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

Duke Energy Kentucky
Case No. 2016-00298
Staff First Set of Data Request
Date Received: October 4, 2016

STAFF-DR-01-005

REQUEST:

Refer to the Application, page 8, paragraph 21, which states, "The formula to be used as part of the NPV tool calculation is contained in the tariff."

a. Explain to which part of the tariff this sentence refers.

b. With the information provided in Exhibit 1, explain how a customer would be able to calculate the net present value.

RESPONSE:

a. Although it is not presented using mathematical symbols, paragraph 2 (iii) under EXTENSION PLAN in the proposed tariff provides the parameters, and hence the formula, for the NPV calculation. The term NPV is commonly understood to mean the present value of all revenue and cost streams, brought back to the present at a specific discount rate.

b. Paragraph 2 (iii) in the EXTENSION PLAN section states that the NPV analysis will be performed by the Company at its discretion. Customers will not have sufficient data (*e.g.,* Company's cost data, nearby customer usage, etc.) to be able to calculate the net present value of an extension without consulting with the Company.

PERSON RESPONSIBLE: James E. Ziolkowski

Duke Energy Kentucky
Case No. 2016-00298
Staff First Set of Data Request
Date Received: October 4, 2016

STAFF-DR-01-006

REQUEST:

Refer to the Direct Testimony of John A. Hill, Jr., page 9. For the years 2010-2015 and 2016 to date, provide the number of inquiries from customers wishing to connect to gas service, by customer class, that did not result in a gas main extension due to cost.

RESPONSE:

The Company did not maintain detailed records of each specific customer inquiry by year that did not result in a connection. The Company did maintain the number of inquiries into an extension, by street, which may have included multiple customers per inquiry.

In Kentucky for 2016 year to date there have been approximately 12 main extension inquiries but did not result in a gas main extension. For years 2010 -2015 there have been approximately 35 main extension inquiries that wished to connect to gas but did not result in a gas main extension. However, based upon recent experience, the split between residential and commercial inquiries is approximately 80 percent residential and 20 percent commercial.

PERSON RESPONSIBLE: Chad Lynch

Duke Energy Kentucky
Case No. 2016-00298
Staff First Set of Data Request
Date Received: October 4, 2016

STAFF-DR-01-007

REQUEST:

Refer to the Direct Testimony of James E. Ziolkowski, pages 4 and 5, which indicate that the 7.377 percent discount rate to be used in Duke Kentucky's NPV analysis is the weighted average cost of capital from its most recent gas base rate case, Case No. 2009-00202.[1] Pursuant to the settlement in that case, Duke Kentucky's authorized Return on Equity ("ROE") was 10.375 percent. Since the final Order in that proceeding, ROE awards for gas distribution utilities in Kentucky have trended downward.[2]

a. Explain whether Duke Kentucky considered using a discount rate based on an ROE that was lower than what was authorized in Case No. 2009-00202.

b. Describe, generally, the impact that a lower ROE in the discount rate would have on the results obtained using the proposed NPV analysis.

RESPONSE:

a. The Company did not consider using a different rate of return than what was authorized in the most recent base distribution rate case. Note that the rate of return used in the calculation is only for the purpose of the NPV calculation to justify the extension and whether a customer contribution is required. The actual dollar return the Company ultimately recovers for this investment will be

[1] Case No. 2009-00202, *Application of Duke Energy Kentucky, Inc. for an Adjustment of Rates* (Ky. PSC Dec. 29, 2009).
[2] See Case No. 2013-00148, *Application of Atmos Energy Corporation for an Adjustment of Rates and Tariff Modifications* (Ky. PSC Apr. 22, 2014) in which the authorized ROE was 9.8 percent.

determined at the time of the next rate case; at which time, the Commission may modify the existing ROE depending on the circumstances at that time.

b. A lower ROE would generally tend to increase the value of future projected earnings increasing the likelihood of producing a positive NPV result.

PERSON RESPONSIBLE: William Don Wathen Jr. / James E. Ziolkowski