate burden for Duke's customers.

Therefore, the PUCO should grant Joint Consumer Advocates' Application for Rehearing on this issue.

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[169] Duke Compliance Tariff Filing. PUCO Gas No. 18. Sheet No. 30.17. Page 1 of 2 (Issued: November 22. 2013).

[170] Duke Compliance Tariff Filing. PUCO Gas No. 18. Sheet No. 65.12. Page 1 of 1 (Issued: November 22. 2013).

[171] Duke Compliance Tariff Filing. PUCO Gas No. 18. Sheet No. 88.6. Page 1 of 1 (Issued: November 22. 2013).

[172] Duke Compliance Tariff Filing. PUCO Gas No. 18. Sheet No. 30.17. Page 1 of 2 Sheet No. 63 Rider PIPP. Rider UE-G. Uncollectable Expense Rider. Sheet No. 68 State Tax Rider. Sheet No. 76 Contract Commitment Cost Rider (Issued: November 22. 2013).

[173] Duke Compliance Tariff Filing (PUCO Gas No. 10. Original Sheet No. 69. page 1 of 1) (November 27. 2013).

[174] Tr. Vol. II at 573-574 (Fiore) (April 30. 2013).

M. The PUCO Erred By Unreasonably Granting The Utility The Authority To Collect (From Customers) MGP-Related Investigation And Remediation Costs Incurred By Duke After December 31, 2012 Through A Rider.

The PUCO granted Duke the authority to continue to defer costs related to MGP remediation after December 31, 2012.[175] However, the PUCO's Order granting Duke the authority to collect from customers such amounts through the MGP Rider that represents costs incurred subsequent to December 31, 2012, is contrary to the Staff Report and Stipulation on this matter which required Duke to file a subsequent rate case application for the collection of future MGP-related investigation and remediation expenses incurred after December 31, 2012. The PUCO stated:

> 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.**[176]

For reasons discussed further below, only those MGP-related investigation and remediation expenses that are found to meet legal and regulatory requirements and that were deferred on or before December 31, 2012, should be subject to being considered for recovery from customers.

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[175] Order at 72.

[176] Order at 72 (Emphasis added).

Duke's Application, in these cases, proposed collection of MGP-related amortization expenses from customers through approved base rates.[177] The discussion of a Rider MGP for collection of authorized MGP-related amortization expenses originated in the Staff Report. The Staff Report states:

> The Staff also does not agree with Duke that the MGP investigation and remediation expenses should be recovered in base rates. * * ***The Staff recommends that the ongoing environmental monitoring costs should continue to be deferred under authority granted by the Commission in Case No. 09-712-GA-AAM with future recovery of the expenses determined in a future rate proceeding.**[178]

The Staff Report recommendation with regards to Rider MGP recommended: (1) the ongoing deferral of Duke's **environmental monitoring costs**, but not any other investigation or remediation costs, and (2) the future recovery (if any recovery is allowed) of such deferrals to be determined in a future rate proceeding.

Despite disagreeing with these recommendations in the Staff Report, Duke did not include either issue within its Objections to the Staff Report.[179] Duke did not object to Staff's recommendation to limit future deferrals, under the authority granted by the PUCO in Case No. 09-712-GA-AAM to ongoing environmental monitoring costs. Therefore, the PUCO should require Duke to file a new application in order to receive PUCO authority to defer MGP-related future investigation (e.g. non-ongoing monitoring) costs, as well as, future investigation and remediation costs. And Rider MGP cannot be used by Duke to collect from customers costs which Duke does not currently have authority to defer.

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[177] Duke Ex. No. 2 (Application Vol. I) at 5-6 (July 9, 2013).

[178] Staff Hearing Ex. No. 1. Staff Report at 47 (January 4. 2013) (Emphasis added).

[179] See Duke Hearing Ex. No. 30. (Objections to the Staff Report) (February 4. 2013).

The PUCO's Order is contrary to the Stipulation because the Stipulating Parties were resolving the Utility's rate case Application that had a test-year that ended on December 31, 2012. The Stipulation states:

> The Parties agree that the Company may establish a rider, subject to the terms of this Stipulation and subject to Commission authorization after hearing from Parties in litigation, for recovery of any Commission approved costs associated with the Companies environmental remediation of manufactured gas plants (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. The Staff agrees to litigate its positions as stated in the Staff Report of investigation on the MGP issues, subject to the usual caveat to allow for correction of errors (if any) or updated information.[180]

There is nothing in the Stipulation that envisions implementation of a Rider that would allow Duke to collect from its customers ongoing MGP-related investigation and remediation costs that have been deferred on or after January 1, 2013.

Furthermore, the Stipulation states:

[180] Joint Ex. No. 1 (Stipulation and Recommendation) at 8 (April 2, 2013).

Staff Report Resolves Other Issues.

> The Parties agree that the Staff Report resolves the remaining issues not addressed in this Stipulation and Recommendation with one exception as follows:
>
> > The Company will not submit a facilities based cost of service study in its next gas distribution rate case. [181]

Therefore, the Staff Report and the Stipulation resolve this issue, and the PUCO's Order is contrary to the intent of the Stipulating Parties with regards to the applicability of Rider MGP to costs deferred after December 31, 2012.

As the Staff Report recommended, a future rate proceeding is where Duke may seek collection from customers of any future deferrals if any additional amounts are authorized to be deferred. Rider MGP is not an appropriate mechanism for the collection of any MGP-related costs incurred after December 31, 2012 unless appropriate deferral is authorized and such amounts are authorized to be collected in a future rate proceeding. Therefore, the PUCO should grant rehearing on this issue.

V. CONCLUSION

For all the reasons stated above, the PUCO should grant rehearing in this case.

[181] Joint Ex. No. 1 (Stipulation and Recommendation at 14 (April 2, 2013).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Application for Rehearing* was served on the persons stated below, electronically this 13th day of December, 2013.

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This foregoing document was electronically filed with the Public Utilities

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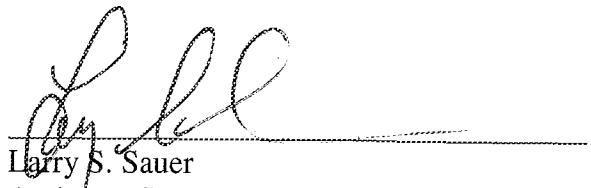
in

Case No(s). 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, 12-1688-GA-AAM

Summary: Application Application for Rehearing by Office of the Ohio Consumers' Counsel, Kroger Company, Ohio Manufacturers' Association, Ohio Partners for Affordable Energy electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Merit Brief and Appendix of Joint Appellants* has been served upon the below-named persons via electronic transmittal this 27th day of May 2014.



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