

**IN THE
SUPREME COURT OF OHIO**

Duke Energy Ohio, Inc.)	Case No. 11-0767
)	
Appellant,)	
)	
v.)	
)	
The Public Utilities Commission of Ohio,)	Appeal from
)	Public Utilities Commission of Ohio
Appellee.)	Case No. 09-1946-EL-RDR

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLANT,
DUKE ENERGY OHIO, INC.**

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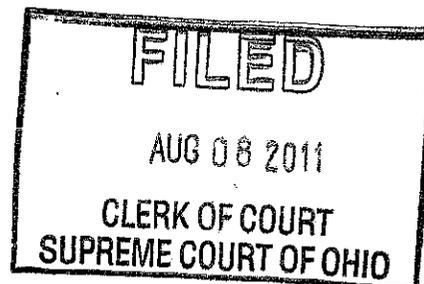


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**MERIT BRIEF
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INTRODUCTION

This case involves the request by an Ohio electric utility to recover the costs associated with restoring service to more than 80 percent of its customers in the wake of an unprecedented wind storm. Despite the intensive efforts expended by employees and contractors of Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) to restore service efficiently and effectively to each customer affected by the storm, and the careful decisions made by the Company to minimize the costs associated with the restoration of service, the Public Utilities Commission of Ohio (Commission) has denied the Company's recovery of more than one-half of those costs.

The largest category of costs for which the Commission denied recovery comprises the cost of contractors who participated in the cleanup effort. Due to its apparent misunderstanding of the evidence of record, the Commission disregarded one group of invoices submitted in support of the Company's recovery and then simply used a formula, based on hearsay and

guesswork, to allocate two-thirds of the remaining contractor costs to Duke Energy Ohio's affiliates in Indiana and Kentucky, over which entities the Commission has no jurisdiction.

Another substantial category of costs for which the Commission disallowed recovery consists of supervision expenses and costs known as "labor loaders." Labor loaders are costs such as payroll taxes and benefits, which must be included in the cost of labor provided by employees of Duke Energy Ohio's affiliated service company. These employees allocate their time to various entities, depending on the work they perform. During the days following the wind storm, their time was devoted to the restoration of service and was, therefore, allocated to Duke Energy Ohio. In addition to the actual salaries corresponding to that time, Duke Energy Ohio incurred the costs of the corresponding labor loaders and of supervising the work performed by the service company employees. Although evidence of the benefits of using these employees was clear and undisputed, the Commission nevertheless refused to allow the Company to recover these legitimate, prudently incurred costs. Once again, the Commission failed to account for the record evidence of the costs in question. These are the two largest errors by the Commission in a decision that repeatedly relied on conjecture and speculation, rather than proven facts.

The Commission's decision to reduce the recoverable costs of the restoration, which the Company undertook on behalf of its customers, and to which the Company is reasonably entitled, is unjust, unreasonable, contrary to the manifest weight of the evidence, and tramples upon important policy considerations connected with the provision of utility service for the public. The Commission's determinations on the five issues asserted herein also reveal a troubling pattern in its recent jurisprudence: the lack of evidentiary support for its decisions.

Accordingly, Duke Energy Ohio seeks a decision from this Court reversing the Commission's decision in five important respects, as set forth herein.

STATEMENT OF FACTS

On September 14, 2008, a powerful wind storm generated by the remnants of Hurricane Ike ripped through a large portion of the United States, including the southwestern Ohio service territory of Appellant, Duke Energy Ohio. The storm's impact was devastating, causing substantial destruction to electric distribution systems throughout Ohio. Sustained wind gusts caused by the storm, exceeding 70 miles per hour, harshly affected Duke Energy Ohio and its customers. The Company's overhead distribution system sustained significant damage as a result of the storm, including power lines and utility poles snapping and being pulled down by falling trees, other vegetation, and structures. As a result of the storm, 83 percent of the Company's customers lost electric service and Duke Energy Ohio recorded 822,000 sustained outages, defined by rule as lasting longer than five minutes, but most of which were much more lengthy. The storm was so extensive as to warrant the declaration of a state of emergency by the Governor within one day of its occurrence.¹

The restoration process upon which Duke Energy Ohio embarked in the hours following the storm's passage was exceptionally demanding. Many streets throughout the Company's service territory were initially impassable. Countless trees and other structures felled by the storm had to be cleared from roadways before vehicular travel could safely occur. Additionally, a great amount of vegetation that was weakened by the force of the storm continued to fall into

¹ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Duke Energy Ohio Exhibit 2, Pages 2-3; Supp. at 000057-58.

the Company's distribution system in the days following the storm, causing further outages and necessitating additional clean-up strategies.²

As a further challenge, many work crews and other resources that Duke Energy Ohio would typically have used to spearhead the restoration process in Ohio had been selected in the days before the wind storm for deployment to southern states that had also felt the strong force of the hurricane.³ In light of the unforeseen destruction in Ohio caused by the storm, however, the Company reacted swiftly, calling upon numerous crews from its affiliates, as well as outside contractors, to hasten the restoration of power to its Ohio customers.⁴ The Company also redirected a number of its own crews, previously designated for storm restoration activities in other states, back to Ohio to assist in this effort. The Company's tireless efforts produced outstanding effects: Within 48 hours of the wind storm, power had been restored to 40 percent of Duke Energy Ohio customers; within four days of the storm, 70 percent of the Company's customers had power restored; and nine days after the weather emergency, the Company had restored service to all remaining customers who were in a position to accept such service.⁵ In this short period of time, Duke Energy Ohio installed 767 new poles and 499 new transformers, and had repaired more than 32 miles of overhead conductor, requiring the use of 31,880 splices

² *Id.*, Duke Energy Ohio Exhibit 2, Page 5, Supp. at 000060.

³ *Id.*, Duke Energy Ohio Exhibit 2, Page 8, Supp. at 000063.

⁴ *Id.*

⁵ *Id.*, Duke Energy Ohio Exhibit 2, Page 6, Supp. at 000061; Transcript of Hearing, Vol. I, Page 43, Supp. at 000004

and 942 cutouts.⁶ Further, the Company utilized thousands of connectors, insulators, fuses, and arresters in the restoration process.⁷ These are remarkable figures.

In connection with its extraordinary efforts to repair the damage caused to its distribution facilities and to restore power to its customers efficiently and effectively, Duke Energy Ohio incurred approximately \$28,500,000⁸ in operating and maintenance (O&M) costs.⁹ Only three months prior to the wind storm, Duke Energy Ohio had filed an application for an increase in its electric distribution rates (2008 Rate Case).¹⁰ The test year for the 2008 Rate Case included three months of actual expenses, dating from January 2008 until March 2008, and nine months of forecasted or budgeted expense information.¹¹ In accordance with these parameters, none of the O&M expenses associated with Duke Energy Ohio's immense restoration efforts in the wake of the September 2008 wind storm were initially included in its revenue requirement for the 2008 Rate Case, although such expenses could subsequently have been included in an adjusted revenue requirement, thereby increasing the resultant rates. Additionally, as a result of other serious weather events that occurred during 2008 in its service territory, by the beginning of September 2008, Duke Energy Ohio had already incurred more than \$5,000,000 in storm-related O&M costs for that year. That amount, even before the September wind storm expenses, far

⁶ *Id.*, Duke Energy Ohio Exhibit 2, Page 6, Supp. at 000061; *see also* Duke Energy Ohio Exhibit 3, Page 5, Supp. at 000078.

⁷ *Id.*

⁸ As is discussed in more detail below, Duke Energy Ohio initially requested recovery of \$30,682,461. Following a review by the Staff of the Commission, the Company agreed to reduce its request to \$28,473,244. The reduced figure is used throughout this Brief.

⁹ *Id.*, Duke Energy Ohio Exhibit 2, Page 10, Supp. at 000065.

¹⁰ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No 08-709-EL-AIR, Application (July 25, 2008), Supp. at 000065.

¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Transcript of Hearing Vol. 1, Pages 154-55, Supp. at 000018-19.

exceeded the \$1,583,148 that had been included in the Company's base rates for storm expenses.¹²

Because the O&M expenses from the wind storm far exceeded any previously forecasted costs for storm restoration, on December 22, 2008, Duke Energy Ohio sought approval from the Commission to defer the O&M costs related to the wind storm, thereby avoiding an immediate impact on base distribution rates.¹³ The Commission granted the Company's proposed deferral mechanism by Finding and Order dated January 14, 2009 (Finding and Order).¹⁴ In the Finding and Order, the Commission instructed the Company to initiate a separate proceeding, in which the reasonableness of the deferred O&M costs would be determined.¹⁵

On March 31, 2009, the parties to the 2008 Rate Case filed a proposed Stipulation and Recommendation in that proceeding, which provided, in pertinent part:

The Parties agree that Rider DR shall be approved as a mechanism to recover **reasonable and prudently incurred storm restoration costs** relative to the September 2008 wind storm associated with Hurricane Ike only. Recovery is limited to the Operating Costs identified in paragraph 16 of the Company's December 22, 2008 Motion for Approval of a Change to Accounting Methods[,], which was approved by the Commission on January 14, 2009 in this docket. The rider shall initially be set at zero in this proceeding.¹⁶

¹² *Id.* at Page 162, Supp. at 000026; see also Duke Energy Ohio Exhibit 4, Page 5, Supp. at 000088.

¹³ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 08-709-EL-AIR, Duke Energy Ohio's Motion for Approval to Change Accounting Methods to Defer and Create a Regulatory Asset for Storm Restoration Costs Incurred During the Test Year and Recovery Mechanism for Storm Restoration Costs (December 22, 2008), Supp. at 000605.

¹⁴ *Id.*, Finding and Order (January 14, 2009), Supp. at 000615.

¹⁵ *Id.*

¹⁶ *Id.*, Stipulation and Recommendation (March 31, 2009) at Paragraph 5, Supp. at 000619 (emphasis added).

In response to the Commission's instruction that Duke Energy Ohio initiate a separate proceeding in order to determine the reasonableness of the deferred O&M costs, and pursuant to the language of the 2008 Rate Case Stipulation and Recommendation set forth above, Duke Energy Ohio initiated Commission Case No. 09-1946-EL-ATA by filing an Application to Establish and Adjust the Initial Level of its Distribution Rate Rider DR (Application), on December 22, 2009.¹⁷ The Application initially sought recovery of O&M expenses and payroll taxes totaling \$30,682,461, exclusive of carrying costs.¹⁸ That Application served as the genesis for the case *sub judice*.

The Office of the Ohio Consumers' Counsel (OCC) and the Kroger Company (Kroger) both filed motions to intervene, which were subsequently granted. Considerable discovery ensued.¹⁹ On February 23, 2010, Commission Staff, Kroger, and OCC each filed comments on the Application. In its comments, Staff indicated that it had completed its review of the Company's expenses, including an inspection of sampled invoices from contractors, material

¹⁷ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Application (December 22, 2009), Supp. at 000506.

¹⁸ *Id.*

¹⁹ The discovery in this proceeding included the issuance, by the Commission and at the request of OCC, of subpoenas that required the presence of witness(es) representing Duke Energy Indiana, Inc., (Duke Energy Indiana), an affiliate of Duke Energy Ohio that is a public utility in the state of Indiana. Duke Energy Ohio and Duke Energy Indiana jointly filed a motion to quash such subpoenas on grounds of jurisdiction and relevance. After the attorney-examiner orally denied the motion to quash, Duke Energy Ohio and Duke Energy Indiana filed an interlocutory appeal. Following the Commission's denial of the appeal, Duke Energy Indiana moved to intervene in the proceeding in order to protect its interests. The motion to intervene was granted. Duke Energy Ohio, while not appealing this extraordinary expansion of Commission jurisdiction to reach an out-of-state public utility, strongly believes that the Commission's conclusion was in error.

requisitions, and payroll records.²⁰ In order to analyze the accuracy and the reasonableness of the Company's deferred expenses, the Staff of the Commission (Commission Staff or Staff) sampled the data documenting the Company's expenditures.²¹ Upon the conclusion of its review process, Commission Staff recommended adjustments of \$1,033,130.94 to the recovery amount initially requested by Duke Energy Ohio.²² Duke Energy Ohio accepted Staff's recommendation and adjusted the amount the Company sought to recover accordingly, resulting in a net requested recovery of \$28,473,244, exclusive of carrying costs.

On March 25, 2010, Duke Energy Ohio filed a letter, in response to a notification deadline imposed in the procedural schedule, stating that all of the issues raised by the Commission Staff and Kroger had been resolved, but that it was unlikely that all of the issues raised by OCC would be able to be resolved. In light of these circumstances, Duke Energy Ohio requested that the Commission set the matter for hearing.²³ The hearing took place on May 25 and 26, 2010, and concluded on June 7, 2010. Duke Energy Ohio, Commission Staff, and OCC each filed a post-hearing brief on June 15, 2010. The Company and OCC also filed reply briefs on June 21, 2010.

On January 11, 2011, the Commission issued its Opinion and Order (Opinion and Order), which authorized Duke Energy Ohio to recover only \$14,104,577 of its total costs expended in response to the storm, plus carrying charges dating from January 14, 2009, at a rate of 6.45

²⁰ ~~*In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*~~, Case No. 09-1946-EL-ATA, Staff Exhibit 2 (February 23, 2011), Page 2, Supp. at 000259.

²¹ *Id.*, Staff Exhibit 1, Page 3, Supp. at 000253.

²² *Id.*, Staff Exhibit 1, Page 5, Supp. at 000255.

²³ *Id.*, Duke Energy Ohio Correspondence (March 25, 2010), Supp. at 000511.

percent, through Rider DR-IKE.²⁴ Thus, the Commission authorized Duke Energy Ohio to recover less than one-half of the total recovery that the Company ultimately sought. As explained above, the expenses the Company incurred arose strictly as the result of an extraordinary natural disaster. The Company's critical use of its judgment regarding the most efficient and effective practices for restoring power to its customers kept the expenses from far exceeding the reasonable total costs that were incurred. The actual costs incurred could easily have been substantially higher than they were.

On February 12, 2011, Duke Energy Ohio filed an Application for Rehearing and, simultaneously, a Request for Clarification, seeking a determination that filing tariffs and initiating new rates to commence recovery of the \$14,104,577 authorized by the Commission for Rider DR-IKE would not render its Application for Rehearing or any potential subsequent appeal moot.²⁵ Alternatively, the Company requested a stay of the Commission's directive that it file tariff pages and initiate new rates for Rider DR-IKE until the review and appeal process in this matter had been exhausted.²⁶ On March 9, 2011, the Commission issued its Entry on Rehearing (Entry on Rehearing), denying the Company's Application for Rehearing, as well as the Company's request for a stay from filing its related tariffs.²⁷ On May 6, 2011, Duke Energy Ohio filed its Notice of Appeal to this Court for determination of the matters discussed herein.²⁸

²⁴ *Id.*, Opinion and Order (January 11, 2011), Page 25, Ap. at 000031.

²⁵ *Id.*, Duke Energy Ohio's Application for Rehearing and Request for Clarification or, Alternatively, Request for Stay (February 10, 2011), Ap. at 000047.

²⁶ *Id.* at Page 22, Ap. at 000068.

²⁷ *Id.*, Entry on Rehearing (March 9, 2011), Ap. at 000033.

²⁸ *Id.*, Notice of Appeal (May 6, 2011), Ap. at 000001.

ARGUMENT

A. Standard of Review

The standard of review applicable in this case requires the Court to affirm an order of the Commission unless the Company shows that the Commission's decision is unlawful or unreasonable.²⁹ Where, as here, the record contains sufficient probative evidence to show that the Commission's decision was against the manifest weight of the evidence and was so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty, the Court must reverse the Commission's decision.³⁰

In its recent decision in *In re Application of Columbus Southern Power Company et al. v. Public Utilities Commission* (AEP Case),³¹ this Court determined that the Commission's characterization of a charge that it authorized an electric utility to recover from its customers was not supported by the evidence.³² This Court further held, in no uncertain terms, that ruling on an issue without record support is an abuse of discretion, and reversible error.³³ The Commission's determinations in the case *sub judice*, recounted in the five Propositions of Law delineated herein, likewise wholly lack record support. Therefore, this Court should determine that the Commission abused its discretion when deciding these issues, reverse the Commission's decision, and adopt the arguments advanced by Duke Energy Ohio, which are indisputably supported by record evidence.

²⁹ R.C. 4903.13 (Anderson 2010), Ap. at 000073; *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 125, 592 N.E.2d 1370, Supp. at 000694.

³⁰ ~~*See Constellation NewEnergy Inc. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, 540, 820 N.E.2d 885, Supp. at 000668~~

³¹ *In re Application of Columbus Southern Power Company et al. v. Public Utilities Commission* (2011), 128 Ohio St.3d 512, 947 N.E.2d 655, Supp. at 000671.

³² *Id.*, 128 Ohio St.3d at 518, Supp. at 000683.

³³ *Id.*, 128 Ohio St.3d at 519, Supp. at 000684.

B. Introduction to Argument

Duke Energy Ohio's ability to restore electric service to its many customers in the wake of the wind storm generated by Hurricane Ike was in large part possible due to the Company's rapid deployment of all resources available to it. These resources included salaried employees of the Company, employees of companies affiliated with Duke Energy Ohio (both its service company and affiliated utilities in other states), and third-party contractors. Rather than acknowledging the Company's intensive efforts to restore service efficiently after the natural disaster and awarding the Company the recovery to which it is entitled, the Commission's determination penalizes Duke Energy Ohio for launching a strong response to the emergency, in that it precludes the Company's recovery of the amounts reasonably and prudently incurred to remedy the outages. The applicable law and relevant public policy considerations weigh heavily against the decisions rendered by the Commission, and the interests of all parties that may be impacted by emergency service disruptions. This Court should, therefore, reverse the Commission's decisions contested herein, in accordance with the following five Propositions of Law.

Proposition of Law I:

The Commission erred in precluding recovery of supplemental compensation for salaried employees as such compensation was a necessary and prudently incurred expense that reasonably enabled prompt restoration of electric services following the storm.

The wind storm that swept through southwestern Ohio on September 14, 2008, caused widespread destruction of the electric distribution system, as described above. One of the resources that the Company called upon to address this destruction and the service problems that resulted from it was the salaried workforce employed by the Company and its service company affiliate. Evidence in the proceeding showed that Duke Energy Ohio provided supplemental

compensation to certain of those salaried employees, but only if a given employee surpassed as preset threshold of extra hours worked and only with supervisory approval.³⁴ These services of salaried employees contributed to a positive outcome in the face of a dire situation for our customers.

Despite this fact and despite the emphasis the Commission has historically placed upon rapid response to customers' power outages, it refused to allow recovery of \$855,796 of such supplemental compensation costs. The Commission determined that it was not reasonable for Duke Energy Ohio to recover amounts paid to salaried employees in the form of supplemental compensation through Rider DR-IKE, and indicated that the Company had not demonstrated that the recovery of such costs was appropriate or reasonable.³⁵ The record evidence, however, does not support the Commission's determination on this issue. Therefore, and in accordance with its recent decision in the AEP Case, this Court should reverse the Commission's decision.

A. Salaried employees played a key role in the restoration of service after the storm.

During the hearing, the OCC argued that it was incumbent upon as many Duke Energy Ohio employees and employees of Duke Energy Ohio's service company affiliate as possible to devote their time and resources to the timely restoration of electric service.³⁶ The Company fulfilled this expectation, in part, by securing the support of salaried employees. Record evidence indicates the importance of the salaried employees in expediting the power restoration

³⁴ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Transcript of Hearing, Vol. III, Page 359, Supp. at 000046.

³⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Opinion and Order, Pages 11-13, Ap. at 000017-19.

³⁶ *Id.*, Transcript of Hearing, Vol. II, Page 246, Supp. at 000032.

process.³⁷ It was undisputed at the hearing that those individuals that are most familiar with internal company systems and procedures, the nature of the service territory, and logistical issues within the service territory should have contributed to the Company's restoration efforts, and did, in fact, play a substantial role in those efforts.³⁸ Because of the unique role that the salaried employees played in the restoration efforts, the Company's use of these individuals, and its decision to supplement their compensation in view of their important efforts, was reasonable and in line with previously existing Company policy.

As noted in the testimony of Duke Energy Ohio witness Beth Clippinger, Duke Energy Ohio had adopted a supplemental pay policy for salaried employees prior to the occurrence of the wind storm. Consistent with this policy, Duke Energy Ohio provided supplemental compensation to a limited number of salaried employees who dedicated substantial time and skills to the urgent power restoration effort.³⁹ No automatic award of additional pay was provided to salaried employees.⁴⁰ In fact, as the uncontroverted evidence confirms and as noted above, supplemental pay was awarded to salaried employees only after such employees had met a substantial, objective threshold of hours worked, and had additionally obtained supervisory approval.⁴¹ Such approval was only extended in cases of extraordinary service.

In view of the Company's supplemental compensation policy, the considerable efforts of a number of salaried employees, and the resultant rapid restoration of power to the Company's customers, it was proper for Duke Energy Ohio to provide select salaried employees with

³⁷ *Id.*, Pages 243-44, Supp. at 000029-30.

³⁸ *Id.*, Page 246, Supp. at 000032.

³⁹ *Id.*, Transcript of Hearing, Vol. III, Page 359, Supp. at 000046.

⁴⁰ *Id.*

⁴¹ *Id.*

supplemental compensation. Rejecting recovery for this moderate benefit provided to employees is not warranted by the circumstances surrounding this case, nor by record evidence. Further, this Commission policy, excluding recovery of reasonable monetary recognition for salaried employees who demonstrate extraordinary commitment to providing the best possible service to customers in the face of extreme adversity, illogically encourages utilities to depend most heavily on the more costly alternative of third-party labor in the case of an emergency that disrupts service. This result would certainly be a detriment to all customer classes. Even the OCC, which was, notably, the only party contesting the Company's recovery of supplemental compensation for salaried employees, admitted in testimony that such a practice would not be a desirable outcome.⁴²

B. Record evidence does not support the Commission's decision to exclude supplemental compensation awarded to select salaried employees.

As the evidence offered in this proceeding confirms, in comparison to the Company's salaried employees and salaried employees of the Company's service company affiliate, third-party contractors would have been paid as much as two times standard rates to perform functions such as logistics, material handling, material delivery, and resource coordination.⁴³ OCC witness Anthony Yankel readily admitted in testimony that the Company should *not* have used contractors to perform these types of functions.⁴⁴ It follows, therefore, that Duke Energy Ohio acted reasonably and prudently by using the most appropriate and cost-effective resources available – the salaried employees – to aid in the timely restoration of services, and by avoiding additional contractor costs.

⁴² *Id.*, Transcript of Hearing, Vol. II, Pages 243-44, Supp. at 000029-30.

⁴³ *Id.* at 245-46, Supp. at 000030-31.

⁴⁴ *Id.* at 243-44, Supp. at 000029-30.

OCC argued that the payment of supplemental compensation to salaried employees was discretionary and therefore unnecessary. As such, OCC proposed that this cost should not be borne by ratepayers.⁴⁵ The Commission agreed that such payment was discretionary. The Company does not dispute this fact. However, the Commission jumped from the fact that supplemental pay was discretionary to a conclusion that Duke Energy Ohio did not show that it was appropriate and reasonable for it to recover the supplemental pay.⁴⁶ The Commission's conclusion on this issue reflects a critical misstatement of the law. The Commission concluded only that Duke Energy Ohio had not shown that *recovery* was appropriate and reasonable. But recovery is appropriate under the law for *expenditures* that are reasonably and prudently incurred.⁴⁷ Duke Energy Ohio met its burden of proof to show that the *expenditure* of monies to compensate its salaried employees and those of its service company affiliate, for their exceptional efforts, was both reasonable and appropriate and an efficient expenditure of funds.⁴⁸ Neither the Commission nor OCC disputed the fact that it was a highly efficient use of time and money to have these salaried employees assist with the recovery effort. Neither the Commission nor OCC disputed the extraordinary amount of time spent by these employees on the cleanup

⁴⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, OCC Initial Brief (June 15, 2010), Page 11, Supp. at 000554; *see also* OCC Reply Brief (June 21, 2010), Page 13, Supp. at 000582.

⁴⁶ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Opinion and Order (Jan. 11, 2011), Page 13, Ap. at 000019; *see also* Entry on Rehearing (March 9, 2011), Page 3, Ap. at 000033.

⁴⁷ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 08-709-EL-AIR *et al.*, Stipulation (March 31, 2009), Page 7, Supp. at 000625.

⁴⁸ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Transcript of Hearing, Vol. II, Pages 242-47, Supp. at 000028-33.

process. Further, neither the Commission nor OCC disputed the reasonableness or prudence of rewarding such employees with supplemental pay. Thus, the uncontroverted evidence shows that this *expenditure* was prudent. Under the standard applicable in this case, the reasonable and prudent expenditure of monies is recoverable.

In its Entry on Rehearing, the Commission added an additional justification for its conclusion, although it also asserted that the Company had not raised any new issues on rehearing, stating that the Company had “failed to show a reasonable basis on which the supplemental compensation was determined.”⁴⁹ However, contrary to this statement, no statute, rule, or legal precedent permits the Commission to refuse a utility’s recovery of reasonable and prudently incurred payments to employees on the ground that the utility has failed to show that there was a reasonable basis for determining how much to pay those employees. In fact, the Commission has no jurisdiction over which employees were paid and how much such employees received. The powers of the Commission are conferred by statute, and it possesses no authority or jurisdiction other than that thus vested in it.⁵⁰ The determination of a utility’s employee compensation issues are well outside of the scope of its jurisdiction.

The Commission’s decision, in refusing to allow recovery of the cost of such resources, is therefore both unlawful and against the manifest weight of the evidence. It is so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. Accordingly, as this Court recently determined in the AEP Case, the Company requests that this Court find that the Commission abused its discretion by ruling on an issue without record support for its decision; here, to exclude from recovery \$855,796 in prudently incurred

⁴⁹ *Id.*, Entry on Rehearing (March 9, 2011), Page 3, Ap. at 000033.

⁵⁰ *See City of Cincinnati v. Public Utilities Commission of Ohio* (1917), 96 Ohio St. 270, 117 N.E. 381, Supp. at 000654; *Penn Central Transp. Co. v. Public Utilities Commission* (1973), 35 Ohio St.2d 97, 298 N.E.2d 587, Supp. at 000699; see also R.C. 4901.02(A), Ap. at 000071.

supplemental compensation to salaried employees. Duke Energy Ohio further requests that this Court reverse the Commission's decision on this issue.

Proposition of Law II:

The Commission unreasonably ordered a reduction of \$371,196, based on the erroneous conclusion that this amount reflects additional sums paid to salaried employees.

As outlined in Proposition of Law I above, Duke Energy Ohio's salaried employees and the salaried employees of the Company's service company affiliate played a significant role in the restoration of electric service to Duke Energy Ohio customers after the destruction caused by the wind storm. In the Opinion and Order and Entry on Rehearing in this matter, however, the Commission reduced the Company's recoverable costs by \$371,196, thereby excluding the Company's recovery of allocable portions of regular salary amounts incurred during the emergency for the service company's employees who had wholly had allocated their time to storm restoration efforts in Ohio during the period in question.⁵¹ The Commission's decision unreasonably places the compensation for affiliate employees who were engaged solely in electric service restoration efforts in the days following the storm into the same category of expenses as supplemental compensation for such salaried employees. No record evidence supports the Commission's determination. Because this determination is unsupported, this Court should determine that the Commission's decision on this issue was against the manifest weight of the evidence, and accordingly, reverse the decision.

⁵¹ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Opinion and Order, Page 13, Ap. at 000019.

A. **The monies the Company attempts to recover solely reflect the time and costs for salaried employees who focused their efforts on storm restoration activities during the emergency.**

The amount Duke Energy Ohio seeks to recover in this category does *not* reflect any additional compensation paid to employees for their services in connection with power restoration in the wake of the wind storm. Rather, the figure is simply a compilation of time, and the costs associated with such time, that the service company salaried employees, who are not paid hourly wages, specifically allocated to the Ohio power restoration efforts. The figure contemplates the fact that numerous salaried employees were not able to perform their usual duties for a number of days after the wind storm occurred, because they were busy assisting with the restoration of electric services, which was necessarily the Company's top priority. Such salaried employees, whose attention was intentionally diverted from their regular tasks to service issues caused by the storm, separately recorded the time they devoted to storm-related activities that they typically conducted during the course of their regular working hours.⁵² The \$371,196 for which the Company seeks recovery is the total cost of storm-related efforts logged by salaried employees of the service company, whose salaries are not recovered in base rates of Duke Energy Ohio, during regular working hours in the days following the storm.

The Commission's decision with regard to this issue is difficult to follow. In its Opinion and Order, the Commission failed to address this issue directly. Instead, following OCC's erroneous lead, the Commission explained its decision relating to supplemental salaried employee compensation and simply applied that decision to the Company's cost that resulted from employees' allocation of their time.⁵³ The Commission did assert that OCC's "formula" for calculating the deduction for these two issues was not "contested," and therefore applied that

⁵² *Id.*, OCC Exhibit 13-A, Supp. at 000431.

⁵³ *Id.*, Opinion and Order, Page 13, Ap. at 000019.

formula to result in a denial of recovery for the employees' allocation of time.⁵⁴ However, Duke Energy Ohio would have no reason to consider, or contest, a formula that irrationally combines two entirely separate issues in the case. The Commission's conclusion was clearly mistaken.

On rehearing, Duke Energy Ohio pointed out that the costs that gave rise to this \$371,196 reduction were not additional amounts paid to employees and that, therefore, it was a mistake for the Commission to include it with supplemental pay.⁵⁵ This point appears to have been lost on the Commission, as it recited the argument but again failed to address it. Rather, the Commission focused on a secondary point that was raised by Duke Energy Ohio: that the Commission had failed to account for the reduction that the Company had already agreed to in this category of costs. Duke Energy Ohio had previously agreed to reduce the recovery for allocated time by \$41,267, reflecting time allocated to the project by individuals who are employees of Duke Energy Ohio, rather than its service company affiliate. Thus, Duke Energy Ohio had agreed with Commission Staff that the recovery in this category should only include the cost of time spent by employees of the service company affiliate – which employees' time is therefore not already included in Duke Energy Ohio rates.

The record evidence shows that the \$371,196 in this category represents actual costs incurred by Duke Energy Ohio, over and above the labor costs that form a part of its base rates. This amount represents time and expenses of employees of the Company's service company affiliate, which employees simply allocate their time to the affiliate for which they are working. During the recovery period, these employees spent their time on tasks specifically related to the

⁵⁴ *Id.*

⁵⁵ *Id.*, Duke Energy Ohio Application for Rehearing and Request for Clarification or, Alternatively, Request for Stay (Feb. 10, 2011), Pages 6-7, Ap. at 000052-53.

cleanup effort. The cost of their time and expenses was, thus, reasonably and prudently incurred and should be recoverable.

B. The figure by which the Commission reduced the Company's recovery, \$371,196, has no foundation in the record, and therefore amounts to an abuse of its discretion.

In determining the amount by which it would reduce the Company's recovery the Commission started with the fact that Duke Energy Ohio had mistakenly requested recovery for \$41,267 of time identified by employees of Duke Energy Ohio itself. The Commission pointed out that the Staff audit had been a sampling, rather than a complete audit, and then leapt to the conclusion that the requested recovery \$41,267 of Duke Energy Ohio employee time should therefore result in a \$371,196 reduction in Duke Energy Ohio's total recovery.⁵⁶ There is no record support whatsoever for this conclusion.

It is important to understand, first, the nature of the audit conducted by Commission Staff. Staff's witness specifically indicated that he had "randomly" selected documents to review.⁵⁷ However, on cross-examination he explained that he had selected the items to review by focusing on the high-dollar-amount line items.⁵⁸ This methodology was consistent with the methods used by Staff in prior audits. Although Duke Energy Ohio was satisfied that the audit was valuable and conducted appropriately, it is also true that various type of reviews are possible. This one was, on its face and contrary to Staff's denomination, absolutely not a statistically random sample. On the basis of sampling technique that was followed, it is patently unreasonable for the Commission to draw any conclusions about the dollar amount of errors that might exist in the portion not sampled or audited. Even the Commission's witness, after

⁵⁶ *Id.*, Entry on Rehearing, Page 4; Ap. at 000036.

⁵⁷ *Id.*, Prepared Testimony of Jeffrey Hecker, Staff Exhibit 1, Page 4, Supp. at 000254.

⁵⁸ *Id.*, Transcript of Hearing, Vol. I, Page 98, Supp. at 000009.

admitting that he was not an expert in statistics but well-versed in the audit methodologies consistently employed by Staff, warned that it would be inappropriate to extrapolate the results of his review and apply those result to all expenses sought to be recovered.⁵⁹ Nevertheless, the Commission did exactly what its Staff indicated should not be done.

Further, the Commission, in leaping to the \$371,196 reduction, did not even attempt to justify or find support for the precise amount of this reduction. It merely asserted that the fact of the partial audit “supports additional reductions.” This assertion is wholly unsupported by the record. The speculative nature of this assertion is entirely improper, and is an abuse of the Commission’s discretion.

Finally, the Commission appears to have gotten lost in the issue of whether or not the agreed-upon reduction of just \$41,267 had already been accounted for. It stated that there was no record evidence of this reduction and appears to imply that the lack of evidence of that small concession is justification for the denial of recovery of \$371,196. Certainly the Commission is mistaken in this regard.

The Commission’s decision with regard to this category of costs was therefore mistaken and unreasonable in several respects. The Commission appears to have misunderstood the fact that these costs were not related to supplemental compensation. The Commission failed to understand that Duke Energy Ohio removed from its request any allocations of time by Duke Energy Ohio employees. The Commission mistakenly treated the audited sample of costs as a statistically random sample. Moreover, the Commission apparently believed that little evidence of a minor concession justified the denial of recovery of all costs in this category. Thus, the Commission’s determination that Duke Energy Ohio cannot recover the \$371,196, representing

⁵⁹ *Id.*, Transcript of Hearing, Vol. I, Pages 139, 141, Supp. at 000011, 000013.

the cost of regular pay for salaried employees of affiliates, is unreasonable and should be reversed.

Proposition of Law III:

The Commission unreasonably ordered a reduction of \$2,052,454 for labor loaders and supervision costs allegedly associated with the supplemental compensation and regular pay to salaried employees.

The Commission determined in its Opinion and Order that the amount Duke Energy Ohio was authorized to collect should be reduced by a total of \$2,052,454 for labor loader and supervision costs related to the eliminated recovery of both supplemental pay for salaried employees and the allocated time of employees of affiliates of Duke Energy Ohio. Of this amount, the Commission reduced the recovery by \$939,863 for labor loaders (*i.e.*, such items as the cost of fringe benefits and payroll taxes) and by \$1,112,591 for supervision costs.⁶⁰ There are multiple reasons why this reduction was in error.

A. The cost of labor loaders and supervision is recoverable, as the underlying labor costs are recoverable.

As argued above in Propositions of Law I and II, the evidence does not support a reduction in the recoverable amount of supplemental compensation paid to salaried employees or a reduction in the recoverable cost of labor provided by salaried employees of affiliates who devoted their time to service restoration activities in the days following the storm. Thus, there should be no corresponding reduction in labor loader and supervision costs that relate to those two categories. Such a reduction is likewise not supported by the record evidence.

B. The calculation of labor loaders was flawed.

Even assuming that the underlying reductions were appropriate, contrary to Duke Energy Ohio's arguments *supra*, the Commission's calculation of the loaders was seriously flawed and

⁶⁰ *Id.*, Opinion and Order, Pages 12-13; *Ap.* at 000018-19.

contrary to the evidence of record. It is important to note that, in supporting its decision to calculate the reduction of labor loader and supervision costs, the Commission relied upon arguments made by OCC. Those OCC arguments were based upon very limited information extracted from the broad body of data available for consideration on this issue. For instance, OCC's calculation for labor loaders simply divided the total supplemental pay costs by total labor costs, resulting in a percentage that OCC argued should apply generally to the calculation of labor loaders.⁶¹ OCC thereby calculated labor loader costs to equal \$939,863.⁶²

Contrary to OCC's argument that such a grossly generalized percentage should apply across all affiliates that provided labor in support of the Ohio restoration efforts, the evidence indisputably shows that different labor loader percentages apply to each participating affiliate.⁶³ Although the Commission indicated, in its Opinion and Order, that it would use OCC's formula in light of Duke Energy Ohio's failure to "contest" that formula, this approach is contrary to the law. Where, as here, a utility submits discrete testimony on the charges it has incurred, the Commission's decision to supplant that testimony with a generalized formula, such as the one adopted by the Commission, is against the manifest weight of the evidence. In this situation, Duke Energy Ohio submitted detailed evidence of its labor costs, including labor loaders and supervision. Additionally, OCC's calculation of \$939,863 for the labor loaders applicable to total supplemental pay also fails to account for reductions amounting to \$800,461 that were previously implemented by the Company, at Staff's suggestion.⁶⁴ The Commission's adoption of OCC's formula was therefore an abuse of its discretion.

⁶¹ *Id.*, OCC Exhibit 1-A, Page 16, Supp., at 000283.

⁶² *Id.*, Opinion and Order, Page 12, Ap. at 000018.

⁶³ *Id.*, Duke Energy Ohio Exhibit 8-A, Page 1, Supp at 000106.

⁶⁴ *Id.*, OCC Exhibit 1-A, Page 21, Supp. at 000126.

In contrast to OCC's indiscriminate calculation, if the applicable labor loading rates are properly assigned to each affiliate as shown in the record evidence, and if the \$800,461 reduction already implemented by the Company is incorporated into the calculation, the actual labor loader figure applicable to these two categories of costs is \$565,058, as opposed to the Commission's \$939,863. In view of this calculation, the Commission's decision to reduce the recoverable total by \$939,863 to reflect labor loader costs related to supplemental compensation to, and allocated time of, salaried employees is unreasonable and contrary to the record.

C. The calculation of supervision costs was flawed.

As with calculation of the amount by which it would reduce recovery for labor loaders, the Commission relied upon OCC's approach in determining the reduction to apply for supervision costs. Beyond the fact that the underlying labor costs should be recoverable, it was also reversible error for the Commission to use an unsupported formula to calculate the supervision costs applicable to those labor costs, when specific evidence of such amounts was available in the record. OCC calculated a percentage to add to all labor costs in these categories by dividing the actual cost of supervision reflected in the evidence by the total labor costs in these categories. While, on its face, this calculation sounds reasonable, it misses one critical fact: all of the actual supervision costs were identified as relating to the base salary of employees of Duke Energy Ohio. No supervision costs were added with regard to other employees, and there is absolutely no evidence of a supervision adder with regard to supplemental compensation.⁶⁵ This evidence was uncontroverted. As Duke Energy Ohio is not requesting recovery of regular salaries paid to its own employees, and supervision costs could

⁶⁵ See, generally, *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Duke Energy Ohio Exhibit 8-A, Supp. at 000105.

only apply to its own employees' regular pay, no supervision adder should be deleted from the total allowed recovery amount. It is unreasonable and a clear error for the Commission to reduce the overall recovery by the amount that OCC calculated as the supervision adder for those categories. As reflected in the testimony of OCC witness Yankel, \$1,112,591⁶⁶ should therefore be added back into the Company's recoverable amount.

D. Erroneous reductions related to Proposition of Law III total \$2,052,454.

The Commission's reductions, described in detail above, related to labor loaders and supervision costs, were entirely erroneous, as the underlying costs are recoverable. In addition, even if the underlying costs had not been recoverable, the labor loaders and supervision costs were determined pursuant to erroneous calculation methods and are not supported by the record. The Company respectfully requests that this Court reverse the Commission's decision, and permit recovery in the amount of \$2,052,454 by Duke Energy Ohio for labor loader and supervision costs. Of this total, erroneous reductions for labor loaders represent \$939,863 and erroneous reductions for supervision represent \$1,112,592.

Proposition of Law IV:

The Commission erred in reducing Duke Energy Ohio's request by an amount equal to the costs charged by Duke Energy Ohio to affiliates for storm restoration services provided by Duke Energy Ohio employees and the Commission's determination in this regard is unjust, unreasonable, and against the manifest weight of the evidence.

The Commission determined, in its Opinion and Order, that Duke Energy Ohio must reduce its recovery by \$1,371,657 to account for amounts that it charged to affiliates, namely Duke Energy Indiana and Duke Energy Kentucky, Inc., (Duke Energy Kentucky). Duke Energy Ohio is a member of a corporate family that includes other state-regulated public utilities. In

⁶⁶ *Id.*, Direct Testimony of Anthony J. Yankel, OCC Exhibit 1-A, Supp. at 000268.

emergency situations, employees of affiliated companies participate in recovery efforts. The 2008 wind storm was one of those situations, and was one that affected the Company's affiliates in Kentucky and Indiana, as well as the Ohio territory. Thus, affiliates' employees worked in Ohio, and some of Duke Energy Ohio's employees worked in Kentucky and Indiana. Such inter-company transactions are controlled by affiliate agreements that are approved by the Commission. Regardless of that fact, the Commission agreed with OCC's "fairness" theory, which entirely ignores the approved agreements, and consequently ordered a reduction in the authorized recovery. Further, instead of relying on specific evidence in the record, the Commission relied on OCC's speculation and conjecture regarding the level of inter-affiliate charges and, thus, incorrectly calculated the amount by which the recovery was to be reduced. The Commission's decision is unreasonable, as it is unsupported by the record, ignores the Company's adherence to Commission-approved affiliate transaction agreements, and, from a policy perspective, will unnecessarily complicate future electric service restoration activities caused by weather and other events.

A. **If payments from affiliates are to reduce the recovery, the calculation of the reduction must be based on evidence, not conjecture and hearsay.**

The Commission's reliance upon the highly speculative ratios advanced by OCC in order to support a \$1,063,785 reduction in the Company's recovery was unsound and unsupported by the record. Just as the accounting adjustments designed to reflect Company employees' labor on behalf of Duke Energy Kentucky cannot reduce Duke Energy Ohio's cost recovery, accounting ~~adjustments to reflect Company employees' labor on behalf of Duke Energy Indiana likewise~~ cannot serve to reduce the Company's cost recovery.

The Commission's reliance upon the unsupported figures and positions advanced by OCC in connection with its arguments on this issue is especially unreasonable in light of the lack

of any affirmative evidence presented by OCC in regard to the allocation of \$1,063,785 in costs to Duke Energy Indiana. In support of the reduction it advocated regarding charges to Duke Energy Indiana, OCC merely compared the storm recovery charges that Duke Energy Ohio allocated to Duke Energy Kentucky with the overall storm costs in Kentucky. OCC then extrapolated that ratio, applying it to hearsay evidence of Duke Energy Ohio's storm-related expenses in Indiana, resulting in a \$1,063,785 figure.

The method employed by OCC to determine Duke Energy Ohio's labor expenses in Indiana was completely erroneous, as it was based on hearsay evidence and assumptions that had no basis in fact. The Commission asserted that Duke Energy Ohio provided "no evidence to rebut OCC's calculation."⁶⁷ Subsequently, in the Entry on Rehearing, the Commission continued this approach, stating that the record is "essentially devoid of any evidence rebutting the conclusion that the affiliate-related costs should be reduced by the amount paid by Duke-Kentucky and Duke-Indiana to Duke-Ohio." These assertions entirely ignore the record evidence. Duke Energy Ohio offered evidence that the actual accounting adjustment in favor of Duke Energy Ohio, reflecting work done by any Company employees in Indiana, was \$3,385. This is the sum of \$1,182 in labor costs, plus labor loaders in the amount of \$2,203. This amount was introduced into record evidence via Duke Energy Ohio Exhibit 8A, as well as OCC Exhibit 14.⁶⁸ The reduction adopted by the Commission, \$1,063,785, starkly contrasts with the record evidence. The Commission's adoption of this figure is against the manifest weight of the evidence, and should be reversed by this Court.

⁶⁷ *Id.*, Opinion and Order, Page 14, Ap. at 000020.

⁶⁸ *Id.*, Duke Energy Ohio Exhibit 8-A, Supp. at 000105; OCC Exhibit 14, Page 19, Line 1028, Supp. at 000500.

B. Affiliate agreements and the law regarding the setting of utility rates control the recovery, rather than OCC's notion of "fairness."

The record below reflects the Commission's agreement with OCC's contention that any "payments" tendered to Duke Energy Ohio by affiliates should be credited to the Company's ratepayers.⁶⁹ The Commission's reliance upon the positions advanced by OCC, in addition to OCC's unsupported figures, is unreasonable in light of the Company's approved affiliate transaction agreements, under which revenue is not permitted to flow from one utility to another.

As explained in the testimony of Duke Energy Indiana witness Freeman, internal accounting adjustments are required to be made in order to charge for labor that one entity receives from an affiliate. Such adjustments are critical for the proper maintenance of records detailing which affiliate incurred any given expense. Strict adherence to such accounting mechanisms is necessary to ensure that improper cross-subsidies do not flow between a company and its affiliate.⁷⁰

Moreover, charges for labor received from an affiliated company are not addressed by way of money flowing from the entity receiving the labor to the affiliated company providing the labor or services. Rather, the expenses are addressed and, therefore, are relevant only in the context of the subsequent rate case for such receiving entity.⁷¹ For example, for accounting purposes, as noted by OCC witness Yankel, if work were performed in Kentucky for the benefit of Duke Energy Kentucky by Duke Energy Ohio employees, the labor associated with that work would be charged to Duke Energy Kentucky. Under an analogous scenario, when Duke Energy Ohio's affiliates, such as Duke Energy Kentucky and Duke Energy Indiana, provide labor in

⁶⁹ *Id.*, OCC Exhibit 1-A, Page 17, Supp. at 000286.

⁷⁰ *Id.*, Transcript of Hearing, Vol. III, Pages 411-12, Supp. at 000052-53.

⁷¹ *Id.*, Transcript of Hearing, Vol. II, Page 274, Supp. at 000036.

Ohio, Duke Energy Ohio is charged for that labor. The present proceeding, which was explicitly authorized in the Company's 2008 Rate Case, is the means for recovering the extraordinary cost of the labor.

Further, the method by which the Company accounts for affiliate labor, including labor provided by Duke Energy Ohio employees to Duke Energy Kentucky (which is charged to Duke Energy Kentucky), is consistent with long-standing practice, as confirmed by an audit of the Company's corporate separation plan. When considered together with the testimony advanced by Duke Energy Indiana witness Freeman and the audit-approved accounting methods the Company utilizes for affiliate labor, the circumstances presented in the above scenarios confirm that Duke Energy Ohio does not receive actual dollars from its affiliates in return for the Company's employees assistance with those affiliates' emergency situations. It logically follows that the Company should not be required to credit non-existent payments from affiliates for its employees' labor to Ohio ratepayers.

Further, strong policy considerations argue against reducing the Company's recovery in an amount corresponding to labor costs charged to affiliates, as such treatment would result in nullification of Commission-approved affiliate transaction agreements. Moreover, administrative considerations and the desire for efficiency seriously discourage the actual flow of dollars from one affiliate to another for services rendered, as such a practice would undoubtedly complicate the provision of future affiliate assistance with service restoration from an accounting standpoint. Such an administrative burden unnecessarily discourages the spirit of cooperation that Duke Energy Ohio and its affiliates presently enjoy, and is not conducive to the efficient restoration of electric service, one of the ultimate goals of utilities faced with emergency scenarios. In accordance with these arguments, OCC's recommended reduction of the properly

recoverable costs under Rider DR-IKE, and by extension, the Commission's adoption of this reduced sum, is entirely unsupported by the evidence and should be reversed by this Court.

Proposition of Law V:

The Commission's finding that Duke Energy Ohio cannot recover \$9,717,564 of the costs associated with contractor labor is unjust, unreasonable, and against the manifest weight of the evidence.

In order to restore service after the 2008 wind storm, Duke Energy Ohio hired contractors to assist with the necessary repairs. Without the contractors' participation, service could not have been restored in a reasonable time period. However, the Commission unreasonably reduced the Company's recoverable costs associated with that contract labor. This decision to reduce the Company's rightful recovery under Rider DR-IKE was not supported by the evidence.

In support of its conclusion, the Commission again adopted the arguments of OCC's witness, who proposed that the requested recovery be reduced in two ways: First, as he recommended, the Commission reduced the \$13,202,611 request by \$2,748,442, to account for several invoices that OCC maintained "reference" an affiliate of Duke Energy Ohio. Second, because the Commission doubted that the remaining invoices were all related to Duke Energy Ohio's storm restoration efforts and Duke Energy Ohio had two affiliates that were also impacted by the storm, the Commission simply "allocated" one-third of the remaining contractor expenses to each of those affiliates, without any record evidence that such allocation had any reasonable basis in fact. Thus, the Commission allowed Duke Energy Ohio to recover only approximately 26 percent of its contractor costs. This conclusion is unreasonable, unjust, and contrary to the manifest weight of the evidence. The decision is so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty on the part of the Commission.

A. The results of Commission Staff's audit should be followed.

As mentioned *supra*, Commission Staff conducted an audit of costs incurred by Duke Energy Ohio in order to determine the costs the Company should properly recover under Rider DR-IKE. The documents reviewed by Commission Staff included invoices, time sheets, receipts, and material requisition forms. Staff's review, while as noted *supra* was not random, was conducted reasonably, and in a manner consistent with commonly accepted audit practices. Staff's review, by its own admission having been focused on the line items having the highest dollar values, demonstrates solid evidentiary support for the recovery of those costs ultimately rejected by the Commission. Staff's review of the Company's pertinent documents resulted in a recommended reduction in recovery of \$46,888 for contractor labor. The Company agreed to Staff's recommended reduction.

Despite Staff's review of the Company's records and accompanying recommendation for a \$46,888 reduction in the recovery of costs, the Commission disregarded its own Staff's recommendation, determining that the Company's requested recovery amounts under the Application should be reduced by \$9,717,564⁷² in contractor labor costs. However, the Commission gave no rationale for ignoring these results. Its conclusion is entirely baseless and should be reversed.

B. The affiliate designations on certain invoices do not reflect the state in which the contractors' work was performed.

The Commission cited several baseless rationales for the reduction. First, as noted *supra*, ~~the Commission determined that charges totaling \$2,748,442 should be removed from the overall contractor labor costs to be recovered by the Company. This decision was based on the fact that~~

⁷² Duke Energy Ohio contends herein, as it did below, that this amount is actually \$9,718,554, as the numbers comprising this reduced amount are \$6,970,112 and \$2,748,442.

an internal spreadsheet listed a payment company, or “PayCo,” other than Duke Energy Ohio, with regard to certain invoices.⁷³ To the extent, however, that such spreadsheet reflected a “PayCo” other than Duke Energy Ohio, the notations contained therein were irrelevant to the state in which contract labor was performed. As fully detailed in the record, the “PayCo” designation on the Company’s records is meaningful and relevant only with regard to the source of *internal* labor, not *external* contractor labor.⁷⁴ The fact that an internal document carried PayCo designations to a list of contractor invoices and reflected either Duke Energy Indiana or Duke Energy Kentucky as the “PayCo” does not, in any way, imply that the contractors designated therein were not working for the benefit of Duke Energy Ohio and its ratepayers. Regardless of that identification, Duke Energy Ohio was the entity responsible for the cost of those contractors, who were working on the restoration efforts in the Duke Energy Ohio territory.⁷⁵ The Commission simply ignored this un rebutted evidence and determined that, where the PayCo line reflected an affiliate of Duke Energy Ohio, the contractor costs on that invoice would be discarded.

It is additionally notable that nearly all of the invoices that OCC recommended be excluded from recovery reflected tree trimming expenses. Of OCC’s recommended \$2,748,442 reduction in recoverable expenses, \$2,741,291 reflects invoices from tree trimmers.⁷⁶ The total costs attributed by Duke Energy Ohio to tree trimming amounted to \$3,083,704.⁷⁷ Therefore, the

⁷³ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, OCC Exhibit 1-A, Page 30, Supp. at 000295; see also *Opinion and Order*, Page 15, Ap. at 000021.

⁷⁴ *Id.*, Transcript of Hearing, Vol. II, Page 280, Supp. at 000042.

⁷⁵ *Id.*, Transcript of Hearing, Vol. II, Page 281, Supp. at 000043.

⁷⁶ *Id.*, Duke Energy Ohio Exhibit 10-A, Supp. at 000246; OCC Exhibit 12-A, Supp. at 000377.

⁷⁷ *Id.*

Commission's acceptance of OCC's recommendation means that the Company is recovering only \$342,414 in tree trimming expenses resulting from the severe wind storm. The number of outages and extent of physical damage incurred as a result of the storm, however, supports a much greater cost recovery. This circumstance confirms the reasonableness of the Company's position that "PayCo" references in the company's records cannot properly be used as a method for discounting contractor costs.

The \$2,748,442 reduction in recovery approved by the Commission is unreasonable and should be reversed by this Court.

C. **The Commission's two-thirds reduction in the remaining contractor costs is entirely unsupported by the record and reflects the Commission's willful disregard of its duty.**

The Commission erroneously determined that Duke Energy Ohio's recovery should be reduced by an additional \$6,970,112, citing the following in support of its decision: (1) invoices were sent to an affiliate; (2) project codes reference another state; (3) the location of the work on the invoices is listed as another state; and (4) work may not have been performed in Ohio because the Company's crews did not have meals, sleep, or launder their clothes in Ohio. The Commission unreasonably embraced OCC's argument that these circumstances conclusively demonstrated that Duke Energy Ohio should not be entitled to recover the costs associated with the contractor labor associated with them. None of the arguments advanced by OCC actually support the Commission's determination, however, as either they are incorrect, as demonstrated by the record evidence, or they have no logical relevance to the determination of recovery.

The factors weighing against recovery that were offered by OCC, and ultimately accepted by the Commission, must be considered in relation to the protocol traditionally used by the Company for purposes of charging labor, materials, and suppliers, as well as logistics. As Duke

Energy Ohio witness James Mehring testified, storm codes were created at the beginning of the Company's restoration activities. The codes were state-specific, and were utilized in such a way that contractors working in Ohio would have used the Ohio charge code.⁷⁸ There is no evidence in the record to refute the consistent, proper use of the Company's storm codes by contractors. In fact, all of the invoices summarizing contractor work, upon which OCC relied, expressly and unambiguously reflect Ohio storm codes.⁷⁹

Another argument advanced by OCC, and adopted by the Commission, was that the summary invoices were incorrect because entries on time sheets were misplaced.⁸⁰ Despite the minimal confusion associated with the entries, record evidence clearly confirms that the Company consistently used Erlanger, Kentucky, right across the Ohio River from Cincinnati, as a staging area.⁸¹ All Duke Energy Ohio contractors, therefore, reported to Erlanger, Kentucky, to receive their assignments, prior to being dispatched to different sites in Ohio for electric restoration efforts. Given the geographic proximity between Duke Energy Ohio's service area in southwestern Ohio and Kentucky, and the necessity for contractors to report to Erlanger, Kentucky, early each morning for instructions and assignments, it is understandable and entirely reasonable that contractors and crews may have slept, dined, and laundered their clothing in Kentucky.⁸² Therefore, to the extent that the contractor invoices reflected charges that were incurred in Kentucky, such charges are not unreasonable and indicate nothing regarding the state

⁷⁸ *Id.*, Transcript of Hearing, Vol. I, Pages 48-49, Supp. at 000006-7.

⁷⁹ *Id.*, OCC Exhibit 1-A, Exhibit AYJ-A, Page 13 (Project Number ref. "STM0H0812"), Supp. at 000328.

⁸⁰ *Id.*, Opinion and Order, Page 15, Ap. at 000021.

⁸¹ *Id.*, Duke Energy Ohio Initial Merit Brief, Page 19, Supp. at 000531; *see also* Opinion and Order, Page 16, Ap. at 000022.

⁸² *Id.*

in which the work was done. Further, the individual who processes Duke Energy Ohio's contractor invoices works out of an office located in Kentucky.⁸³ The fact that contractor invoices were mailed to Kentucky simply has no relevance to where the contractor's work actually took place. Each of these arguments is reflected in record evidence. Therefore, the Commission's denial of Company recovery of these expenses is unreasonable.

As a general principle, cost recovery cannot properly be assigned on a generic ratio. Therefore, the Commission's decision to assign cost recovery to Duke Energy Ohio on that basis is entirely unreasonable. Assuming, *arguendo*, however, that a generic ratio basis for determining cost recovery had been appropriate, the record evidence does not support a reduction of approximately \$7,000,000 in recoverable costs for Duke Energy Ohio. As advanced in the record evidence, the actual total *outage* percentages from the wind storm, properly allocated to each company, were 61 percent for Duke Energy Ohio, 28 percent for Duke Energy Indiana, and 11 percent for Duke Energy Kentucky.⁸⁴ As further advanced on the record, Duke Energy Ohio's percentage of actual total restoration *costs* was 58 percent, whereas Duke Energy Indiana accounted for 33 percent of total restoration costs, and Duke Energy Kentucky accounted for nine percent.⁸⁵ Therefore, specifically aligning the extent of the damage with the costs incurred, logic indicates that the costs incurred by Duke Energy Ohio were consistent with the extent of the outages to which it responded.

By re-allocating cost recovery on a generic ratio that had no basis in fact, the Commission effectively shifted costs to utilities that are (1) outside of its jurisdiction, and (2) regulated by analogous commissions in other states. As a creature of statute, tasked strictly with

⁸³ *Id.*, Duke Energy Ohio Application for Rehearing, Page 19, Ap. at 000065.

⁸⁴ *Id.*, Transcript of Hearing, Vol. III, Pages 377-78, Supp. at 000048-49.

⁸⁵ *Id.*

the responsibilities explicitly delegated to it by the Ohio General Assembly, the Commission lacks the authority to take such an action. Therefore, its decision to treat nearly \$7,000,000 in labor costs that were incurred in order to efficiently restore electric service to Duke Energy Ohio customers as though the costs were actually incurred on behalf of Duke Energy Indiana and Duke Energy Kentucky unreasonably redistributes the percentage of total costs incurred by each affiliate. The following table shows the impact of the Commission's decision:

	<u>Percent of Outages</u>	<u>Percent of Costs Incurred</u>	<u>Percent of Costs, after Redistribution by the Commission</u>
Duke Energy Ohio	61%	58%	39%
Duke Energy Indiana	28%	33%	48%
Duke Energy Kentucky	<u>11%</u>	<u>9%</u>	<u>13%</u>
	100%	100%	100%

The record evidence from the proceeding shows that this result is not a reasonable or appropriate representation of total costs incurred by each of the affiliates. Further, under the Commission's unilateral redistribution of costs, the entity responsible for the repair of the majority of the outages, Duke Energy Ohio, is not credited with a majority of the associated costs. This result sharply contrasts with what should result under general cost causation principles and what is fair, under any reasonable approach.

The Commission's decision to allocate cost recovery generically further overlooks the uncontested fact that extensive field work was performed in the Duke Energy Ohio service territory by contractors. As stated *supra*, Duke Energy Ohio contractors assisted in replacing 767 utility poles and 499 transformers, and helped repair over 32 miles of conductor in the Company's service territory. Despite record evidence confirming that Duke Energy Ohio's service territory sustained the most extreme damage of the local affiliates in the wind storm,

necessitating extensive restoration work in the field, the Commission unreasonably ignored such evidence and, instead, arbitrarily shifted expenses incurred by the Company for the benefit of Ohio customers to other states.

The Commission's approach was patently unreasonable and lacks evidentiary support. Therefore, the Company respectfully requests that this Court recognize the Commission's inappropriate treatment of costs incurred for contractor labor, reverse the Commission's finding, and permit Duke Energy Ohio to recover the amounts to which it is rightfully entitled.

CONCLUSION

The Commission's Opinion and Order and Entry on Rehearing unreasonably failed to consider important record evidence advanced by the Company and Staff, thereby seriously reducing the rightful recovery by the Company of amounts expended for electric restoration activities associated with the storm. The Company's expenditures were made in consideration of the countless customers without service in the wake of the severe wind storm, and were undertaken with careful consideration of the economics of the deployment of the Company's resources. Duke Energy Ohio should not be penalized by a significant reduction in recovery for its commitment to rapidly restore service to its customers. Accordingly, this Court should reverse the Commission's decision on the issues discussed above, and permit Duke Energy Ohio to recover the restoration costs requested in its Application.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief Submitted on Behalf of Appellant, Duke Energy Ohio, Inc., and Appendix, as well as the Appellant's Supplement, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 8th day of August, 2011.



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**IN THE
SUPREME COURT OF OHIO**

Duke Energy Ohio, Inc.)	Case No. 11-0767
)	
Appellant,)	
)	
v.)	
)	
The Public Utilities Commission of Ohio,)	Appeal from
)	Public Utilities Commission of Ohio
Appellee.)	Case No. 09-1946-EL-RDR

**APPENDIX TO MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLANT,
DUKE ENERGY OHIO, INC.**

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FILE

46

IN THE SUPREME COURT OF OHIO

Duke Energy Ohio, Inc.

Appellant,

v.

The Public Utilities Commission
of Ohio,

Appellee.

Case No. 11-0767

Appeal from the Public Utilities
Commission of Ohio

Public Utilities Commission
of Ohio
Case No. 09-1946-EL-RDR

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NOTICE OF APPEAL
OF
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FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

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Notice of Appeal of Duke Energy Ohio, Inc.

Appellant, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby gives notice of its appeal, pursuant to R.C. 4903.11 and 4903.13, to the Supreme Court of Ohio from the Public Utilities Commission of Ohio (Commission) Opinion and Order, entered in the journal on January 11, 2011, and its Entry on Rehearing, entered in the journal on March 9, 2011, in Case No. 09-1946-EL-RDR, both of which are attached hereto. The referenced matter involves Duke Energy Ohio's request for reimbursement of operating and maintenance costs incurred in restoring the Company's electric distribution system following a September 14, 2008, wind storm that ravaged southwest Ohio.

The Commission's January 11, 2011, Opinion and Order unlawfully and unreasonably denies the Company full remuneration for the costs it reasonably and prudently incurred in responding to the damage caused by the wind storm.

On February 10, 2011, Duke Energy Ohio timely filed its application for rehearing, from the above-referenced Opinion and Order, pursuant to R.C. 4903.10. The issues raised in that application were denied in an Entry on Rehearing entered on March 9, 2011. Duke Energy Ohio has timely filed its Notice of Appeal with respect to Case No. 09-1946-EL-RDR, with the Clerk of the Supreme Court of Ohio and the Docketing Division of the Commission, and has served such Notice of Appeal upon the Chairman of the Commission and upon all parties who have entered an appearance in the proceeding before the Commission.

Duke Energy Ohio's Allegations of Error

Duke Energy Ohio hereby alleges that the Commission's January 11, 2011, Opinion and Order and its March 9, 2011, Entry on Rehearing in Case No. 09-1946-EL-RDR, are unlawful,

unjust, and unreasonable for the following reasons, as set forth the Company's Application for

Rehearing:

1. The Commission erred in precluding recovery of supplemental compensation for salaried employees as such compensation was a necessary and prudently incurred expense that reasonably enabled prompt restoration of electric services following the storm.
2. The Commission unreasonably ordered a reduction of \$371,196, based on the erroneous conclusion that this amount reflects additional sums paid to salaried employees.
3. The Commission unreasonably ordered a reduction of \$2,052,454 for labor loaders and supervision costs allegedly associated with the supplemental compensation and regular pay to salaried employees.
4. The Commission erred in reducing Duke Energy Ohio's request by an amount equal to the costs charged by Duke Energy Ohio to affiliates for storm restoration services provided by Duke Energy Ohio employees and the Commission's determination in this regard is unjust, unreasonable, and against the manifest weight of the evidence.
5. The Commission's finding that Duke Energy cannot recover \$9,717,564 of the costs associated with contractor labor is unjust, unreasonable, and against the manifest weight of the evidence.

WHEREFORE, Duke Energy Ohio, Inc., respectfully submits that the Commission's January 11, 2011, Opinion and Order and March 9, 2011, Entry on Rehearing are unlawful, unjust, and unreasonable and thus should be reversed, vacated, or modified. Duke Energy Ohio respectfully requests that the Supreme Court of Ohio remand this case to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,



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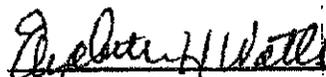
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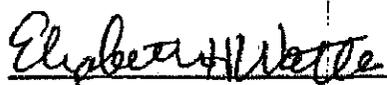
CERTIFICATE OF FILING

I certify that a copy of the foregoing was filed on this the 6th day of May, 2011, with the docketing division of the Public Utilities Commission in accordance with Rules 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.


Elizabeth H. Watts

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the chairman of the Commission, by leaving a copy at the office of the Chairman and also on the following persons or entities, being the appellant and all parties to the proceeding that is the subject of this appeal, via regular U.S. mail delivery, postage prepaid, overnight delivery and/or electronic mail delivery on this the 6th day of May, 2011.


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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Establish and Adjust) Case No. 09-1946-EL-RDR
the Initial Level of its Distribution)
Reliability Rider.)

OPINION AND ORDER

The Public Utilities Commission of Ohio, having considered the record in this matter and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

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Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Ann M. Hotz and Michael E. Idzkowski, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential utility consumers of Duke Energy Ohio, Inc.

Chester, Wilcox & Saxbe, LLP, by John W. Bentine, Mark S. Yurick, and Matthew S. White, 65 East State Street, Columbus, Ohio 43215, on behalf of the Kroger Company.

OPINION:

I. Background

Duke Energy Ohio, Inc. (Duke-Ohio) is an electric light company, as defined in Section 4905.03(A)(3), Revised Code, and a public utility under Section 4905.02, Revised Code. Duke-Ohio supplies electricity and natural gas to approximately 700,000 customers in southwestern Ohio (Duke Ex. 1 at 1).

By opinion and order issued July 8, 2009, in *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates*, Case No. 08-709-EL-AIR, et al., (Duke

Electric Rate Case), the Commission approved a stipulation submitted by Duke-Ohio and other parties in that case. The stipulation, as approved, established the Distribution Reliability Rider (Rider DR-IKE) as a mechanism to recover reasonable and prudently incurred storm restoration costs associated with the September 2008 wind storm related to Hurricane Ike (2008 Storm). The stipulation further provided that Rider DR-IKE was to be set at zero, but authorized Duke-Ohio to file a separate application to establish the initial level of Rider DR-IKE. A process for the review of Duke-Ohio's application to adjust Rider DR-IKE was also established in the stipulation. By order issued January 14, 2009, in the *Duke Electric Rate Case*, the Commission also granted the application filed by Duke-Ohio to modify its accounting procedures to defer incremental operations and management (O&M) expenses associated with the 2008 Storm, with carrying costs, stating that the reasonableness of the deferred amounts and recovery, if any, will be examined in a future proceeding.

On December 11, 2009, Duke-Ohio filed the instant application to adjust Rider DR-IKE to allow recovery of the company's 2008 Storm restoration costs, along with testimony supporting the application.

On February 9, 2010, the attorney examiner issued an entry which, *inter alia*, granted the motion to intervene filed by the Ohio Consumers' Counsel (OCC) and set a procedural schedule in this case. Specifically, the entry set forth February 23, 2010, as the deadline for the filing of comments and motions to intervene. Additionally, March 25, 2010, was set as the deadline for Duke-Ohio to notify the Commission if all of the issues raised in the comments had been resolved.

Comments were filed on February 23, 2010, by Staff, OCC, and the Kroger Company (Kroger). On March 25, 2010, Duke-Ohio filed a letter stating that all of the issues raised by Staff and Kroger had been resolved, but that it was unlikely that all of the issues raised by OCC would be resolved; therefore, Duke-Ohio requested that this matter be set for hearing.

By entry issued April 14, 2010, the attorney examiner, *inter alia*, scheduled this matter for hearing on May 25, 2010, at the offices of the Commission. In this same entry, the attorney examiner granted the motion to intervene filed by Kroger.

The hearing was held on May 25 and 26, 2010, and concluded on June 7, 2010. At the hearing held on June 7, 2010, the attorney examiner granted the motion to intervene filed by Duke Energy Indiana, Inc. (Duke-Indiana). At the May 25, 2010, hearing, the attorney examiner issued an oral ruling denying the motion to quash filed by Duke-Ohio and Duke-Indiana regarding two motions for *subpoena duces tecum* filed by OCC. By entry issued June 2, 2010, the Commission denied the interlocutory appeal filed by Duke-Ohio

and Duke-Indiana regarding the attorney examiner's May 25, 2010, ruling and affirmed the attorney examiner's denial of the motion to quash.

Duke-Ohio, Staff, and OCC filed briefs on June 15, 2010, and Duke-Ohio and OCC filed reply briefs on June 21, 2010.

II. Discussion of the Issues

A. Cause and Duration of 2008 Storm Outages

Duke-Ohio explains that, on September 14, 2008, during the test year of the *Duke Electric Rate Case*, a wind storm resulting from Hurricane Ike struck large parts of the Midwest, including Duke-Ohio's entire greater Cincinnati service area. According to Duke-Ohio, the 2008 Storm caused the largest electric outage in the history of Duke-Ohio and its predecessor entities. Further, Duke-Ohio points out that the damage from the 2008 Storm was so severe that Governor Strickland declared a state of emergency in Ohio and requested federal assistance. (Duke Ex. 1 at 1-2; Duke Ex. 2 at 2-3.)

Leading up to the 2008 Storm, Duke-Ohio's witness Mehring explains that, during the week of September 7, 2008, the company's meteorologists monitored the storm's progress and sent forecasts to appropriate personnel. The witness states that, on the morning of September 14, 2008, prior to the event, a special notice was sent by one of Duke-Ohio's meteorologists advising of the escalation of the weather conditions. According to Mr. Mehring, this early warning allowed the company to call out additional resources before the storm hit. Mr. Mehring states that the initial evaluation and assessment of the storm began the afternoon of September 14, 2008, when Duke-Ohio called in its transmission and distribution construction crews to supplement the normal trouble shift employees. From the afternoon of September 14, 2008, into the morning of September 15, 2008, these resources responded to emergency agency calls and began assessment and restoration of complete circuit lockouts. Also, on the afternoon of September 14, 2008, Mr. Mehring explains that responders from the premise services group and the engineering/technical personnel were called in for damage assessment. On September 15, 2008, when the company realized the extent of the restoration necessary, it began to call in second-tier responders, including nonfield responders and other corporate employees. Storm meetings were held twice a day throughout the event and regular meteorology updates were given at those meetings. Mr. Mehring believes the early warning and the regular updates throughout the event aided in the overall management of the restoration. (Duke Ex. 2 at 4-5.)

Duke-Ohio attests that it documented 822,000 outages of greater than five minutes in duration due to the 2008 Storm, which affected approximately 83 percent of its customers (Duke Ex. 1 at 2). Duke-Ohio's witness Mehring explains that, due to the

massive extent of damage, it took nine days to fully restore the system. Mr. Mehring testified that the number of Duke-Ohio customers without power peaked at 492,002 on September 14, 2008. Of those customers who lost power, the company was able to restore power to: 40 percent within 48 hours; 70 percent within four days; and all customers within nine days. (Duke Ex. 2 at 5-6.)

OCC maintains that Duke-Ohio did not explain why it did not realize the extent of the damage until the day after the storm occurred. According to OCC, Duke-Ohio has not been forthcoming about the causes of the outages, the personnel used during the storm, the design of the distribution system, or the specific level of wind speed its system is designed to withstand. Therefore, OCC recommends that, before Duke-Ohio is permitted to recover any costs, the Commission require Duke-Ohio to reveal these facts and to demonstrate that it responded to the storm in a prudent manner. (OCC Ex. 1A at 44; OCC Ex. 10 at 13-15.)

With regard to the timeliness of the company's response, Duke-Ohio's witness Mehring states that the company did not delay in requesting additional crews or assistance in responding to the outages both from the Duke Energy companies and from outside contractors. The witness points out that the company could not dispatch crews on September 14, 2008, to inspect the entire distribution system because the conditions were unsafe. He argues that, even immediately after the storm, the company could not access all of the system because the streets were closed or blocked, and downed trees and debris had to be removed. In addition, he notes that they had to walk the distribution systems in the rural areas to locate faults. Mr. Mehring submits that, after critical facilities had been addressed, the company prioritized its restoration efforts to maximize the number of customers to whom service was restored. (Duke Ex. 3 at 4-5.)

In addition, Duke-Ohio's witness Mehring maintains that it is not uncommon in the restoration process for outages to occur after the storm has passed. Since a storm leaves trees in weakened conditions, limbs may continue to fall and cause outages after the storm, and the same is true for structures left in precarious positions. Mr. Mehring insists that the condition of Duke-Ohio's system did not contribute to the number of outages; rather, the outages were a result of the excessive damage to the distribution system caused by the storm. (Duke Ex. 3 at 3-4.)

OCC submits that Duke-Ohio failed to properly report the number of customers experiencing outages, the length of time of the outages, and the number of outages (OCC Ex. 10 at 11-12). OCC's witness Yankel recommends that the Commission order a study of Duke-Ohio's procedures and reactions to the 2008 Storm (OCC Ex. 1A at 44). Duke-Ohio argues that OCC's request for a study is both irrelevant and misplaced and that OCC has no objective, factual criteria on which to base such a recommendation. Duke-Ohio avers

that there is no basis to suggest that the company's emergency response plans increased the severity or duration of the event. (Duke Br. at 24-25.)

OCC believes that Duke-Ohio's disinterest in exploring the causes for customer outages and improving its response to storm outages is inappropriate, given the serious damages suffered by its customers (OCC Ex. 10 at 15). According to OCC's witness Yankel, the economic loss and damage incurred by the customers far exceeds the costs Duke-Ohio is requesting that the customers pay (OCC Ex. 1A at 4). OCC advocates that the Commission should consider the losses already suffered by Duke-Ohio's customers from the 2008 Storm and not permit collection of any storm restoration costs (OCC Br. at 6). In response to OCC's issue regarding losses customers may have sustained during the 2008 Storm, Duke-Ohio believes that whether a customer sustained losses as a result of the storm is not relevant to whether the company is entitled to cost recovery for storm repairs (Duke Br. at 20). OCC disagrees with Duke-Ohio, stating that the Commission has relied upon equity in the past when determining whether utilities should collect costs from customers (OCC Reply Br. at 5).

There is no dispute on the record that the 2008 Storm was an unavoidable major event that caused substantial outages in Duke-Ohio's service territory. The Commission notes that, in accordance with Rule 4901:1-10-08, Ohio Administrative Code (O.A.C.), Duke-Ohio maintains an emergency plan which sets forth procedures the company must follow in situations such as the 2008 Storm. This plan is available to the Commission's outage coordinator and, in the event there is a question regarding a company's response to an emergency situation, Staff would review the situation to ensure that the plan is being properly implemented by the company. With regard to Duke-Ohio's response to the 2008 Storm, there is nothing in the record, other than unsupported statements made by OCC, which would warrant further inquiry into Duke-Ohio's implementation of its emergency plan. Therefore, the Commission finds that Duke-Ohio has sustained its burden of proof on this issue and that OCC's suggestion that the Commission initiate a study of Duke-Ohio's reaction to the 2008 Storm is without foundation. Therefore, OCC's request should be denied.

B. 2008 Storm Expenses Overview

Duke-Ohio's witness Wathen testified that, in accordance with the Commission's January 14, 2009, order in the *Duke Electric Rate Case*, Duke-Ohio deferred \$30,682,461 in distribution and related O&M costs incurred to repair the damage caused by the 2008 Storm, and recorded carrying costs at the most recently approved long-term debt rate of 6.45 percent (Duke Ex. 5 at 6, *Atta 1-2*; Duke Ex. 1 at 4). Duke-Ohio indicates that, while the costs associated with the 2008 Storm were incurred during the test year for the *Duke Electric Rate Case*, had those costs been included in the rate case, they would have, theoretically, increased the customers' base distribution rates. Thus, rather than include

the 2008 Storm costs in the base distribution rates, Duke-Ohio requested, in the *Duke Electric Rate Case*, to narrow the scope of Rider DR-IKE to those expenses related to the 2008 Storm damage. (Duke Ex. 1 at 2-3.)

According to Duke-Ohio's witness Wathen, the actual storm restoration costs for the year 2008, excluding the costs associated with Hurricane Ike, were significantly higher than the amount included in base rates in 2008. For example, Mr. Wathen offers that a reasonable estimate of storm costs included in base rates for 2008 for distribution O&M is approximately \$1,583,148; however, the actual storm costs incurred for the year 2008, excluding the costs related to Hurricane Ike, for distribution O&M were \$5,360,922. Therefore, Mr. Wathen asserts that all of the storm restoration costs associated with the 2008 Storm were incremental to the storm costs being recovered in base rates in the year 2008. (Duke Ex. 5 at 3-5.)

OCC's witness Yankel advocates that Duke-Ohio should forgo 100 percent of the restoration costs for the 2008 Storm. According to Mr. Yankel, while he is not saying that the costs were not incurred or that the costs were not, to some extent, prudent, he questions the reasonableness of requesting recovery of such costs. (OCC Ex. 1A at 7.) OCC believes that Duke-Ohio should have been better prepared to deal with the storm. Moreover, OCC states that it is not clear from the record that Duke-Ohio had appropriate cost containment measures in place to ensure the efficiency of the restoration efforts. (OCC Ex. 10 at 3; OCC Br. at 21.)

OCC's witness Yankel submits that a utility should not be allowed to collect imprudently incurred costs, costs associated with other jurisdictions, or costs that should be capitalized, as opposed to expensed. Moreover, Mr. Yankel points out that a utility has built into its rates a certain allowance for storm-related expenses and it should not be expected that full recovery, or any recovery, will occur, during times when the expenses exceed those built into rates. The witness points out that, when storm costs are less than what is built into rates, the utility does not request a decrease in rates; thus, there should be no expectation of recovery when expenses exceed what is built into rates. (OCC Ex. 1A at 4.) OCC maintains that, while in recent years Duke-Ohio may have exceeded its test-year amount for storm restoration, there may have been other years where Duke-Ohio benefited by having a test-year amount that exceeded the actual storm restoration costs. Therefore, OCC insists that, in order to meet Duke-Ohio's burden of proof on this issue, Duke-Ohio must provide comparisons of test-year amounts to actual costs for more than just recent years. (OCC Br. at 10.) Mr. Yankel also points out that a spokesperson for Duke Energy Indiana, Inc. (Duke-Indiana) stated that it will not seek recovery of the costs associated with the 2008 Storm and that, while Duke Energy Kentucky, Inc. (Duke-Kentucky) has requested deferral of the 2008 Storm costs, it has not requested recovery. (OCC Ex. 1A at 4-5.)

In contrast, Duke-Ohio submits that its existing base distribution rates do not include the 2008 Storm costs. Furthermore, Duke-Ohio maintains that OCC's witness Yankel failed to justify his erroneous conclusion that Duke-Ohio may have over-recovered storm costs in the past. Duke-Ohio notes that, at the time of the 2008 Storm, the base rates included about \$2 million for O&M storm costs. According to Duke-Ohio, in the intervening years, it has incurred O&M storm costs well in excess of the amount included in base rates. (Duke Br. at 22.)

Furthermore, Duke-Ohio avers that, contrary to OCC's assertions, foreign jurisdictions cannot dictate this Commission's authority (Duke Br. at 23). OCC replies that, in the past, the Commission has looked at the treatment of customers by utilities in other states to gauge reasonableness. See *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan Which May Result in Future Rate Increases and for a New Alternative Regulation Plan*, Case No. 96-899-TP-ALT, Opinion and Order (November 4, 1999). In addition, OCC argues that the Commission has found that trends in other states are relevant, especially in a state where a company has an affiliate. See *In the Matter of the Review of SBC Ohio's TELRIC Costs for Unbundled Network Elements*, Case No. 02-1280-TP-UNC, Entry on Rehearing (April 21, 2004). (OCC Reply Br. at 4.)

In the *Duke Electric Rate Case*, the Commission approved a stipulation by the parties in that case which permitted Duke-Ohio to establish Rider DR-IKE as a mechanism to recover reasonable and prudently incurred storm restoration costs associated with the 2008 Storm. While Rider DR-IKE was initially set at zero, Duke-Ohio was authorized in that case to file the instant application in order to present evidence supporting its proposal for the initial level of Rider DR-IKE. By agreeing to the creation of Rider DR-IKE for the purpose of recovering reasonable and prudently incurred storm restoration costs, the stipulating parties, one of which was OCC, acknowledged that there were, in fact, costs that Duke could at least request that the Commission consider for recovery through a rider mechanism. For OCC to now advocate that 100 percent of the 2008 Storm costs should be forgone by Duke-Ohio, without even examining such costs, seems somewhat disingenuous. With the requirement that any costs recovered through Rider DR-IKE are reasonable and appropriate, we will proceed to consider Duke-Ohio's request in this case and the evidence of record to determine if Duke-Ohio has met its burden of proof.

C. Summary of Parties' Positions Regarding Expenses to be Recovered

Duke-Ohio's witness Wathen explains that, generally, the company is proposing to include the following costs in Rider DR-IKE: distribution O&M; certain administrative and general accounts, including labor, office supplies and expenses, benefits, and other administrative and general accounts used to record storm restoration costs; and payroll taxes associated with the labor costs (Duke Ex. 5 at 7).

According to Duke-Ohio's witness Mehring, the expenses incurred as part of the restoration from the 2008 Storm were almost ten times the company's average annual storm-related costs. He attests that the 2008 Storm expenses were \$32.5 million, of which \$31.8 was O&M costs and payroll taxes, and \$0.7 million was for capital-related expenses. Mr. Mehring states that the company is only asking for recovery of the distribution-related O&M costs and is not seeking recovery of the capital costs in this proceeding. According to Mr. Mehring, the expenses from the storm, as proposed in the application, can be divided into the following four cost categories: internal labor for Duke-Ohio and its affiliates (\$15.3 million); third-party contractor labor (\$14 million); materials and supplies (\$0.7 million); and costs of logistical support for the field crews (\$1.7 million). Before carrying costs, the witness submits that, in its initial application, Duke-Ohio requests recovery of the distribution share of the O&M costs amounting to \$30,682,461. (Duke Ex. 2 at 9-10.)

Based on its review, Staff recommends that the recovery amount proposed in the application, be decreased by \$1,033,130 to \$29,649,330 (Staff Ex. 2 at 2-3, Att. 1-2). Upon consideration of Staff's comments, Duke-Ohio's witness Wathen testified that the company will reduce its request for recovery through Rider DR-IKE to \$29,355,562. According to the witness, this amount includes the reduction requested by Staff, as well as additional adjustments for supervisory and service company labor and other miscellaneous items totaling \$293,767.65. (Duke Ex. 6 at 3.) In addition to the reduction recommended by Staff and the additional \$293,767.65 reduction, Duke-Ohio's witness Wathen testified that, in the course of responding to discovery, the company found it applied a formula for estimating fringe benefit costs on overtime labor that inappropriately included certain costs as incremental that were not truly incremental. Therefore, Duke-Ohio has adjusted its request to account for this error and has reduced the beginning balance of the regulatory asset by \$800,461. According to Mr. Wathen, the company also made a number of other miscellaneous adjustments that total \$81,856. (Duke Ex. 6 at 8, 10.)

Accordingly, taking the above adjustments into consideration, Duke-Ohio requests recovery in this case of \$28,473,244 in costs resulting from the 2008 Storm. (Duke Ex. 6 at 8, 10.) Therefore, Duke-Ohio's revised actual expenses in the four cost categories are: internal labor for Duke-Ohio and its affiliates (\$12,898,598); third-party contractor labor (\$13,202,611); costs of logistical support for the field crews (\$1,597,025); and materials and supplies (\$775,010). (Duke Ex. 3 at 6-7.)

Staff believes that, with the adjustment it recommends, as well as the further adjustments agreed to by Duke-Ohio, which reduce the recovery amount to \$28,473,244, Staff has reasonable assurance that the 2008 Storm damage expenses to be recovered in Rider DR-IKE are reasonable (Staff Ex. 2 at 2-3, Att. 1-2; Staff Br. at 5-6).

OCC witness Yankel offers that he reviewed nonfield-related costs and costs associated with salaried personnel. The witness points out that, while Duke-Ohio agreed in its responses to interrogatories to remove certain charges, Duke-Ohio initially requested recovery for such items as \$7,349 for massages in support of the call center staff and \$42,058.60 for gravel. (OCC Ex. 1A at 9-10.) Mr. Yankel states that, based on his review of the documentation, of the \$28,473,244 that Duke-Ohio requests recovery of in this case, he recommends the Commission approve recovery of no more than \$5,135,181. In summary, Mr. Yankel recommends the following items be deducted from the amount requested by Duke-Ohio: \$3,279,446 for supplemental compensation to salaried employees; \$307,872, which was paid to Duke-Ohio by Duke-Kentucky; \$1,063,785, which is an estimate of the amount paid to Duke-Ohio by Duke-Indiana; \$2,748,442, which was billed by a contractor to Duke-Ohio, rather than the appropriate affiliate; \$6,969,446, which OCC believes includes charges which may not have been incurred for work done in Ohio; and \$8,969,072 for charges that should be removed from the O&M accounts and should be capitalized. (OCC Ex. 1A at 42.) Therefore, OCC believes that Duke-Ohio should only be allowed to receive \$5,135,181 of the \$28,473,244 proposed by the company (OCC Br. at 20).

D. Consideration of Evidence Concerning Expenses

After reviewing the record in this case, the Commission finds that each party categorized the expenses allegedly incurred by Duke-Ohio as a result of the 2008 Storm and presented evidence in this case relating to those expenses in a different manner. Therefore, for purposes of our consideration of the record and determination of whether Duke-Ohio has sustained its burden to prove that it reasonably and prudently incurred \$28,473,244 in costs related to the 2008 Storm, we will divide the costs into two categories: Labor Expenses; and Operations and Maintenance, and Capital Accounts. Under Labor Expenses, we will consider Duke-Ohio's request to recover \$27,698,234 for: internal labor for Duke-Ohio and its affiliates; third-party contractor labor; and the costs of logistical support for the field crews. Under Labor Expenses, we will also consider OCC's proposal that Duke-Ohio not be allowed to recover \$14,368,991 for: supplemental compensation to salaried employees; amounts paid to Duke-Ohio by Duke-Kentucky and Duke-Indiana; amounts billed by a contractor to Duke-Ohio, rather than the appropriate affiliate; and for charges which OCC advocates may not have been incurred for work done in Ohio. Under Operations and Maintenance, and Capital Accounts, we will consider Duke-Ohio's request to recover \$775,010 in materials and supplies, and OCC's request that certain costs Duke-Ohio placed in the O&M account be capitalized.

1. Labor Expenses

Duke-Ohio's witness Mehring testified that, on September 14, 2008, Duke-Ohio and its affiliates, Duke-Kentucky and Duke-Indiana, began implementing their emergency plans to respond to the storm damage. According to Mr. Mehring, of the Duke Energy

employees and contractors responding to the storm: more than 1,200 assessed damage, prepared material for the field, assigned jobs to crews, removed damaged vegetation, repaired downed lines and equipment, and provided support services; and 450 worked in the call center. In addition, Duke-Ohio and Duke-Kentucky retained approximately 1,230 contractors and employees from utilities in other states not affected by the storm, including 570 employees and contractors from Duke Energy Carolinas. (Duke Ex. 2 at 8.) Mr. Mehring explains that the costs for logistical support include food, lodging, transportation, and miscellaneous expenses. The witness states that the costs for this category were calculated by taking the number of people working on the storm restoration efforts per day, which was provided by operations, times a daily per person amount, which was based on field input. (Duke Ex. 2 at 10.)

Mr. Freeman, with Duke Energy, explains that, when a Duke-Indiana employee performs work for Duke-Ohio, Duke-Indiana will not be compensated for those services in the form of revenue flowing between the two companies; rather, consistent with the affiliate rules, there is an entry in the books of Duke-Indiana to reduce the expenses for the company. According to Mr. Freeman, this reduction in expenses would then become relevant in Duke-Indiana's next rate case. (Tr. at 411-412.) In response, OCC points out that an accounting entry will only prevent double recovery if it is included in the company's test year (OCC Reply Br. at 14).

Staff states that its review of the expenses for the repair of the storm damage included inspection of sampled invoices from contractors, material requisitions, and payroll records (Staff Ex. 2 at 2). Staff's witness Hecker explains that, in his audit of the storm costs, he requested a detailed list of transactions making up the total charged for each of the following categories used by the company: external contracts; company and affiliate labor; material; and logistics. From these lists, Mr. Hecker randomly selected source documents to identify specific invoices, material acquisitions, and timesheets to examine the reasonableness of the expenses and accuracy of the data. According to the witness, his audit revealed that labor expenses needed to be reduced by \$986,244.62 and contractor expenses need to be reduced by \$46,866.32. Mr. Hecker explains that the majority of the adjustments for labor expense were for straight-time employees because these expenses, and the associated overhead costs, would have been incurred whether there was a storm or not and would have been included in base rates. Other adjustments were made to the labor expense because, in the timesheets that he chose randomly, the witness found employees whose hours on their timesheets were lower than the actual amount charged. With regard to the adjustments for contractor expenses, Mr. Hecker attests that some of the invoices revealed that the work being billed was done for storm repairs in Kentucky and Indiana or on other projects outside of the storm; thus, these expenses should not have been charged to Ohio customers. (Staff Ex. 1 at 2-4.)

OCC submits that Staff's review was too brief and perfunctory to identify all of the problems with Duke-Ohio's costs in this case. OCC points out that Mr. Hecker, testifying in support of Staff's position, stated that he actually reviewed a couple hundred items out of tens of thousands of invoices and timesheets. OCC notes that Duke-Ohio offered that Staff sampled more than 8,000 lines of data; however, Mr. Hecker stated that he only reviewed a couple hundred items. Pointing to Mr. Hecker's statement that he could not put a percentage on the number of items in his random sampling, OCC opines that Staff's method of review was simply random, with no methodological or statistically purposeful sense. Moreover, OCC remarks that Staff's witness Hecker admitted that there is a possibility of other undiscovered discrepancies. (OCC Reply Br. at 2, 9-10; Tr. at 98, 120-121, 134-135, 137.)

As stated previously, Duke-Ohio requests that it be permitted to recover \$27,698,234 in labor expenses through Rider DR-IKE. Conversely, OCC advocates that Duke-Ohio not be allowed to recover \$14,368,991 of the requested \$27,698,234 in associated labor expenses relating to: supplemental compensation to salaried employees; affiliate labor expenses; and third-party contractor labor expenses. The Commission, in determining what labor expenses resulting from the 2008 Storm are appropriate for recovery through Rider DR-IKE and whether Duke-Ohio met its burden of proof, considered the following issues raised on the record: internal labor expenses and supplemental compensation; affiliate labor expenses; and contractor labor expenses.

a. Internal Labor Expenses and Supplemental Compensation

Duke-Ohio's witness Mehring testified that the daily direct labor rates were determined based on timesheets that were entered into the payroll system for work performed for storm-related activities. He explains that the direct labor cost was then loaded with fringe benefit costs, supervision costs, which were calculated as a percent of labor, and transportation costs. In addition, Mr. Mehring indicates that the direct labor cost total includes the cost of all Duke-Ohio support labor used for the restoration efforts, including personnel from outside of power delivery and internal labor from departments such as the call center, information technology, purchasing, and warehousing. (Duke Ex. 2 at 9.)

OCC indicates that Duke-Ohio is collecting some level of overtime costs through the rates established in the *Duke Electric Rate Case*. Therefore, OCC advocates that, unless the level of overtime currently being recovered in base rates is subtracted from the overtime costs the Commission finds proper in this case, Duke-Ohio will be collecting a test-year amount of overtime charges twice in one year. Furthermore, OCC argues that Duke-Ohio has not demonstrated that it has actually incurred all of the internal overtime costs that it claims, particularly if the overtime represents work by salaried employees who are not paid overtime when they work overtime. (OCC Ex. 10 at 10-11.)

In response to OCC's concerns regarding overtime charges, Duke-Ohio's witness Wathen offers that the amount of overtime approved in the *Duke Electric Rate Case* was approximately \$3.7 million and the total electric distribution overtime actual charges for the year 2008, excluding the 2008 Storm charges, were \$5.3 million. Mr. Wathen states that the overtime charges related to the 2008 Storm were \$3.5 million. Therefore, the witness asserts that the amount of storm-related overtime requested in this proceeding is incremental to the overtime collected in base rates. (Duke Ex. 6 at 7.)

In addition, OCC witness Yankel goes on to advocate that any extra payment to salaried employees because of the 2008 Storm is inappropriate. In his review, Mr. Yankel found that there were two types of direct compensation noted by the company that were paid to salaried employees because of the 2008 Storm, supplemental and regular hour pay. The witness found that there were 223 salaried employees that received only a fixed amount of supplemental pay, 238 salaried employees that received both supplemental pay and pay based on the number of hours worked, and 46 salaried employees that received only pay based on the number of hours that they worked, as if they were hourly employees. (OCC Ex. 1A at 10.)

According to Mr. Yankel, \$855,796 of supplemental compensation was given to salaried employees and \$371,196 was paid on an hourly basis to salaried employees. Mr. Yankel argues that the total extra compensation given to salaried employees, \$1,226,992, is inappropriate and Duke-Ohio should not be allowed to recover this amount through Rider DR-IKE. In addition, Mr. Yankel advocates that the labor loader and supervision costs applied to the \$1,226,992 supplemental compensation to salaried employees should be removed from recovery in this case. Accordingly, the witness calculates that the request for recovery in this case should be reduced by \$3,279,446, which consists of the direct payroll cost of \$1,226,992, and the associated labor loader and supervision costs of \$939,863 and \$1,112,591, respectively. Mr. Yankel submits that, if Duke-Ohio wishes to compensate its salaried employees for extra hours worked during the 2008 Storm, it can do so, but ratepayers should not have to fund this supplemental compensation. (OCC Ex. 1A at 13-17.) Rather, OCC advocates that Duke-Ohio's shareholders should incur the costs of this supplemental pay because it was an unnecessary expense (OCC Br. at 11; OCC Reply Br. at 13).

In response to OCC, Duke-Ohio's witness Mehring states that, as a general proposition, salaried employees are not paid overtime. However, he explains that there are unusual circumstances that may require salaried employees to work excessive hours; therefore, in recognition of, and to reward, those employees, Duke Energy has a supplemental pay policy. According to the witness, it is at management's discretion to give salaried employees some compensation in addition to their regular salaries for their effort. (Duke Ex. 3 at 8.) Duke-Ohio's witness Clippinger also notes that there is a

threshold of additional hours that must be worked first before supplemental pay is provided (Tr. 359).

As noted by Duke-Ohio's witness, paying salaried employees overtime is not the general practice of Duke-Ohio and awarding salaried employees supplemental compensation, in addition to their regular salaries, is totally within the discretion of the company. Upon review of the record, the Commission finds that Duke-Ohio has not shown that it is appropriate and reasonable for the company to recover the discretionary supplemental pay awarded salaried employees through Rider DR-IKE. In considering the appropriate costs resulting from the 2008 Storm restoration effort to be recovered through Rider DR-IKE, the Commission agrees that the discretionary supplemental pay awarded salaried employees should not be included. The formula utilized by OCC to arrive at the supplemental compensation it recommends be deducted from the costs to be recovered was not contested in this case. Therefore, the Commission finds that the recovery amount requested by Duke-Ohio should be reduced by \$3,279,446.

b. Affiliate Labor Expenses

OCC asserts that Duke-Ohio's documentation of the 2008 Storm costs was so haphazard and unreliable that it can not be relied on to meet Duke-Ohio's burden of proof that the costs included in the application were prudently incurred. OCC points out that, when comparing the spreadsheets of the labor costs incurred by Duke-Indiana and Duke-Ohio, it is clear that Duke-Indiana tracked three items: regular hours, overtime hours, and supplemental pay. However, Duke-Ohio's spreadsheet tracked only two items: an hourly rate of pay and supplemental pay. Thus, OCC argues that it is impossible to tell from the Ohio data whether any of the labor charged was regular hours. OCC points out that, when questioned about the Ohio data, Duke-Ohio's witness Clippinger testified first that all labor in Ohio was overtime and then later testified that some of the labor for Ohio was regular time. (OCC Br. at 18-19; Tr. at 66; Tr. at 357.)

OCC's witness Yankel points out that approximately half of the \$15.3 million Duke-Ohio was initially requesting to recover for internal labor costs resulted from employees of Duke-Ohio affiliates. According to Mr. Yankel, these costs are not fair because Duke-Ohio is being charged for work performed by employees of Duke-Ohio's affiliates and those employees are already being paid by ratepayers in other jurisdictions. Mr. Yankel submits that, at a minimum, there should be an offset of the amount of money paid by Duke-Kentucky and Duke-Indiana for Duke-Ohio employees that performed work in those jurisdictions. When he tried to assemble data on the amount paid to Duke-Ohio by affiliates, Mr. Yankel claims that Duke-Ohio refused to answer discovery requests that dealt with other jurisdictions. Thus, to support his contention with regard to Duke-Kentucky, Mr. Yankel points to a data request in Kentucky, which attributes \$307,872 in labor costs to Duke-Ohio for supporting Duke-Kentucky in its 2008 Storm restoration

efforts. For the costs paid to Duke-Ohio by Duke-Indiana, Mr. Yankel reviewed the information he gleaned from a statement made by Duke-Indiana's spokesperson that Duke-Indiana's total costs for the 2008 Storm were \$17 million. By using a ratio of the Duke-Indiana costs of \$17 million to the estimated costs for Duke-Kentucky, Mr. Yankel estimates that the amount of payments to Duke-Ohio from Duke-Indiana was \$1,063,785. Therefore, Mr. Yankel believes that, at a minimum, the request in this case should be reduced by \$1,371,657, which consists of payments to Duke-Ohio of \$307,872 from Duke-Kentucky and \$1,063,785 from Duke-Indiana. (OCC Ex. 1A at 5, 17, 19-20.) In addition, OCC submits that the Commission should require that these payments from the affiliates to Duke-Ohio be flowed through to customers (OCC Br. at 14).

Furthermore, in comparing the costs charged by Duke-Carolina to its affiliates for assistance on 2008 Storm restoration, OCC notes that Duke-Ohio was charged more for the same employees than Duke-Indiana was charged. Duke-Ohio's witness Clippinger explains that the per hour rate charged Duke-Ohio was a blended rate of overtime and regular time. OCC notes that the blended rate added to the supplemental pay charged to Duke-Ohio was higher per hour than the overtime rate plus the supplemental pay charge to Duke-Indiana. When questioned about this, Duke-Ohio's witness Clippinger states that the Duke-Carolina employees were deployed to Indiana first and then to Ohio, after the overtime charges started. OCC believes that, for whatever reason, Duke-Carolina charged Duke-Ohio more for the same employees than it charged Duke-Indiana and the charges to Duke-Ohio are not reasonable; therefore, because Duke-Ohio cannot explain the basis for the higher charges to Ohio, the costs should be disallowed. (OCC Br. at 16-18; OCC Exs. 13A and 14A; Tr. at 356-376.)

After reviewing the record on the issue of affiliate compensation, the Commission finds that Duke-Ohio did not sustain its burden to prove that all of the affiliate-related costs which it proposed should be recovered through Rider DR-IKE. OCC has submitted evidence that calls to question whether \$1,371,657 of those charges should be allowed and Duke-Ohio provided no evidence to rebut OCC's calculation. Accordingly, the Commission finds that the costs requested by Duke-Ohio for recovery through Rider DR-IKE should be reduced by \$1,371,657 in order to address this issue.

c. Contractor Labor Expenses

According to Duke-Ohio's witness Mehring, the cost of contractor support was calculated by aggregating the contractor invoices charged to the storm event (Duke Ex. 2 at 9).

In its audit, Staff determined that there needed to be adjustments for contractor expenses, finding that some of the invoices revealed that the work being billed was done

for storm repairs in Kentucky and Indiana or on other projects outside of the storm; thus, these expenses should not have been charged to Ohio customers. (Staff Ex. 1 at 4.)

With regard to specific contractor invoices which are included in the request for recovery in this case, OCC's witness Yankel describes numerous invoices from one contractor where it appears that the invoices have no connection with the 2008 Storm restoration in Ohio and there is no clear demarcation of the jurisdiction in which the restoration work was performed. The witness suspects these invoices either because they were sent to a Duke-Ohio affiliate, rather than Duke-Ohio; the project codes reference a state other than Ohio; or the location of the work is listed as a state other than Ohio. He points out that, on many of the invoices, the location of the work was whited out; thus, while some of the invoices appeared to have letters (i.e., "y" or "cky") that would indicate that the location was in Kentucky, it is uncertain where the project was located. In addition, the witness notes that some of the invoices had project descriptions that were clearly not related to the 2008 Storm; however, Duke-Ohio, in its May 11, 2010, filing agreed to remove those invoices from its request in this case. According to Mr. Yankel, of the invoices totaling \$563,322.26 for this one contractor, only \$32,733.48 could definitely be attributed to Ohio, \$261,600 should not be charged to Ohio, and it is uncertain whether the remaining \$269,000 should be charged to Ohio. (OCC Ex. 1A at 30-36.) Mr. Yankel also states that there were invoices from other contractors where the receipts submitted by the contractors indicate that the work might not have been done in Ohio, because the invoice is for items such as food, laundry, transportation, and field materials in Kentucky; however, Mr. Yankel acknowledges that a crew or a contractor could have worked in more than one jurisdiction. (OCC Ex. 1A at 37-39, 41.)

OCC's witness Yankel claims that it appears from a sampling he did of contractor invoices included in the request for recovery in this case that the companies responsible for some of those invoices were either Duke-Indiana or Duke-Kentucky. He argues that Duke-Ohio has not met its burden of proof and demonstrated that all of the \$13,202,611 associated with contractor restoration, for which Duke-Ohio is requesting recovery, actually occurred in Ohio. Mr. Yankel recommends that the requested \$13,202,611 be reduced by \$2,748,442 to account for those invoices that reference a Duke-Ohio affiliate as the responsible utility. In addition, since Duke-Ohio was one of three affiliates located in different states that incurred costs resulting from the 2008 Storm, Mr. Yankel recommends that only one-third of the costs be recovered from Ohio ratepayers; thus, the witness recommends that two-thirds, or \$6,969,446, of the remaining amount be removed because Duke-Ohio did not substantiate where the costs were incurred. With these reductions, Mr. Yankel submits that Duke-Ohio should only be allowed to recover \$3,484,723 for contractor services. (OCC Ex. 1A at 28-30, 41.)

In response to OCC's concern about certain invoices reflecting charges for services, such as lodging and meals, in another state, Duke-Ohio points out that it is not surprising,

with a staging area and lodging across the river in Kentucky, that some Ohio crews took care of some daily needs in Kentucky (Duke Br. at 19). Duke-Ohio argues that OCC's proposal that two-thirds or \$6,969,446 of the Ohio costs should be removed from this request is unreasonable and arbitrary. Duke-Ohio submits that the manner in which Mr. Yankel arrives at this figure by referencing that there were three Duke Energy companies affected by the storm lacks any mathematical, objective, or defined criteria. (Duke Br. at 15.)

It is evident from our review of the record, including both Staff's audit and OCC's attestations, that there are discrepancies in the documentation for contractor expenses which should have been billed to affiliates in other states and not billed to Duke-Ohio. While we understand that these disparities may have occurred due to the emergency nature of the 2008 Storm, the Commission believes that Duke-Ohio failed to prove that the total amount of contractor labor costs it is requesting under Rider DR-IKE is reasonable. The Commission believes that Duke-Ohio has not presented evidence to support its contention that all of these contractor costs were reasonably incurred and subject to recovery under Rider DR-IKE. We acknowledge that the record reflects that Duke-Ohio hired third-party contractors to assist with restoration efforts resulting from the 2008 Storm and we agree that Duke-Ohio should be permitted to recover appropriate contractor costs; however, Duke-Ohio has failed to substantiate what those actual costs are. Therefore, we are left with either disallowing all contractor costs or decreasing the requested contractor costs based upon the record of evidence, which permits Duke-Ohio to recover a portion of the contractor costs. Upon consideration, we find that the appropriate result is to make a downward adjustment to the contractor expenses requested in this case to account for the discrepancies.

Duke-Ohio has requested recovery through Rider DR-IKE of \$13,202,611 for contractor services. Upon consideration of the evidence before us in this case, the Commission finds that OCC's proposal that the contractor expenses be reduced by \$2,748,442 to \$10,455,169, in order to take into account those invoices that reference a Duke-Ohio affiliate as the responsible party, is reasonable. Furthermore, upon consideration of the reasonableness of permitting Duke-Ohio to recover the remaining \$10,455,169 for contractor services through Rider DR-IKE, we find that there is sufficient evidence to suggest that, at most, Duke-Ohio may reasonably only recover one-third of this remainder; the other two-thirds should be allocated to the states of Indiana and Kentucky. The Commission notes that no party disputes the contention that Duke-Ohio should at least be permitted to recover one-third of the remaining \$10,455,169 contractor-services costs. Therefore, the Commission finds that the remaining \$10,455,169 should be further reduced by two-thirds, or \$6,970,112, in order to account for other charges for which there is no evidentiary support for recovery. Accordingly, the Commission concludes that Duke-Ohio's request for recovery of \$13,202,611 for contractor services

should be reduced by \$9,717,564, such that Duke-Ohio should be permitted to recover \$3,485,047 for contractor services.

d. Conclusion - Labor Expenses

Upon review of the record in this case, the Commission finds that Duke has not shown that the labor expenses incurred for restoration from the 2008 Storm were appropriately coded and the evidence of record has shed sufficient doubt on whether some of the labor expenses were appropriately allocated to Ohio. While it appears that Duke-Ohio attempted to reconcile the accounts after the emergency situation had passed, Duke-Ohio did not substantiate, on the record, that all of the labor expenses were appropriately allocated as they should have been. For example, it appears that, initially, all of the labor costs charged to Ohio were overtime hours and, while the company may have attempted to correct this accounting after the fact, Duke-Ohio fails to provide evidence on the record to support its contention that the accounts have been fully reconciled.

As acknowledged by the company, Duke-Ohio's current base rates include an allowance for storm-related expenses. While the Commission agreed that the storm costs could be deferred and reviewed at a later time to determine if the costs were prudently incurred and thus be recovered through Rider DR-IKE, such deferral authority was in no way a guarantee that Duke-Ohio would be permitted to recover all of the costs, or, in fact, any of the costs. As we stated in our January 14, 2009, order in the *Duke Electric Rate Case*, which granted deferral authority, the reasonableness of the deferred amounts and recovery, if any, will be examined in a future proceeding. Since the case at hand is the future proceeding envisioned for review of the costs, the burden of showing that the costs for which Duke-Ohio requests recovery are reasonable and were, in fact, incurred in the restoration of electric service for the 2008 Storm in the state of Ohio, rests solely on the company in this case. While Duke-Ohio has provided the numbers and a minimal level of information alleging that the labor expenses incurred were for Ohio customers, the record reflects that there are inconsistencies and inaccuracies in the company's accounting procedures that the company has neither explained, rebutted, nor discounted. Given these facts, the Commission cannot support recovery of alleged labor expenses which the company has not proven.

Therefore, while the Commission agrees that the record supports the recovery by Duke-Ohio of a portion of the labor expenses requested by the company, the Commission finds that Duke-Ohio did not prove that the total amount of labor expenses it requested, \$27,698,234, was reasonable and prudently incurred. Accordingly, upon review of the record in this case, the Commission concludes that, as delineated in detail in the previous Labor Expense section of this order, Duke-Ohio's request for recovery of labor expenses through Rider DR-IKE must be reduced to \$14,368,667, which includes a reduction of:

\$3,279,446 for supplemental compensation; 1,371,657 for affiliate labor; and 9,717,564 related to contractor labor.

2. Operations and Maintenance, and Capital Accounts

Duke-Ohio's witness Mehring states that the material and supply costs were calculated from what was actually recorded in the ledger from the company's storerooms during the time of the storm restoration efforts (Duke Ex. 2 at 10). Mr. Mehring explains that, as a result of the 2008 Storm, 707 distribution poles and 499 transformers had to be replaced. In addition, the storm damage required the replacement of 862 crossarms, 171,278 feet of electric wires, 53,134 connectors, 4,728 insulators, 12,877 fuses, and 314 arresters. The damage resulting from the 2008 Storm also required a total of 31,880 splices and 942 cutouts, according to Mr. Mehring. (Duke Ex. 2 at 6; Duke Ex. 3 at 5.)

OCC notes that Duke-Ohio did not account for the locations of the 31,880 splices and the 942 cutouts that were made during the restoration efforts for the 2008 Storm, nor did it document the teams who completed this work or the time consumed in completing the work. Therefore, OCC argues that it is not possible to ensure that the splices and cutouts for which Duke-Ohio is requesting recovery were actually done. OCC notes that Duke-Ohio only estimated the number of splices and cutouts done as evidenced by Duke-Ohio's witness Mehring's statement that those numbers reported were obtained from the material management system. (OCC Br. at 19-20; Tr. at 58.)

OCC asserts that Duke-Ohio charged excessive costs incurred in response to the 2008 Storm to the O&M expense accounts, when replacement costs, installation costs, and possibly other costs should have been charged to capital accounts. OCC argues that, if Duke-Ohio can not demonstrate that all of the replacement costs were properly charged to capital accounts and all of the repair costs were properly charged to expense accounts, the Commission should deny the collection of the costs from customers. For example, OCC notes that many of the items identified by Duke-Ohio included the replacement of poles, transformers, and other damaged equipment. According to OCC, these items are capital items and should be allocated to a capital account; however, Duke-Ohio charged all costs, including these costs, to the O&M expense accounts. OCC submits that, in accordance with the stipulation approved in the *Duke Electric Rate Case*, Duke-Ohio may only collect from customers, through Rider DR-IKE, incremental operational expenses associated with the storm restoration activities, not capital costs. Therefore, OCC believes that Duke-Ohio is attempting to collect costs that the Commission stated could not be collected. (OCC Ex. 10 at 4-5.)

Furthermore, OCC argues that if the premise services group, the engineering/technical personnel, the normal trouble shift employees, and the second tier-responders were primarily support staff during the storm response, then the costs

associated with their work should be allocated in proportion to the field work charges, and appropriately made to the capital accounts and the O&M accounts based on the actual field work completed. OCC submits that Duke-Ohio charged almost no costs to the capital accounts; however, Duke-Ohio reported a large amount of capital item replacements. Therefore, OCC comments that more of the field work labor costs, as well as the same percentage of support work labor costs, should have been charged to capital accounts. (OCC Ex. 10 at 8.)

Duke-Ohio's witness Clippinger asserts that the company's replacement of units of property was appropriately capitalized and repairs were appropriately charged to the O&M accounts. Ms. Clippinger explains that, if Duke-Ohio installs a unit of property, then the unit of property and the labor and other costs associated with the installation of that property must be charged to the capital accounts. According to the witness, the type of equipment installed will determine whether the item is recorded as capital or expense. For example, she explains that, if a pole is replaced, the costs would be capitalized; however, if an overhead line is repaired by installing a line splice, the costs are expensed. With respect to the 2008 Storm restorations, Ms. Clippinger explicates that the company used both internal and external labor that were not necessarily familiar with the charging practices of the company. Therefore, the witness attests that, in order to allow personnel to focus on the restoration efforts, they were instructed to charge all of their efforts to the O&M accounts. Ms. Clippinger also states that the materials used for service restoration were initially charged to the O&M accounts. However, the witness notes that, in October 2008, the units of property and the associated labor costs were moved from the O&M accounts to the capital accounts. (Duke Ex. 4 at 3-4.)

OCC's witness Yankel believes that the \$0.7 million amount being capitalized with respect to direct labor costs is too low. Mr. Yankel asserts that all of the labor costs and the labor loadings both for internal labor and contractor labor should be capitalized. Mr. Yankel states that neither he nor Duke-Ohio has an estimate of how much of these costs should be capitalized. The witness acknowledges the duress the company was under during the 2008 Storm and understands why Duke-Ohio directed that all costs should be recorded in the O&M accounts; however, now that time has passed, there is not quality data to show what should be either O&M or capital costs. Therefore, Mr. Yankel recommends that an estimate be made to separate the costs into capital and O&M categories. Utilizing an average of the capitalization percentage used by investor-owned utilities in Kentucky that were hit by the 2008 Storm, Mr. Yankel estimates that \$8,969,072 of the requested \$28,473,244 recovery amount should be capitalized. (OCC Ex. 1A at 24-28; OCC Br. at 15-16.)

Duke-Ohio argues that OCC's proposal that the percentage of costs that should be capitalized should be based upon the average percentage applicable to two Kentucky utilities that are not Duke-Ohio's affiliates is arbitrary and fails to acknowledge certain

facts. Namely, Duke-Ohio states that OCC failed to address whether the other utilities replaced the same amount of material as Duke-Ohio. Moreover, the fact that a company subject to generally accepted accounting principles has some degree of latitude in establishing its capitalization policies means that another entity's undefined capitalization policy can not be imposed on Duke-Ohio. (Duke Br. at 15-17; Tr. at 264-265.) In addition, Duke-Ohio points out that, if \$8,969,072 is removed from O&M and capitalized, as OCC proposes, customers would actually pay more over a longer period of time, because the costs would become part of rate base and the rate of return would be equivalent to the full cost of capital applied to that rate base. However, as proposed by the company, the debt rate would be used to calculate the carrying costs over a three-year period for those amounts that remain in O&M and are amortized. (Duke Br. at 17.)

Upon consideration of the record, the Commission finds that Duke-Ohio has substantiated its claim that \$775,010 in material and supply costs is reasonable and should be included in the amount recovered through Rider DR-IKE. While OCC appears to be skeptical of the amount of costs capitalized by Duke-Ohio, OCC has not substantiated its claim that the company inappropriately charged items to the O&M accounts. Moreover, Duke-Ohio's witness, while acknowledging that the materials used for service restoration were initially charged to the O&M accounts, went on to verify that, in October 2008, the units of property and the associated labor costs were appropriately moved from the O&M accounts to the capital accounts. Therefore, we find that Duke-Ohio should be permitted to recover \$775,010 in materials and supplies and OCC's request for a reduction to the O&M expenses recovered through Rider DR-IKE should be denied.

E. Carrying Costs

OCC's witness Yankel argues that, since it has been 20 months since the 2008 Storm and it was completely within Duke-Ohio's discretion when to request recovery for these costs, the Commission should not allow recovery of accrued interest since September 2008. Moreover, OCC points out that it took Duke-Ohio 11 months to file for recovery of its claimed costs after it was given authorization to do so and, as a result, customers are being asked to pay approximately \$160,000 per month for carrying charges due to the company's delay in filing for recovery. Therefore, OCC recommends that Duke-Ohio only be allowed to collect carrying charges for the three years that costs are deferred, beginning when the Commission issues its order in this case. (OCC Ex. 1A at 43; OCC Br. at 10; OCC Reply Br. at 11.)

Duke-Ohio opposes OCC's assertion that the company should not be allowed to begin accruing carrying charges until recovery is approved in this proceeding. Duke-Ohio believes that the Commission, in its order in the *Duke Electric Rate Case*, expressly and unambiguously accepted Duke-Ohio's proposal to accrue carrying charges on the full deferred amount, citing the Commission's January 14, 2009, Finding and Order, at finding

6. Therefore, Duke-Ohio requests recovery of carrying charges at 6.45 percent from January 2009, until such time as recovery is complete. (Duke Br. at 25-26.)

In our January 14, 2009, Finding and Order in the *Duke Electric Rate Case*, the Commission considered and approved Duke-Ohio's request for authority to modify its accounting procedures to defer the O&M expenses associated with the 2008 Storm, along with carrying charges; however, we found that the determination of the reasonableness of the deferred amounts and the recovery thereof would be examined and addressed in a future proceeding. In the instant case, the Commission is now considering the reasonableness of the company's request for recovery of the deferred amounts, with carrying charges, and it is in this order that we will determine what expenses and carrying charges may be recovered. Upon consideration of the record in this case, the Commission concludes that it is reasonable to allow Duke-Ohio to recover the 2008 Storm expenses, as modified by this order, as well as the associated carrying charges beginning on January 14, 2009, which is the date that the Commission authorized Duke-Ohio to defer the expenses.

F. Depreciation

OCC points out that Duke-Ohio failed to recognize that all of the assets that were replaced needed to be fully depreciated. According to OCC, although the new assets must be added to rate base, Duke-Ohio should also subtract from rate base any of the depreciation remaining on the assets that were removed. OCC submits that Duke-Ohio has not demonstrated that its failure to address depreciation of replaced assets was just and reasonable. (OCC 10 at 9.)

In response, Duke-Ohio's witness Wathen points out that the company follows composite depreciation accounting, which has historically been used and approved by the Commission in past rate cases. The witness explains that the composite method of accounting does not recognize losses on assets retired prior to their estimated life; the result being that, over the entire life cycle, the portion of costs not recouped prior to average life is balanced by the cost recouped subsequent to average life. Therefore, Mr. Wathen asserts that, if the depreciation remaining on assets removed is subtracted from rate base, it would be inconsistent with composite depreciation accounting. Mr. Wathen also notes that the Commission approves depreciation rates from periodic depreciation studies conducted by the company, which analyze components of the business, including the over and under impacts of retirements in the development of depreciation rates. (Duke Ex. 6 at 7.)

The Commission finds that it is acceptable for Duke-Ohio to follow the composite depreciation method of accounting. Therefore, we conclude that OCC's request on this issue is without merit and should be denied.

G. Rate Design

According to Mr. Wathen, in order to minimize ratepayer impact while allowing the company to have a reasonable recovery period, Duke-Ohio proposes to recover the costs over a three-year period and implement the rate on a per bill basis using the cost-of-service study from the *Duke Electric Rate Case* to allocate the costs among the rate classes. Mr. Wathen contends that, because the costs are distribution related, transmission service (TS) customers should be excluded from the calculation and a standard distribution allocation factor to allocate to the various customer classes should be used. Therefore, the witness proposes that the allocation factor be based on the class system peak, i.e., the average of the 12-monthly peaks. According to Duke-Ohio's witness Wathen, this allocation approach was used to allocate distribution O&M expenses in Duke-Ohio's last distribution cost-of-service study in the *Duke Electric Rate Case* and no party in that case objected to the allocation factors. Mr. Wathen states that this methodology will produce an annualized revenue requirement for each rate class that can be used to calculate the Rider DR-IKE rates. (Duke Ex. 5 at 7-9.) According to the witness, compared to the total bill, the impact of Rider DR-IKE for all customers will be less than one percent (Duke Ex. 6 at 5).

Mr. Wathen believes that, because the charge will be on a per-bill basis and the customer count is fairly predictable, it is unlikely that there will be any significant over- or under-collection during the three-year period; therefore, he states that Duke-Ohio is not proposing a true-up. However, Mr. Wathen notes that Duke-Ohio plans to file a letter in this docket at the end of the three-year period detailing the monthly balances of the regulatory asset, which shows the amortization of the asset, the accruals generated by applying the carrying cost rate, and the ending monthly balances. (Duke Ex. 5 at 10.) Staff recommends that Duke-Ohio provide Staff with the yearly balance and activity on the regulatory asset, by April 30 of each year, so that Staff can monitor the balance in the event the rate would need to be adjusted (Staff Ex. 2 at 3). In response to Staff's comments, Duke-Ohio witness Wathen states that the company will provide Staff with the requested annual reports. In addition, the company is willing to true-up Rider DR-IKE at the end of the three-year period, if the Commission deems the balance of any over or under-recovery to be material. (Duke Ex. 6 at 3.)

Kroger comments that, while it does not object to Duke-Ohio recovering reasonable costs associated with the wind storm to the extent that the costs are allocated among classes using a customer allocator, Duke-Ohio's application does not properly align the design of the cost recovery mechanism with the underlying cost allocation. Kroger asserts that Duke-Ohio's proposed rate design fails to adhere to the standard principle that rate design should reflect cost causation. Kroger explains that Duke-Ohio proposes to allocate the storm costs to the customer classes based solely on class coincident peak demand and to recover the costs through a fixed monthly customer charge. Kroger believes that, while

it is appropriate to recover fixed customer costs through a fixed monthly charge, it is not appropriate to recover demand-related costs in such a manner. Kroger argues that the result of assigning costs to customer classes based on class peak demand, and then recovering the costs from customers as if they were fixed customer costs, produces a distorted and unreasonable rate impact on customers. Kroger advocates that, if the Commission finds it reasonable for costs to be assigned to customer classes based solely on class peak demand, then the costs assigned to demand-billed classes should be recovered exclusively through a demand charge and not through a monthly fixed customer charge. Kroger offers that the methodology should be based on an appropriate combination of customer and demand-related costs, consistent with the National Association of Regulatory Utility Commissioner Electric Utility Cost Allocation Manual. (Kroger Ex. 2 at 1-4, 6.) Kroger's witness Higgins submits that recovery of allowed storm damage costs from Service at Secondary Distribution Voltage (DS) and Service at Primary Distribution Voltage (DP) customers is best accomplished through a uniform demand charge levied on these two rate schedules. Upon review of Duke-Ohio's modification to its rate design to provide for such a demand charge, Mr. Higgins states that the revised Rider DR-IKE rate design appropriately incorporates such a rate design for the DP class and the DS class customers. (Kroger Ex. 1 at 3.)

Upon consideration of Kroger's comments, Duke-Ohio's witness Wathen advises that the company will modify its request with regard to the per bill customer charge. Therefore, for those customers taking service under tariffs that charge based on demand, Rider DR-IKE will be on a per kW basis. Mr. Wathen explains that this change has no impact on the relative allocation between customer classes, but it will slightly shift the impact of Rider DR-IKE among customers within those affected rate classes. (Duke Ex. 6 at 4.)

As revised by Duke-Ohio, the rate design for Rider DR-IKE provides for a uniform demand charge for DS and DP customers and a class-specific customer charge for all other classes. Upon consideration of the proposed rate design for Rider DR-IKE, as revised, the Commission finds that it is reasonable and should be approved.

CONCLUSION:

The Commission notes that, pursuant to the stipulation approved in the *Duke Electric Rate Case*, Duke-Ohio bears the burden of proving that the costs associated with the 2008 Storm were prudently incurred and reasonable. In the present case, we find that Duke has not met its burden with respect to all of the costs for which it is requesting recovery. For example, when considering the evidence presented by Duke regarding supplemental compensation, the Commission notes that overtime for salaried employees was not a general practice and was within the company's discretion; therefore, we have determined that it was an inappropriate expense for recovery. With respect to the

expenses incurred for contractor labor, we find that OCC demonstrated the presence of some unexplained discrepancies in the documentation provided by Duke, which called into question whether the costs Duke sought to recover for contractor expenses were prudent and reasonable. Duke requested recovery of \$28,473,244 through Rider DR-IKE. With the reductions in this order of \$14,368,667 for labor expense, the Commission has determined that, based on the record in this case, the total amount that Duke-Ohio should be authorized to recover through Rider DR-IKE is \$14,104,577, plus carrying charges on that amount beginning on January 14, 2009, at the rate of 6.45 percent. Furthermore, we find that the proposed rate design for Rider DR-IKE, as revised, which provides for a uniform demand charge for DS and DP customers and a class-specific customer charge for all other classes is reasonable and should be approved. Accordingly, the Commission finds that Duke-Ohio should work with Staff to revise its tariffs consistent with this order and then may file such revised tariffs to implement the new Rider DR-IKE in this docket. As a final matter, the Commission directs Duke-Ohio to provide Staff with the yearly balance and activity on the regulatory asset, by April 30 of each year. Duke-Ohio should work with Staff at the end of the three-year period to determine if there is a need to true-up Rider DR-IKE in order to account for any material over or under-recovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Duke-Ohio is an electric light company, as defined in Section 4905.03(A)(3), Revised Code, and a public utility under Section 4905.02, Revised Code.
- (2) On December 11, 2009, Duke-Ohio filed its application in this case.
- (3) By entries issued February 9, 2010, and April 14, 2010, OCC and Kroger were granted intervention. At the June 7, 2010, hearing, Duke-Indiana was granted intervention.
- (4) Comments on the application in this case were filed by Staff, OCC, and Kroger on February 23, 2010. On March 25, 2010, Duke-Ohio filed a statement regarding the disputed issues.
- (5) The hearing in this matter was held on May 25 and 26, 2010, and June 7, 2010.
- (6) Duke-Ohio, Staff, and OCC filed briefs on June 15, 2010, and Duke-Ohio and OCC filed reply briefs on June 21, 2010.
- (7) Duke-Ohio's application to adjust its Rider DR-IKE charge is reasonable and should be approved, with the following modifications as further delineated in this order: the recovery

amount shall be reduced by \$14,368,667 for labor expenses. The total amount that Duke-Ohio shall be authorized to recover through Rider DR-IKE is \$14,104,577, plus carrying charges on that amount beginning on January 14, 2009, at the rate of 6.45 percent. Duke-Ohio shall provide Staff with the yearly balance and activity on the regulatory asset, by April 30 of each year. Duke-Ohio should work with Staff at the end of the three-year period to determine if there is a need to true-up Rider DR-IKE in order to account for any material over or under-recovery.

- (3) Duke-Ohio should work with Staff to revise its tariffs consistent with this order and then may file such revised tariffs to implement the new Rider DR-IKE rate in this docket.

ORDER:

It is, therefore,

ORDERED, That, with the modifications set forth in this order, Duke-Ohio's application to adjust its Rider DR-IKE is reasonable and should be approved. It is, further,

ORDERED, That Duke-Ohio take all necessary steps to carry out the terms of this order. It is, further,

ORDERED, That Duke-Ohio be authorized to file in final form four complete copies of the tariff pages consistent with this opinion and order and to cancel and withdraw its superseded tariff pages. Duke-Ohio shall file one copy in its TRF docket (or may make such filing electronically as directed in Case No. 06-900-AU-WVR) and one copy in this case docket. The remaining two copies shall be designated for distribution to the Rates and Tariffs, Energy and Water Division of the Commission's Utilities Department. It is, further,

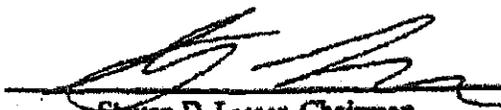
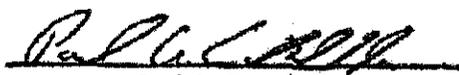
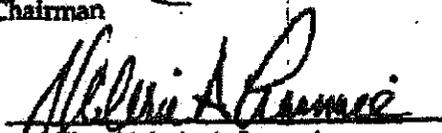
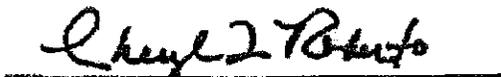
ORDERED, That the new rates for the Rider DR-IKE charge shall be effective on a date not earlier than the date upon which four complete, printed copies of the final tariff page is filed with the Commission. It is, further,

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

ORDERED, That 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,

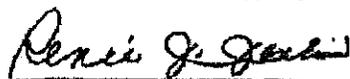
ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Steven D. Lesser, Chairman
Paul A. Centolella
Valerie A. Lemmie
Cheryl L. Roberto

CMTP/KLS/vrm

Entered in the Journal
JAN 11 2011



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. to Establish and Adjust) Case No. 09-1946-EL-RDR
the Initial Level of its Distribution)
Reliability Rider.)

ENTRY ON REHEARING

The Commission finds:

- (1) Duke Energy Ohio, Inc. (Duke-Ohio) is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.
- (2) By opinion and order issued July 8, 2009, in *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates*, Case No. 08-709-EL-AIR, et al., (*Duke Electric Rate Case*), the Commission approved a stipulation submitted by Duke-Ohio and other parties in that case. The stipulation, as approved, established the Distribution Reliability Rider (Rider DR-IKE) as a mechanism to recover reasonable and prudently incurred storm restoration costs associated with the September 2008 wind storm related to Hurricane Ike (2008 Storm). The stipulation further provided that Rider DR-IKE was to be set at zero, but authorized Duke-Ohio to file a separate application to establish the initial level of Rider DR-IKE. A process for the review of Duke-Ohio's application to adjust Rider DR-IKE was also established in the stipulation.
- (3) On December 11, 2009, Duke-Ohio filed the instant application to adjust Rider DR-IKE to allow recovery of the company's 2008 Storm restoration costs.
- (4) By opinion and order issued in the instant case on January 11, 2011, the Commission concluded that, pursuant to the stipulation approved in the *Duke Electric Rate Case*, Duke-Ohio bears the burden of proving that the costs associated with the 2008 Storm were prudently incurred and reasonable. Upon review of the record, the Commission found that Duke-Ohio did not meet its burden with respect to all of the costs for which it is requesting recovery. Duke-Ohio requested recovery of \$28,473,244 through Rider DR-IKE. With the reductions of

\$14,368,667 for labor expense, the Commission determined that, based on the record in this case, the total amount that Duke-Ohio should be authorized to recover through Rider DR-IKE is \$14,104,577, plus carrying charges on that amount beginning on January 14, 2009, at the rate of 6.45 percent.

- (5) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in the proceeding by filing an application within 30 days after the entry of the order upon the journal of the Commission.
- (6) On February 10, 2011, Duke-Ohio and the Ohio Consumers' Counsel (OCC) filed applications for rehearing of the Commission's January 11, 2011, order. Duke-Ohio and OCC filed memoranda contra each others' applications for rehearing on February 22, 2011. Duke-Ohio and OCC each set forth five assignments of error.

Internal Labor Expenses and Supplemental Compensation

- (7) In the January 11, 2011, order, with regard to supplemental compensation, the Commission determined that, based on the record in this case, overtime for salaried employees was not a general practice and was within the company's discretion; therefore, it was not found to be an appropriate expense for recovery through Rider DR-IKE. Accordingly, the Commission concluded that the recovery amount requested by Duke-Ohio should be reduced by \$3,279,446, which consists of: \$855,796 of supplemental compensation to salaried employees; \$371,196 that was paid on an hourly basis to salaried employees; \$939,863 associated labor loader costs; and \$1,112,591 associated with and supervision costs. (Order at 11-13.)
- (8) In its first assignment of error, Duke-Ohio states that the Commission erred by precluding recovery of supplemental compensation for salaried employees, as such compensation was a necessary and prudently incurred expense that reasonably enabled prompt restoration of electric services following the storm. Duke-Ohio points out that only certain salaried employees received additional compensation, noting that an award of additional pay is not automatic and such pay

is only awarded after a threshold of hours are worked and supervisor approval is obtained.

- (9) In response to Duke-Ohio's first assignment of error, OCC states that utilities are permitted to recover nondiscretionary nonrecurring costs on an annual basis and are not permitted to recover discretionary, nonrecurring costs, such as supplemental compensation. Further, OCC argues that Duke-Ohio's claim that supplemental compensation costs were necessary to assist in restoration was not supported by the record.
- (10) The Commission thoroughly reviewed the record on this issue, which reflected that awarding salaried employees supplemental compensation was within the total discretion of the company. Duke failed to show a reasonable basis on which the supplemental compensation was determined. Therefore, as stated in our order, based upon the specific facts and circumstances in this case, Duke-Ohio did not show that it is appropriate and reasonable to recover the requested amount of discretionary supplemental pay awarded salaried employees through Rider DR-IKE. Duke-Ohio has raised nothing new on rehearing that was not previously considered by the Commission in its order; therefore, Duke-Ohio's first assignment of error is without merit and should be denied.
- (11) In its second assignment of error, Duke-Ohio asserts that the Commission unreasonably ordered a reduction of \$371,196 in the supplemental compensation based on the erroneous conclusion that this amount reflects additional sums paid to salaried employees. Instead, Duke states that this amount simply reflects a summary of time recorded for storm restoration efforts in Ohio and the costs associated with this time. Therefore, Duke explains that the \$371,196 is a compilation of hours that salaried employees, who are not paid hourly wages, worked on storm restoration efforts, while not performing their usual duties. Furthermore, Duke-Ohio claims that it already reduced the total regular time charged to the 2008 Storm by salaried employees by \$41,267, in accordance with the detailed audit conducted by Staff.
- (12) OCC responds to Duke-Ohio's second assignment of error stating that Duke-Ohio did not substantiate, on the record, that the \$41,267 removed by Staff was included in the \$371,196.

Therefore, OCC argues that Duke-Ohio did not meet its burden of proof on this issue.

- (13) The Commission's order is based on the evidence on the record in this matter. Initially, the Commission notes that, while Duke-Ohio repeatedly, throughout its application for rehearing, relies on what Duke-Ohio describes as a "detailed" Staff audit of the costs in this case, by Staff's own admission, Staff sampled only a couple hundred items out of more than 8,000 lines of data and Staff could not put a percentage on the number of items that it randomly sampled. Moreover, Staff admitted that there is a possibility of other undiscovered discrepancies. (Order at 11.) As Duke-Ohio concedes, in accordance with Staff's audit finding, Duke-Ohio reduced the 2008 Storm costs by \$41,267, to reflect the regular time charged by salaried employees to the 2008 Storm costs. Since Duke-Ohio acknowledges that there should be a reduction for the partial audit conducted by Staff, it stands to reason that the record supports additional reductions associated with remainder of the costs not audited. While Duke-Ohio asserts that the \$371,196 includes the \$41,267 already deducted, there is no evidence on the record to substantiate the company's claim; rather, the record reflects a necessary additional reduction of \$371,196, for time paid to salaried employees, whose salaries are already recovered in Duke's base rates, and Duke-Ohio fails to point to any evidence that would indicate that this amount includes the \$41,267 Staff reduction. Therefore, the Commission finds that Duke-Ohio's second assignment of error is without merit and should be denied.
- (14) In its third assignment of error, Duke-Ohio contends that the Commission unreasonably ordered a reduction of \$2,052,454 for labor loaders and supervision costs associated with the supplemental compensation and regular pay to salaried employees. Pointing to its first two assignments of error, Duke-Ohio asserts that, just as the underlying direct costs for supplemental compensation and regular pay to salaried employees should not be disallowed, the additional fringe benefits associated with those costs should not be disallowed. Duke-Ohio argues that the reductions for labor loaders recommended by OCC, and adopted by the Commission in its decision in this case, were speculative and not supported by the evidence in this case.

- (15) Contrary to Duke-Ohio's assertion in its third assignment of error, OCC maintains that the evidence OCC presented in this case took into consideration the reductions made by Duke-Ohio in response to Staff's audit and was not speculative. OCC points out that Duke-Ohio had an opportunity to contest OCC's calculation of labor loaders and supervisory costs at the hearing in this case but did not. Therefore, OCC argues that Duke-Ohio's allegations on rehearing are an inappropriate attempt to insert evidence that is not in the record.
- (16) As with our findings regarding Duke-Ohio's first two assignments of error, the Commission agrees that there is not sufficient evidence of record to support Duke-Ohio's position on rehearing. Moreover, Duke-Ohio has raised no issue that would lead the Commission to believe that our determination to reduce the overall costs recoverable under Rider DR-IKE was not supported by the record before us in this proceeding. Accordingly, Duke-Ohio's third assignment of error is without merit and should be denied.

Affiliate Labor Expenses

- (17) In the January 11, 2011, order, the Commission found that Duke-Ohio did not rebut the evidence on the record, that called to question \$1,371,657 relating to compensation paid by Duke-Kentucky and Duke-Indiana to Duke-Ohio. Therefore, the Commission concluded that the costs requested for recovery under Rider DR-IKE were reduced by this amount. (Order at 13-14.)
- (18) In its fourth assignment of error, Duke-Ohio maintains that the Commission erred in reducing its request by \$1,371,657, which is an amount equal to the costs charged by Duke-Ohio to affiliates for storm restoration services provided by Duke-Ohio to employees. Duke-Ohio states that such determination is unjust, unreasonable, and against the manifest weight of the evidence. According to Duke-Ohio, affiliate labor was appropriately charged to the companies for whom services were provided, pursuant to affiliate transaction agreements, and there is no regulation in Ohio that requires actual dollars to be credited to one utility when it performs work for an affiliate.

- (19) OCC responds to Duke-Ohio's fourth assignment of error, stating that the Commission lawfully and reasonably adopted the estimate provided by OCC for the reduction of affiliate labor compensation. OCC submits that Duke-Ohio's claims regarding the contribution of labor between the affiliates is suspect because Duke-Ohio stated that it did not contribute labor to Kentucky, however, the record reflects that it did. In addition, OCC notes that, while Duke-Ohio argues that this is the appropriate case to allow it to collect from Ohio customers the costs it incurred for the work of out-of-state affiliate employees, Duke-Ohio believes that this is not the appropriate case in which to credit customers if it received revenues from its affiliates in relation to the same storm.
- (20) Contrary to Duke-Ohio's assertions, our determination in this case in no way affects the company's affiliate transaction agreements or how the affiliates credit each other for work performed. Rather, the Commission's review in this case specifically addresses the question of whether the costs Duke-Ohio has submitted for recovery under Rider DR-IKE were appropriately incurred and substantiated on the record in this case. The decision in this case is based solely on the record. Substantial questions were raised on the record regarding Duke-Ohio's recovery of costs related to compensation paid to Duke-Ohio by affiliates in other states. The record in this case is essentially devoid of any evidence rebutting the conclusion that the affiliate-related costs should be reduced by the amount paid by Duke-Kentucky and Duke-Indiana to Duke-Ohio. The Commission's disallowance of this amount is reasonable and supported by the record, and, therefore, Duke-Ohio's fourth assignment of error should be denied.

Contractor Labor Expenses

- (21) In the January 11, 2011, order, the Commission addressed Duke-Ohio's request to recover \$13,202,611 for contractor services through Rider DR-IKE. We found OCC's proposal that the contractor expenses be reduced by \$2,748,442 to \$10,455,169, in order to take into account those invoices that reference a Duke-Ohio affiliate as the responsible party, to be reasonable. In addition, we found that there is sufficient evidence on the record to suggest that, at most, Duke-Ohio may reasonably only recover one-third of the remaining \$10,455,169

and the other two-thirds should be allocated to the states of Indiana and Kentucky. Therefore, the Commission reduced the remaining \$10,455,169 by two-thirds, or \$6,970,112, in order to account for other charges for which there is no evidentiary support in the record for recovery. The Commission concluded that Duke-Ohio's request for recovery of \$13,202,611 for contractor services should be reduced by \$9,717,564, such that Duke-Ohio should be permitted to recover \$3,485,047 for contractor services. (Order at 14-17.)

- (22) In its fifth assignment of error, Duke-Ohio argues that the Commission's finding that Duke-Ohio cannot recover \$9,717,564 of the costs associated with contractor labor is unjust, unreasonable, and against the manifest weight of the evidence. In support of its contention, Duke-Ohio points out that it agreed to reduce its contract labor costs by \$46,888 in accordance with Staff's audit recommendation; however, contrary to Staff's proposal, the Commission further reduced its contractor labor.
- (23) Duke-Ohio states that, with regard to the invoices included in the initial reduction of \$2,748,442, OCC's assumption that the responsible party (PayCo) indicated on the invoice was an affiliate of Duke-Ohio is erroneous. According to Duke-Ohio, the fact that the company designated on the invoice as the PayCo was either Duke-Indiana or Duke-Kentucky is only meaningful for internal labor and does not lead to the conclusion that contractors were not working in Ohio. Furthermore, Duke-Ohio notes that the \$2,748,442 amount was part of the company's \$3,083,704 costs for tree trimmers; therefore, if this reduction is sustained, Duke-Ohio would only be recovering \$342,414 in tree trimming expenses associated with the 2008 Storm. Therefore, considering the number of outages, Duke-Ohio argues that the PayCo designation on the invoices cannot be used to discount contractor costs.
- (24) In response to Duke-Ohio's argument pertaining to the \$2,748,442 reduction in contractor costs, OCC states that Duke-Ohio failed to sustain its burden of proof on this point. According to OCC, the company is asking the Commission to ignore the evidence of record that lists the PayCo as Duke-Indiana or Duke-Kentucky and find that the invoices and evidence of record were not correct.

- (25) With regard to Duke-Ohio's argument that Staff audited the contractor costs and only recommended a slight reduction, as we stated earlier, Staff only audited a portion of the overall information in this case. Therefore, Duke-Ohio's reliance on Staff's audit findings is not persuasive. Once again, the Commission finds that there is no evidence of record to substantiate Duke-Ohio's assertion in its application for rehearing that the costs reflected on the invoices were incurred in Ohio. There is no question that the PayCo designations listed on the invoices are out-of-state affiliates. Duke-Ohio's assertion that these designations represent something other than the fact that the company named will be paying for the contractor services, is not supported by the record. While it is possible the PayCo designation of contractor costs to a non-Ohio affiliate might indicate something other than its plain meaning, no alternative meaning was presented by Duke-Ohio on the record. The only conclusion that can be reached based on this record is that, if Duke-Indiana or Duke-Kentucky paid the contractor for services rendered, then the services were provided in those states, and Ohio ratepayers should not be paying for those services through Rider DR-IKE. Accordingly, this issue set forth in Duke-Ohio's fifth assignment of error is without merit and should be denied.
- (26) Turning to Duke's argument regarding the additional reduction to contractor labor costs of \$6,970,112, Duke-Ohio submits that the reasons offered by OCC and accepted by the Commission must be considered with reference to the protocol used by Duke-Ohio for purposes of charging labor, materials and supplies, and logistics. According to Duke-Ohio, the storm codes were created at the beginning of the restoration activities, these codes were state-specific, and the contractors working in Ohio would have used the Ohio charge code. Duke-Ohio asserts that there is no evidence to refute that the storm codes were consistently used by contractors. Duke-Ohio claims OCC's arguments, which were accepted by the Commission, that the summary invoices were wrong because of entries on time sheets are misplaced. Moreover, Duke-Ohio contends that the determination of cost recovery cannot be made on a generic ratio, which allocates only one-third of the costs to Ohio. Duke-Ohio maintains that the record reflects that 61 percent of the storm damage was in Ohio, which equates to 58 percent of the restoration costs for all three states, Ohio, Indiana, and

Kentucky. The company believes that the Commission unreasonably and arbitrarily shifted expenses incurred for the benefit of Ohio customers to other states.

- (27) OCC responds to Duke-Ohio's argument regarding the \$6,970,112 reduction in contractor costs, stating that Duke-Ohio is asking the Commission to believe that even: if the invoices were sent to a non-Ohio affiliate, they were intended for Duke-Ohio; if the invoices contained project codes referencing another state, they were intended for Duke-Ohio; if the location of the work on the invoices is listed as having been done in another state, they were intended for Duke-Ohio; and if the living expenses of the employees were incurred outside of Ohio, they were related to work in Ohio. Furthermore, OCC notes that Section 4903.09, Revised Code, requires that the Commission to have adequate records to support its findings of fact and Duke-Ohio has not provided the Commission with a record in this case to support Duke-Ohio's assertions.
- (28) As the Commission acknowledged in the order, it is clear from the record that there are discrepancies in the documentation for contractor expenses and that there are expenses which should have been billed to affiliates in other states and not billed to Duke-Ohio. Moreover, we noted our understanding that these disparities may have occurred due to the emergency nature of the 2008 Storm; the Storm did not relieve Duke-Ohio of the responsibility to maintain a reasonable system to account for storm related costs or to demonstrate that the amounts it is seeking to recover through Rider DR-IKE are reasonable. We highly value the efforts of contractor and utility personnel to promptly restore service to consumers after such an event. However, the Commission must review the record as presented in this case, and, upon review of the record, it is apparent that that Duke-Ohio failed to prove that the total amount of contractor labor costs it is requesting under Rider DR-IKE is reasonable. Having made this determination, we acknowledged that the record did reflect that Duke-Ohio hired third-party contractors to assist with restoration efforts resulting from the 2008 Storm, and, therefore, Duke-Ohio should be permitted to recover appropriate contractor costs. However, Duke-Ohio failed to substantiate what those actual costs were and it is impossible to determine from the record the actual dollar amount of the costs incurred. Therefore, we were

left with either disallowing all contractor costs or decreasing the requested contractor costs based upon the record of evidence. We decided it was appropriate to use the record evidence before us and make a downward adjustment to the contractor expenses to account for the discrepancies. In its fifth assignment of error, Duke-Ohio wants the Commission to assume information that is not present in the record before us. All we can do is review the information and facts as they are presented on the record. On rehearing, Duke-Ohio seeks recovery of 58 percent of the contractor costs. Initially, the Commission notes that the record reflects that the 58 percent referenced by Duke-Ohio was in relation to the operations and maintenance (O&M) costs incurred by Duke-Ohio and not the contractor costs. Duke-Ohio has pointed to no evidence on the record that would indicate that the percentage of O&M costs related to the 2008 Storm is comparable to the percentage of contractor costs related to the 2008 Storm. Therefore, the record does not support Duke-Ohio's assertion that 58 percent is an appropriate proxy for the contractor costs that were incurred in Ohio. Accordingly, there is no way to compute the actual percentage of costs attributable to Duke-Ohio versus its affiliates in Indiana and Kentucky. The bottom line is that the evidence presented on the record reflected numerous discrepancies in Duke-Ohio's documentation of contractor expenses and Duke-Ohio did not sustain its burden to proof with regard to the contractor costs attributed to Ohio. Duke-Ohio has put the Commission in a difficult position, as it did not present evidence on the record supporting its contentions. Thus, the Commission is left with the 33 percent figure. Accordingly, the Commission concludes that Duke-Ohio's fifth assignment of error is without merit and should be denied, in its entirety.

OCC's Assignments of Error

- (29) In its first assignment of error, OCC offers that, under Section 4909.152, Revised Code, Duke-Ohio should have been denied recovery of all costs in this case because Duke-Ohio's customers suffered greater damages during the outages due to their loss of service than Duke-Ohio did in restoring service. Furthermore, OCC notes that a utility does not necessarily recover costs that it incurs in maintaining service during an emergency.

- (30) In response to OCC's first assignment of error, Duke-Ohio states that the Commission properly found that the company's recovery of restoration costs for the 2008 Storm was not influenced by whether Duke-Ohio customers incurred damages as a result of the storm. Duke-Ohio notes that Section 4909.152, Revised Code, is a discretionary statute that provides that the Commission "may" consider facilities and service provided by the utility when fixing rates, noting that the Commission may also consider the value of the service provided. Moreover, Duke-Ohio contends that OCC's argument against the recovery of any costs for the 2008 Storm reflects OCC's continued disregard for its agreement with the stipulation in the *Duke Electric Rate Case*, which created Rider DR-IKE.
- (31) It is disingenuous of OCC to agree to the creation of Rider DR-IKE to recover reasonable and prudently incurred costs for restoration after the 2008 Storm, thus, acknowledging that there were costs incurred, and now assert that 100 percent of the costs should be forgone by Duke-Ohio. The Commission has thoroughly reviewed the record and determined the appropriate costs for recovery. OCC's first assignment of error is without merit and should be denied.
- (32) In its second assignment of error, OCC asserts that Duke-Ohio should not be permitted to recover any costs for restoration because Duke-Indiana did not ask its customers in Indiana to pay for the storm restoration costs in Indiana.
- (33) Duke responds to OCC's second assignment of error, stating that the Commission properly found that Duke-Ohio's recovery of storm restoration costs is not contingent on the business decision of utilities beyond the Commission's jurisdiction.
- (34) OCC raises nothing in its second assignment of error that warrants reconsideration. Therefore, it is without merit and should be denied.
- (35) In its third assignment of error, OCC submits that, under Section 4909.15(D)(2), Revised Code, Duke-Ohio should not be permitted to recover any costs for restoration because it is

already recovering storm restoration costs from customers through base rates.

- (36) In response to OCC's third assignment of error, Duke-Ohio submits that the Commission properly found that Duke-Ohio is not already recovering the costs related to the 2008 Storm in its base rates.
- (37) As alluded to previously, the Commission approved the creation of Rider DR-IKE in the *Duke Electric Rate Case* as a mechanism through which Duke could request recovery of costs associated with the 2008 Storm. Again, OCC agreed to the creation of this mechanism and process by agreeing to the stipulation in that case. To now assert that Rider DR-IKE is superfluous, because such costs are covered in base rates, is disconcerting, given that OCC agreed to the mechanism in the very case wherein the Commission was considering Duke-Ohio's base rates. OCC's third assignment of error is unfounded and should be denied.
- (38) In its fourth assignment of error, OCC contends that Duke-Ohio should not be allowed to recover any costs it incurred for storm restoration, because its documentation was unreliable and haphazard and did not provide the necessary facts on the record to justify cost collection under Section 4903.09, Revised Code.
- (39) With regard to OCC's fourth assignment of error, Duke-Ohio maintains that the documents it offered into evidence provide a proper foundation for its cost recovery.
- (40) We have already thoroughly addressed the discrepancies in the record and the fact that Duke-Ohio did not sustain its burden of proof to recover all of the costs it is requesting in this docket. However, it is unquestioned that Duke-Ohio did, in fact, incur costs related to restoration efforts after the 2008 Storm. Therefore, we conclude that OCC's fourth assignment of error is without merit and should be denied.
- (41) In its fifth assignment of error, OCC asserts that the Commission erred by not ordering Duke-Ohio to conduct a study of the company's procedures and reactions to the 2008 Storm based on the number of outages that occurred and Duke-

Ohio's failure to recognize the extent of damage until the day after the storm occurred.

- (42) Duke-Ohio, in response the OCC's fifth assignment of error, asserts that the Commission did not err in concluding that the company's storm response procedures were appropriate and not in need of further evaluation.
- (43) As the Commission noted in the order, in accordance with Rule 4901:1-10-08, Ohio Administrative Code, Duke-Ohio maintains an emergency plan which sets forth procedures the company must follow in situations such as the 2008 Storm. With regard to Duke-Ohio's response to the 2008 Storm, there is nothing in the record, other than unsupported statements made by OCC, which would warrant further inquiry into Duke-Ohio's implementation of its emergency plan. The Commission finds OCC's request for reconsideration of our decision on this issue is unfounded, and, therefore, OCC's fifth assignment of error should be denied.

Tariff Clarification/Request for Stay

- (44) As a final matter, Duke-Ohio notes that the Commission's January 11, 2011, order directed Duke-Ohio to file tariffs consistent with the order. Duke-Ohio states that, since it is filing for rehearing, it will not file its tariffs, if doing so would render its application for rehearing or any subsequent appeals moot. Therefore, Duke-Ohio asks that the Commission determine herein that Duke-Ohio's filing of implementation tariffs reflecting recovery of \$14,104,577 in storm costs, plus carrying charges, will not prejudice Duke-Ohio's interests in the review process with regard to the amounts not authorized by the Commission for recovery. In the alternative, Duke-Ohio requests a stay of the Commission's directive that Duke-Ohio file tariff pages and initiate new rates for Rider DR-IKE, until such time as the review and appeal process has been exhausted.
- (45) OCC opposes Duke-Ohio's request for a stay stating that the company has not addressed: whether, on appeal, it would prevail on the merits; whether the company would suffer irreparable harm absent the stay; whether the stay would cause

substantial harm to other parties; and how the public interest would be affected by a stay.

(46) The Commission finds that Duke-Ohio should file its tariffs as directed in the January 11, 2011, order. As in any case before the Commission, Duke-Ohio has all rights afforded to applicants pursuant to the Ohio Revised Code. Accordingly, Duke-Ohio's motion for stay should be denied.

It is, therefore,

ORDERED, That the applications for rehearing filed by Duke-Ohio and OCC be denied. It is, further,

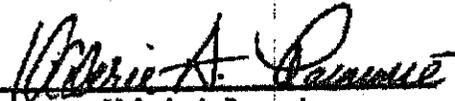
ORDERED, That Duke's motion for stay be denied. It is, further,

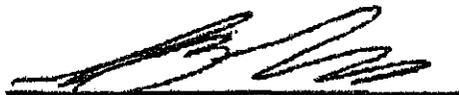
ORDERED, That a copy of this entry on rehearing be served upon all interested parties of record.

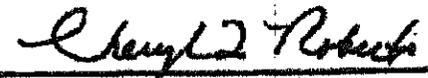
THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Sritchler, Chairman


Paul A. Centofella

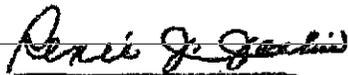

Valerie A. Lennie


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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Report of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider.)	Case No. 09-1946-EL-RDR
)	
)	
)	

**DUKE ENERGY OHIO, INC.'S APPLICATION FOR REHEARING
AND REQUEST FOR CLARIFICATION OR,
ALTERNATIVELY, REQUEST FOR STAY**

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35 of the Ohio Administrative Code (O.A.C.), Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) applies for rehearing of the Opinion and Order (Order) of the Public Utilities Commission of Ohio (Commission) issued in the above-captioned proceeding on January 11, 2011.

There is no dispute that the 2008 wind storm was unprecedented, both in terms of the extent of the physical damage and the widespread nature of the power outages. It is also undisputed that Duke Energy Ohio reacted as expeditiously as possible, with the first priority being to safety, in restoring power to its customers. Indeed, the Commission found that the Company's emergency plan sufficiently detailed the Company's response to this catastrophic event.¹ Thus, the only question central to this proceeding is whether the costs incurred by Duke Energy Ohio in connection with its prompt and diligent response are recoverable from customers.

The Commission's Order decided a number of issues related to Duke Energy Ohio's recovery of costs incurred in responding to the unprecedented damage caused by the remnants of Hurricane Ike. In doing so, the Commission rejected the conclusions of its Staff and found that the

¹ In the Matter of the Application of Duke Energy Ohio, Inc., to Establish and Adjust the Initial Level of its Distribution Reliability Rider, Case No. 09-1946-EL-RDR, Opinion and Order, at page 5 (January 11, 2011).

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Company should not be authorized to recover approximately 50 percent of its documented storm restoration costs.

The Commission's Order is unjust and unlawful for the following reasons:

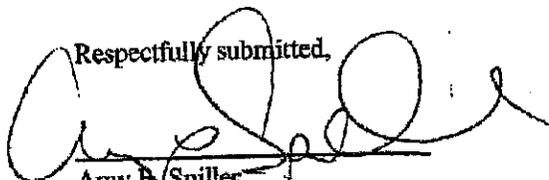
1. The Commission erred in precluding recovery of supplemental compensation for salaried employees as such compensation was a necessary and prudently incurred expense that reasonably enabled prompt restoration of electric services following the storm.
2. The Commission unreasonably ordered a reduction of \$371,196, based on the erroneous conclusion that this amount reflects additional sums paid to salaried employees.
3. The Commission unreasonably ordered a reduction of \$2,052,454 for labor loaders and supervision costs allegedly associated with the supplemental compensation and regular pay to salaried employees.
4. The Commission erred in reducing Duke Energy Ohio's request by an amount equal to the costs charged by Duke Energy Ohio to affiliates for storm restoration services provided by Duke Energy Ohio employees and the Commission's determination in this regard is unjust, unreasonable, and against the manifest weight of the evidence.
5. The Commission's finding that Duke Energy cannot recover \$9,717,564 of the costs associated with contractor labor is unjust, unreasonable, and against the manifest weight of the evidence.

In its January 11, 2011, Order, the Commission instructed Duke Energy Ohio to file tariff pages consistent with its findings. Such tariff pages would serve to initiate recovery of the authorized \$14,104,577 in costs, plus carrying charges. As Duke Energy Ohio seeks rehearing – and reconsideration of the amount storm costs that it is authorized to recover – it will not file tariffs if doing so renders moot its application for rehearing or any subsequent appeals. Consequently, Duke Energy Ohio is also seeking a determination from this Commission that its filing of implementation tariffs reflecting recovery of the first \$14,104,577 in storm costs, plus carrying costs, shall not and does not prejudice the Company in the review process with regard to the amounts not authorized by the Commission for recovery. Alternatively, Duke Energy Ohio respectfully requests a stay of the

Commission's directive that it file tariff pages and initiate new rates for Rider DR-IKE consistent therewith until such time as the review and appeal process has been exhausted.

Duke Energy Ohio respectfully requests that the Commission reconsider and modify its Order and, to the extent such modification does not authorize total recovery of \$28,473,244, in addition to carrying costs, further conclude that implementing tariffs to collect the amount authorized for recovery will not have a prejudicial effect, as more fully explained in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

- L. The Commission erred in precluding recovery of supplemental compensation for salaried employees as such compensation was a necessary and prudently incurred expense that reasonably enabled prompt restoration of electric services following the storm.**

This case concerns the Commission's approval of cost recovery related to a September 2008 wind storm resulting from Hurricane Ike. It is undisputed that this wind storm caused widespread and catastrophic damage. It caused the worst electric outage in history of Duke Energy Ohio and its predecessor companies.² Despite the magnitude of the storm, Duke Energy Ohio was able to restore service safely to its customers in an expeditious fashion. Indeed, 40 percent of the Company's customers had their power restored within forty-eight hours of the storm; 70 percent had service restored within four days; and all customers had their service restored within nine days.³ In order to complete all service restorations within this period of time, the Company called upon all available resources – salaried employees, employees of affiliated companies, and third-party contractors. And despite the diligent efforts of these three categories of resources, the Commission has concluded that the Company may recover only about one-half of its documented, and Staff-audited, costs.

Insofar as it concerns salaried employees, the Commission found that it was not reasonable for the Company to recover amounts paid to salaried employees in the form of supplemental compensation. Specifically, the Commission concluded that it was not appropriate to recover such costs through Rider DR-IKE and further intimated that the Company did not demonstrate that recovery of such costs was appropriate or reasonable. But this conclusion cannot be reconciled with evidence and thus merits reconsideration.⁴

² *Id.*, Opinion and Order, at page 5.

³ *Id.*, Opinion and Order, at page 4.

⁴ *Id.*, Opinion and Order, at pages 11-13.

The Office of the Ohio Consumers' Counsel (OCC) argued that it was incumbent upon as many employees as possible to focus on timely restoration of electric service.⁵ And Duke Energy Ohio fulfilled this expectation, in part, by securing the support of salaried employees. As the evidence clearly demonstrates, this internal labor served to expedite the storm restoration efforts.⁶ Indeed, it is undisputed that those individuals most familiar with internal company systems, process, and procedures, Duke Energy Ohio's service territory, and local logistics should and did contribute to the prompt restoration efforts.⁷ Consistent with its supplemental pay policy, Duke Energy Ohio provided only certain of the salaried employees who dedicated their skills to this urgent effort with additional compensation.⁸ There was no automatic award of additional pay; rather, as the uncontroverted evidence confirmed, such pay was awarded only after an employee had met an objective threshold of hours worked and had obtained supervisor approval.⁹

It was appropriate for the Company to pay selected salaried employees this supplemental compensation to recognize their commitment to Ohio customers and the first priority of getting the lights back on. Rejecting this moderate benefit to employees is not warranted in the circumstances giving rise to this proceeding. Furthermore, the conclusion that some reasonable monetary recognition in the face of extreme adversity is not recoverable forces utility companies to consider the more costly alternative of engaging more contract labor, which, as even the OCC admits, would not yield efficient and cost-effective results.

As the evidence in this proceeding confirms, these external contractors would have been paid as much as double time to perform functions such as logistics, material handling, material

⁵ *Id.*, Transcript of Hearing, Volume II, at page 246.

⁶ *Id.*, Transcript of Hearing, Volume II, at pages 243-244.

⁷ *Id.*, Transcript of Hearing, Volume II, at pages 246.

⁸ *Id.*, Transcript of Hearing, Volume III, at pages 359.

⁹ *Id.*, Transcript of Hearing, Volume III, at pages 359.

delivery, and resource coordination.¹⁰ And the OCC admitted that Duke Energy Ohio should not have used contractors to perform these functions.¹¹ Duke Energy Ohio acted reasonably and prudently in avoiding these additional contractor costs and, instead, using the most appropriate resources to aid in the timely restoration of services.

The Commission thus erred in finding that Duke Energy Ohio failed to show that costs for supplemental labor were appropriate and reasonable. Its decision to exclude \$855,796 in such costs is therefore unjust, unlawful, and unsupported by the record.

II. The Commission unreasonably ordered a reduction of \$371,196, based on the erroneous conclusion that this amount reflects additional sums paid to salaried employees.

In the Order, the Commission determined that the Company could not recover \$371,196 in hourly pay to salaried employees, seemingly putting this into the same category as the supplemental compensation discussed above.¹² But the apparent conclusions that there is no distinction between the supplemental compensation and regular pay, and that the latter should not be recoverable, misinterpret the evidence and thus necessarily warrant revision.

Significantly, this hourly pay category does not reflect *additional* compensation paid to salaried employees. Rather, this figure simply reflects a summary of time recorded for storm restoration efforts in Ohio and the costs associated with such time. The figure is merely a compilation of hours that salaried employees, who are not paid hourly wages, specifically directed to the Ohio storm efforts as they were not performing their usual duties. As confirmed by the exhibits offered into evidence by the OCC:

The regular time costs charged to the Ike storm event are where salaried *employees charged their regular time* directly to the storm. The Supplemental compensation [in

¹⁰ *Id.*, Transcript of Hearing, Volume II, at pages 243-244.

¹¹ *Id.*, Transcript of Hearing, Volume II, at pages 243-244.

¹² *Id.*, Opinion and Order, at page 13.

contrast] is payment made to salaried employees for time worked in excess of their normal schedule.¹³

The documents submitted into evidence by the OCC demonstrate that salaried employees were recording their time as related to the Ohio storm activities. The \$371,196 amount is *not* a total of additional amounts paid to salaried employees. Rather, it is only a summary of compensation based on hours charged directly by salaried employees to the Ohio restoration efforts. As the uncontroverted evidence confirms, \$855,796 represents the total of all supplemental pay to salaried employees. The \$371,196 should not have been included with that supplemental pay adjustment in the Commission's determinations.

The Commission's decision with regard to this element of costs is further complicated by the fact that it ignored the reductions previously taken by the Company. As a result of the detailed audit performed by Commission Staff, Duke Energy Ohio reduced the total regular time charged to the storm by salaried employees by \$41,267, an amount reflecting the regular time charged by Duke Energy Ohio employees.¹⁴ Thus, to make another reduction that includes amounts already removed from this proceeding is incorrect. Giving proper consideration to the prior reduction leaves a total of \$329,927 for regular time charged by salaried employees of Duke Energy Ohio's affiliates to the Ohio storm restoration efforts.

The Commission's finding that further reductions for another purported form of supplemental pay reflects a misinterpretation of the undisputed evidence and should be revised. In this regard, Duke Energy Ohio notes that the Commission did not take exception with the *regular* pay paid to salaried employees in respect of their efforts in responding to the wind storm. Thus, Duke Energy Ohio submits that the Commission's Order should be amended to authorize recovery of the \$371,196 in regular pay for salaried employees working on the Ohio storm restoration

¹³ *Id.*, OCC Exhibit 13-B (emphasis added).

¹⁴ *Id.*, Duke Energy Ohio 6, at pages 2-3.

activities. At a minimum, it should be corrected to avoid a second reduction for amounts already removed from the Company's request.

III. The Commission unreasonably ordered a reduction of \$2,052,454 for labor loader and supervision costs allegedly associated with the supplemental compensation and regular pay to salaried employees.

The Order reduced labor loader and supervision costs by \$2,052,454. This amount was the total reduction based on multiple issues, all of which are incorrect and should be modified. Specifically, the Order reduced the recoverable total by (1) \$939,863 for labor loaders on total supplemental compensation and regular pay to salaried employees, and (2) \$1,112,591 for supervision costs.¹⁵ As noted above, the evidence does not support a reduction in supplemental compensation paid to salaried employees. Similarly, the evidence cannot justify a reduction in the regular pay provided to salaried employees. As a general matter, therefore, a reduction in labor loaders and supervision costs for supplemental compensation and regular pay to salaried employees is not supported by the evidence. That is, just as the underlying, direct labor costs should not be disallowed, these additional costs for fringe benefits associated with the direct labor should not be disallowed.

With regard to the payroll costs reviewed by the OCC, it is important to understand both the information available to the OCC and the information on which it relied in calculating its proposed reductions for labor loadings and supervision costs. The importance in this comparison is reflected in the fact that the OCC only relied upon select information for purposes of this recommendation.

Overall costs for regular internal labor include certain loadings, such as fringe benefits, supervision, and transportation costs.¹⁶ The costs for internal labor, as well as all other costs for which Duke Energy Ohio seeks recovery, were reviewed by Staff in the context of a detailed audit.

¹⁵ *Id.*, Opinion and Order, at pages 12-13.

¹⁶ *Id.*, Duke Energy Ohio Exhibit 2, at page 9.

Staff undertook extensive efforts in sampling more than 8,000 lines of data serving to document the costs at issue with the purpose of determining both the accuracy and reasonableness of the charges.¹⁷ As a result of Staff's audit, Duke Energy Ohio reduced its internal labor costs by the amount of \$986,245 for regular labor and fringe benefits.¹⁸ As a further result of Staff's audit, Duke Energy Ohio reduced costs associated with internal labor expense by \$293,768 for supervisory and service company labor.¹⁹ Importantly, these reductions were recommended by Staff because they were already in Duke Energy Ohio's base rates. And Duke Energy Ohio accepted the revisions.²⁰ Further reductions for fringe benefits (e.g., labor loaders) were also taken by the Company. These reductions totaled \$800,461²¹ and are not in dispute.

It is also not disputed that the evidence reflected the specific breakdown, by company, of the amounts related to direct labor, labor loaders, fleet or transportation, and supervision.²² Yet, despite the level of evidentiary detail available to the OCC and the admitted reductions in internal labor costs, the OCC performed an incomplete and thus inaccurate calculation of labor loaders and supervision costs associated with supplemental pay and regular pay for salaried employees. And based upon its inaccurate accounting, it recommended further reductions that the Commission accepted. As discussed below, the OCC's recommendation is speculative and not supported by the evidence; therefore, the Commission's reliance upon that recommendation is misplaced.

The OCC's first mistake in calculating the labor loaders was simply to compare total supplemental pay to *total* labor costs. Specifically, the OCC merely took the total of supplemental pay, divided by total labor, to arrive at what it believed to be the correct percentage to apply to labor

¹⁷ *Id.*, Staff Exhibit 1, at pages 3-4.

¹⁸ *Id.*, Staff Exhibit 1 at pages 3-4 and Staff Exhibit 2, Schedule 1 (recommending \$986,245 reduction in internal labor expenses). See also, Duke Energy Ohio Exhibit 6, at page 3 (Duke Energy Ohio agreed to remove from its request the sum of \$986,245, reflecting regular labor and fringe benefits already in base rates).

¹⁹ *Id.*, Duke Energy Ohio Exhibit 6, at page 3.

²⁰ *Id.*, Staff Exhibit 1, at pages 3-4.

²¹ *Id.*, OCC Exhibit 1-A, at page 21; *Id.*, Duke Energy Ohio Exhibit 6, at page 8.

²² *Id.*, Duke Energy Ohio Exhibit 8-A.

loaders.²³ The OCC then calculated labor loaders on the total supplemental pay as being \$939,863. But the evidence reflects different labor loader percentages for the various affiliates that provided labor in support of the Ohio restoration efforts, and there is no justification for ignoring this specific information in favor of more generic math.

The OCC's math is also problematic in that it does not give consideration to the reductions in labor previously taken by the Company. Specifically, the OCC ignored the \$800,461 in reductions,²⁴ thereby inflating the percentage applicable to labor loaders. If one uses the labor loading rates for each individual pay company and adjusts for the \$800,461 reduction, the correct loading would be \$565,058 rather than \$939,863.

The tables below capture the inaccuracies resulting from the OCC's failure to calculate labor loaders on a company-specific basis and its failure to include prior reductions. The first table is directly from OCC Exhibit 8-A:

	DEGS	DE Carolinas	DE Indiana	DE Kentucky	DE Ohio	Src Company	Total
Direct Labor-Payroll	238	1,230,378	35,919	66,580	3,230,483	1,317,095	5,880,694
Labor loaders-Peoplesoft	87	1,975,885	66,948	117,221	1,779,028	565,381	4,504,551
Loaded labor	325	3,206,263	102,867	183,802	5,009,512	1,882,476	10,385,245
Fleet		147,925	1,320	1,572	242,847	7,555	401,220
Supervision-Peoplesoft					4,673,120		4,673,120
Less transfers to capital					(202,701)		(202,701)
Journal corrections		(10,861)			(128,197)	(76,480)	(215,489)
Grand Total	325	3,343,328	104,188	185,374	9,594,580	1,813,602	15,041,395

Labor loaders can be calculated from OCC Exhibit 8A using the following formula: $\text{Loader} = \text{Labor loaders-Peoplesoft} / \text{Direct Labor-Payroll}$. These loaders are reflected as follows:

²³ *Id.*, OCC Exhibit 1-A, at page 16.
²⁴ *Id.*, OCC Exhibit 1-A, at page 21.

	DEGS	DE Carolinas	DE Indiana	DE Kentucky	DE Ohio	Svc Company
Labor Loaders	36.6%	150.6%	186.4%	176.1%	55.1%	42.9%

An adjustment to Duke Energy Ohio rates can then be made. The original labor and loaders are taken from chart above, as shown in OCC Exhibit 8-A. Removing the fringe rate adjustment from Ohio, based on Duke Energy Ohio Exhibit 6 (Wathen Supplemental Testimony), page 8, line 20, would produce the following fringe rate change:

Pay Company	Labor	Loaders	Orig Rate	Less Adj	Loader Adj	Adj Rate
DEO	3,230,483	1,779,928	55.1%	(800,461)	978,567	30.3%

The re-calculated loadings are shown in the chart below, using the rates for each specific pay company,²⁵ with the rates for Duke Energy Ohio adjusted for the removal of the \$800,461:

Pay Company	Suppl Comp	Rate	Loadings \$'s
DEGS	132	37%	48
DEC	175,411	161%	281,696
DEO	212,562	31%	65,247
DEK	6,365	176%	11,207
DEI	6,824	186%	12,720
SvcCo	454,501	42%	190,589
Total	853,796		561,516

These charts are significant in that they confirm the lack of evidentiary support for the OCC's calculations on which the Commission relied in reducing the Company's request. A reduction of \$939,863 for labor loaders is not supported by the record and this aspect of the Commission's decision should be reviewed.

As noted, the Order also reduces the total recovery by \$1,112,591 for supervision costs associated with supplemental pay and regular pay to salaried employees. This is also in error. First, Duke Energy Ohio does not load supervision costs on supplemental compensation or on

²⁵ *Id.*, OCC Exhibit 13-A, rows 1389 to 1896.

compensation for Duke Energy Corporation entities other than Duke Energy Ohio.²⁶ As such, the Company's request does not include *any* amounts for supervision costs associated with supplemental pay.

Second, the correct, post-audit figure for regular pay to salaried employees (that is, \$329,929)²⁷ does not represent additional monies paid to salaried employees on an hourly basis. Rather, this amount is merely a reflection of the time charged by salaried employees directly to the Ohio storm restoration efforts. To the extent the OCC proposed further reduction for supervision costs on the mistaken assumption that this amount reflected *additional* monies paid to salaried employees, it did so in error. Consequently, it is improper to reduce the request by \$1,112,591.

The OCC's errors in respect of calculating labor loader percentages, determining total labor loaders associated with supplemental pay, and including supervision costs on such pay, all of which have been perpetuated by the Commission's decision, merit reconsideration. Authorized recovery should therefore be increased by \$2,052,454.

IV. The Commission erred in reducing Duke Energy Ohio's request by an amount equal to the costs charged by Duke Energy Ohio to affiliates for storm restoration services provided by Duke Energy Ohio employees and the Commission's determination in this regard is unjust, unreasonable, and against the manifest weight of the evidence.

Despite the evidence of record, which included an audit by Staff confirming recoverability of affiliate labor,²⁸ the Commission has concluded that Duke Energy Ohio must reduce its recovery by \$1,371,657 for issues surrounding affiliate compensation. The Commission seemingly agrees with the OCC that, because Duke Energy Ohio employees provided storm response assistance for utility affiliates, Duke Energy Ohio customers are entitled to a credit commensurate with the labor

²⁶ *Id.*, OCC Exhibit 8-B.

²⁷ See footnote 14, *supra*, the regular pay of Duke Energy Ohio's salaried employees has already been adjusted, consistent with Staff recommendations.

²⁸ *Id.*, Duke Energy Ohio Exhibit 6, at page 3.

charged to affiliates. The Commission's determination is not supported by the evidence of record, reflects a mistake or misapprehension in the review of that evidence, and serves to complicate future storm restoration activities.

The OCC theorizes that Duke Energy Ohio received payments from affiliates that should be "flowed through" to ratepayers. Thus, the Commission concludes, the amounts recoverable under Rider DR-IKE should be reduced by the sum of the payments to Duke Energy Ohio from Duke Energy Indiana and Duke Energy Kentucky for services provided in those jurisdictions by Duke Energy Ohio employees. After reaching this conclusion, the Commission then relied on the OCC's speculation and unsubstantiated ratios to determine an amount by which to reduce Duke Energy Ohio's recovery for its storm restoration efforts. This rationale is flawed both from an affiliate accounting standpoint and because it bases recovery on pure conjecture.

The Commission's reduction ignores the Company's adherence to affiliate transaction agreements approved by the Commission and pursuant to which revenue does not flow from one utility to the other. As explained by Duke Energy Indiana witness Kent Freeman, internal accounting adjustments must be made to charge the expenses for the entity receiving labor from its affiliates. These accounting adjustments are critical to maintaining proper records of which affiliate incurred a given expense. Adherence to this charging mechanism is necessary to ensure that no improper cross-subsidies flow from one company to an affiliate.²⁹ These charges are not addressed by way of money flowing from the receiving entity to its affiliates. Rather, the expenses are addressed – and thus relevant – only in the context of the next rate case for that receiving entity.³⁰ As even the OCC, through its witness, admitted, where work is performed in Kentucky by Duke Energy Ohio employees, the labor associated with this work would be charged to Kentucky. And

²⁹ *Id.*, Transcript of Hearing, Volume III, at pages 411-412.

³⁰ *Id.*, Transcript of Hearing, Volume II, at page 274.

the total expenses for affiliate labor would be a factor in determining the revenue requirement in Duke Energy Kentucky's next rate case.³¹ The converse is also true -- when Duke Energy Ohio's affiliates provide labor in Ohio, the Company is charged for that labor. And this proceeding, authorized in Duke Energy Ohio's most recent rate case, is the means for recovering these additional expenses. The evidence thus confirms that Duke Energy Ohio does not receive actual dollars from its affiliates in return for allowing its employees to assist with the affiliates' emergencies and it should not be expected to flow through to ratepayers the non-existent payment from the affiliates for its employees' labor.

The method by which Duke Energy Ohio accounted for affiliate labor, including that labor charged to Duke Energy Kentucky, is consistent with long-standing practice, as confirmed by an audit of the Company's corporate separation plan.³² Reducing the Company's request to account for expenses allocated to affiliates renders the affiliate transaction agreements a nullity, forces an actual flow of dollars to be exchanged between these affiliates to ensure proper accounting of revenue and labor, and undeniably complicates future storm restoration as Duke Energy Ohio will incur additional time and expense in processing accounts receivable and/or accounts payable. Such unnecessary administrative burden is not conducive to the timely and efficient restoration of electric service. Furthermore, such a reduction unfairly penalizes Duke Energy Ohio as its request for cost recovery in this proceeding never included amounts charged to affiliates for work performed in other states.

For these same reasons, the Commission must reconsider the reduction of \$1,063,785 in alleged costs charged to Duke Energy Indiana. Just as the accounting adjustments to reflect Duke Energy Ohio employees' labor performed in Kentucky cannot serve to reduce the Company's cost

³¹ *Id.*, Transcript of Hearing, Volume II, at pages 272-274.

³² *In the Matter of the Application of Duke Energy Ohio for Approval of the Second Amended Corporate Separation Plan*, Case No. 09-495-EL-UNC, Final Report of Auditor (March 29, 2010).

recovery, accounting adjustments to reflect Duke Energy Ohio employees' labor performed in Indiana cannot have that same effect. More troubling about the Commission's review of Indiana charges is the additional fact that it is certainly the product of speculation and conjecture. Notably, although the OCC subpoenaed records from Duke Energy Indiana in the context of this proceeding, it did not affirmatively present any evidence that would have established that Duke Energy Ohio allocated \$1,063,785 in costs to Duke Energy Indiana. Rather, the OCC simply compared the total charges allocated to Duke Energy Kentucky by Duke Energy Ohio to the overall storm costs in the Commonwealth and guessed that the same ratio was applicable in Indiana such that, according to the OCC's supposition, Duke Energy Ohio must have allocated \$1,063,785 in labor expense to Duke Energy Indiana. But this methodology is erroneous, is not supported by the evidence, and merits another review.

Notably, the OCC – and now the Commission, by accepting this methodology – overlooked the evidence that identifies \$3,385 as the actual amount charged to Duke Energy Indiana by Duke Energy Ohio.³³ Thus, to the extent the Commission elects to disregard affiliate transaction agreements and impose onerous accounting procedures on Duke Energy Ohio (that will invite inequities as its affiliates cannot be so compelled to adopt new procedures), it should disregard the arbitrary and haphazard methodology employed by the OCC and, instead, rely upon the undisputed factual evidence.

With regard to an additional issue, the Commission recited the OCC's concern that Duke Energy Carolina charged more to Duke Energy Ohio than it did to Duke Energy Indiana, for the same employees. The OCC contends that this is unreasonable, whatever the rationale. But the documents offered into evidence by the OCC confirm that Duke Energy Carolinas did not charge

³³ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Duke Energy Ohio Exhibit 8-A, OCC Exhibit 14-A (\$1,182 plus labor loaders of \$2,203 (from Duke Energy Indiana rate of 186.4%) for a total of \$3,385).

markedly higher hourly rates to Duke Energy Ohio. Rather, using a straight average of hourly rates, Duke Energy Carolinas charged an hourly rate of \$43.31 to Duke Energy Indiana and an hourly rate of \$43.30 to Duke Energy Ohio.³⁴ Furthermore, as Duke Energy Ohio witness Beth Clippinger explained, overall labor rates may have been higher in Ohio than in Indiana because of union agreements and the manner in which employees of affiliated companies were deployed first to Indiana and then to Ohio. Understandably, if employees exceeded their regular shifts and thus were working hours in Ohio that contractually entitled them to overtime or double-time pay, Duke Energy Ohio would have compensated these employees consistent with their labor agreements.³⁵ This testimony cannot properly be rebutted by the OCC's speculative conclusion that Duke Energy Carolinas overcharged Duke Energy Ohio.

The Commission's conclusion that affiliate labor costs should be reduced by \$1,371,657 is in error and should be reversed. It is incorrect to state that Duke Energy Ohio "provided no evidence to rebut OCC's calculation."³⁶ Affiliate labor was appropriately charged to the companies for whom services were provided, pursuant to affiliate transaction agreements, and there is no regulation in Ohio that requires actual dollars to be credited to one utility when it performs work for an affiliate.³⁷

V. The Commission's finding that Duke Energy cannot recover \$9,717,564 of the costs associated with contractor labor is unjust, unreasonable, and contrary to the manifest weight of the evidence.

Just as the Commission erred in reducing costs associated with affiliate labor, so too did it err in reducing costs associated with contract labor. The Commission's decision in this regard is not

³⁴ *Id.*, Duke Energy Ohio 8-A and OCC Exhibit 14-A.

³⁵ *Id.*, Transcript of Hearing, Volume III, at pages 371-372.

³⁶ *Id.*, Opinion and Order, at page 14.

³⁷ *Id.*, Transcript of Hearing, Volume II, at page 272.

predicated upon the evidence and, when taken to its logical conclusion, mandates additional, not less, cost recovery by Duke Energy Ohio.

Although not mentioned with any degree of significance in the Order, Staff conducted an audit of Duke Energy Ohio's request, based on its complete access to any and all of the records on which the Company relied in seeking recovery of reasonably and prudently incurred costs. Significantly, Commission Staff had access to over 8,000 entries of data, representing all of the journal entries related to the storm restoration, serving to document the expenses at issue. And Staff reviewed hundreds of documents to substantiate the accuracy and reasonableness of the charges. The documents reviewed by Staff included invoices, time sheets, receipts, and material requisition forms.³⁸ This review by Staff, which was conducted consistent with accepted and objective audit practices, demonstrates the evidentiary support for recovery of the disallowed amounts. Following this audit, Staff recommended a reduction of \$46,888 for contractor labor.³⁹ Duke Energy Ohio agreed to this reduction. Contrary to the recommendations of its Staff, the Commission concludes that Duke Energy Ohio cannot recover \$9,718,554⁴⁰ in contractor labor costs. This conclusion is unjust, unreasonable, and contrary to the manifest weight of the evidence.

The first reduction ordered by the Commission concerns amounts that the OCC argued were charged to entities other than Duke Energy Ohio. Specifically, in accepting the OCC's rationale, the Commission found that charges totaling \$2,748,442 must be removed from the Company's request because the PayCo associated with these charges was not Duke Energy Ohio.⁴¹ A closer review of the evidence associated with this issue demonstrates the error in the OCC's reasoning.

³⁸ *Id.*, Transcript of Hearing, Volume I, at pages 134-135, 137.

³⁹ *Id.*, Post-Hearing Brief of the Staff of the Public Utilities Commission of Ohio, at page 5 (June 15, 2010).

⁴⁰ The Opinion and Order reflects an amount of \$9,717,564; however, this is assumed to be a typographical error as the numbers comprising this amount are \$6,970,112 and \$2,748,442.

⁴¹ *Id.*, OCC Exhibit 1, at page 30; See also, Opinion and Order, at page 15.

To the extent records reflect a "PayCo" other than Duke Energy Ohio, such a notation is irrelevant to the question of the state in which contract labor was performed. As the evidence confirmed, the "PayCo" designation is meaningfully only with regard to internal labor.⁴² Consequently, the fact that a "PayCo" may have been listed as Duke Energy Indiana or Duke Energy Kentucky does not lead to the conclusion that contractors were not working in Ohio.

Furthermore, it is noteworthy that nearly *all* of the invoices that the OCC recommended be excluded from this proceeding reflect tree trimming expenses. Indeed, of the OCC's suggested \$2,748,442 reduction, \$2,741,291 reflects invoices from tree trimmers.⁴³ In comparison, the total tree trimmer costs identified by Duke Energy Ohio are \$3,083,704.⁴⁴ Thus, accepting the OCC's recommendation would yield a result in which Duke Energy Ohio recovers only \$342,414 in tree trimming expenses related to the catastrophic wind storm. Of course, the number of outages and extent of physical damage do not support such a result and, instead, confirm the fact that the "PayCo" reference cannot be used to discount contractor costs. Therefore, the \$2,748,442 reduction should be reconsidered.

The reduction of \$6,970,112 ordered by the Commission's is also based upon the arguments of the OCC, which maintain that two-thirds of the contractor labor costs must be rejected only because 66 percent "is less than 90 percent."⁴⁵ In supporting its finding, the Commission reiterates the OCC's purported justification for the reduction: (1) invoices were sent to an affiliate; (2) project codes reference another state; (3) the location of the work on the invoices is listed as another state; and (4) work *may* not have been done in Ohio because crews did not have meals, sleep, or wash

⁴² *Id.*, Transcript of Hearing, Volume II, at page 280.

⁴³ *Id.*, at Duke Energy Ohio Exhibit 10-B and OCC Exhibit 12-B (both of which are confidential).

⁴⁴ *Id.*, at Duke Energy Ohio Exhibit 10-B and OCC Exhibit 12-B (both of which are confidential).

⁴⁵ *Id.*, Transcript of Hearing, Volume II, at page 278.

their clothes in Ohio.⁴⁶ Most disturbing about the OCC's argument, embraced by the Commission, is that it recommends a blanket two-third reduction in costs because contractors also assisted Duke Energy Ohio's sister utilities in storm restoration efforts in those jurisdictions. The Commission stated that the reduction would "account for other charges for which there is no evidentiary support for recovery."⁴⁷ But the Commission's statement cannot be reconciled with the evidence. And, of course, there was no dispute that Duke Energy Ohio actually paid these amounts to contractors.

The reasons offered by the OCC, and accepted by the Commission, must be considered with reference to the protocol used by the Company for purposes of charging labor, materials and suppliers and logistics. As Duke Energy Ohio witness James E. Mehring confirmed, storm codes were created at the beginning of the restoration activities; these codes were state-specific such that contractors working in Ohio would have used the Ohio charge code.⁴⁸ There is no evidence to refute the consistent use of these storm codes by contractors. Indeed, *all* of the summary invoices on which the OCC relied expressly and unambiguously reflect the Ohio storm codes.⁴⁹ The OCC's arguments, accepted by the Commission, that the summary invoices are wrong because of entries on time sheets are misplaced. The evidence clearly confirmed that Erlanger, Kentucky, served as a staging area for Duke Energy Ohio, which meant that contractors reported to Kentucky for their assignments prior to being dispatched to sites in Ohio. Furthermore, invoices for Ohio work were mailed to Kentucky, as the individual processing these invoices works out of an office located in Kentucky. And given the geographic proximity between Duke Energy Ohio's service territory in southwest Ohio and Kentucky, it is entirely reasonable for crews to have slept, dined, and washed their clothes in the Commonwealth.

⁴⁶ *Id.*, Opinion and Order, at page 15.

⁴⁷ *Id.*, Opinion and Order, at page 16.

⁴⁸ *Id.*, Transcript of Hearing, Volume I, at pages 48-49.

⁴⁹ *Id.*, OCC Exhibit 1-A, Exhibit AYJ-A (project number reference listed as "STMOH0812").

A determination of cost recovery cannot be made on a generic ratio, such as was done by the Commission. But even if such a determination were to be made, the evidence does not support a nearly \$7 million reduction in costs for Duke Energy Ohio. As the evidence confirms, between Duke Energy Ohio, Duke Energy Indiana, and Duke Energy Kentucky, the percentage of total outages from the wind storm for each company was 61 percent, 28 percent, and 11 percent, respectively. As further confirmed by the evidence, Duke Energy Ohio's percentage of total restoration costs was 58 percent, as compared to 33 percent for Duke Energy Indiana and 9 percent for Duke Energy Kentucky.⁵⁰ Thus, aligning the extent of the damage with the costs, it necessarily follows that the costs incurred by Duke Energy Ohio were consistent with the extent of the outages to which it responded.

Here, the Commission attempts to shift costs to utilities outside of its jurisdiction and that are regulated by other commissions. But the Commission lacks authority to do this. Unfairly treating almost \$7 million as if it had been additional costs incurred by Duke Energy Ohio on behalf of Duke Energy Indiana and Duke Energy Kentucky theoretically increases their percentage of total costs to 48 percent and 14 percent, respectively. And it reduces Duke Energy Ohio's percentage of the total costs to 39 percent. As a result, the jurisdiction that sustained the majority of the outages does not similarly incur the majority of the costs, as would be the result under standard cost-causation principles. But such a haphazard assignment of costs overlooks the uncontested fact that significant field work was performed in Ohio by contractors. These contractors assisted in replacing 707 utility poles and 499 transformers; they helped repair over 32 miles of conductor.⁵¹ The Commission apparently glosses over the fact that Duke Energy Ohio's service territory sustained the brunt of this storm, which necessitated extensive restoration work in the field. Instead, the

⁵⁰ *Id.*, Transcript of Hearing, Volume III, at pages 377-378.

⁵¹ *Id.*, Duke Energy Ohio Exhibit 2, at page 6.

Commission unreasonably and arbitrarily shifts expenses incurred for the benefit of Ohio customers to other states. But, as the Commission's Order demonstrates, randomly assigning costs without regard to the reasons for which such costs were incurred runs afoul of ratemaking principles and basic principles of fairness, as well as the rules of evidence.

Insofar as it concerns an arbitrary reduction, based solely on the number of states in which Duke Energy utilities were adversely affected by the 2008 wind storm, Duke Energy Ohio submits that the Commission's decision is also unreasonable and unjust as it ignores the undeniable consequence of that decision. Significantly, taking the Commission's logic to its natural conclusion, Duke Energy Ohio must be permitted recovery of some portion of the costs incurred for contract labor in the neighboring states. But the Commission did not authorize such recovery here. That is, of the approximate \$17 million in costs incurred in Indiana, the Commission does not apply the natural balancing adjustment to assign a similar, arbitrary amount of these costs to Ohio customers. The logic to do so is a mirror image of the logic employed by the OCC and adopted by the Commission in its Order. Nor does it employ the rationale set forth in its Order to assign some part of the nearly \$5 million in costs incurred in Kentucky to Duke Energy Ohio. But such a result is mandated by the Commission's logic in assigning costs, incurred in respect of the Ohio restoration efforts, to Duke Energy Indiana and Duke Energy Kentucky. After all, if the Commission is to unsystematically assign costs for contract labor to Duke Energy Indiana and Duke Energy Kentucky, it follows that it must also assign one-third of the Indiana contract labor costs (now inflated by \$3.5 million) and one-third of the Kentucky contract labor costs (also inflated by \$3.5 million) to Duke Energy Ohio. Of course, this discussion demonstrates the error in the Commission's decision. It cannot justify a nearly \$7 million reduction in costs on the faulty premise that such costs must have been incurred in other states affected by the storm. The Commission's decision reflects a misinterpretation of the evidence and is thus deserving of reconsideration.

VI. Request for Clarification

In its Order, the Commission directed Duke Energy Ohio to submit tariff pages, consistent with the Order. The Commission further instructed that new rates for Rider DR-IKE cannot become effective until the final tariff pages are filed with the Commission. Those tariff pages would enable the recovery of part of the costs at issue in this proceeding; namely, \$14,104,577, plus carrying charges. Duke Energy Ohio does not contest the recovery of this amount; however, it does seek rehearing in respect of the costs the Commission found it could not recover, or \$14,368,667. Duke Energy Ohio does not believe that its ability to pursue further review of the Commission's decision will be undermined by implementing tariffs to commence recovery of the first \$14,104,577 in storm costs. Although Duke Energy Ohio will carry out the Commission's order by filing tariff pages allowing the recovery of \$14,104,577, its ability to recover the balance of its storm costs is currently undecided. Consequently, until such time as the appeal process is complete, there will be some part of the Commission's Order on which the Supreme Court's decision could operate. As a result, Duke Energy Ohio does not believe implementation of tariffs now will jeopardize its right of review.⁵²

But as different opinions may be offered, Duke Energy Ohio seeks clarification from the Commission that initiating recovery of costs authorized to date will not render any subsequent requests for review, including appeals, moot. Toward that end, Duke Energy Ohio respectfully requests that the Commission accept tariff pages that expressly and unambiguously create the opportunity for revision to the tariff amounts following completion of the review process. Alternatively, Duke Energy Ohio seeks a stay of the Commission's directive to file tariff pages until such time as the review process has been exhausted. As a stay only operates to extend the amount

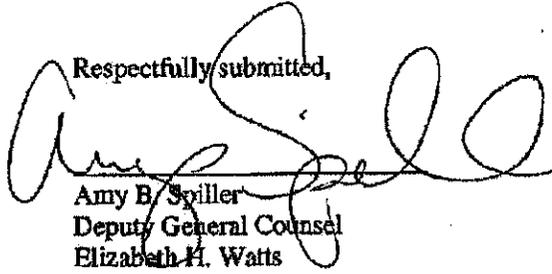
⁵² *Cincinnati Gas & Electric Company v. Public Utilities Commission of Ohio*, (2004), 103 Ohio St.3d 398, 401, 2004 Ohio 5466, 816 N.E.2d 238 (where a commission order has been carried out, no stay has been granted, and there is nothing left upon which the court's decision could operate, appeal deemed moot).

of carrying charges, this is not the preferred option. But if the Commission cannot accept tariff language that expressly preserves Duke Energy Ohio's right of appeal, this would be the only option.

Conclusion

For the reasons discussed above Duke Energy Ohio respectfully requests the Commission grant this Application for Rehearing to modify the Opinion and Order issued in the above-captioned proceeding.

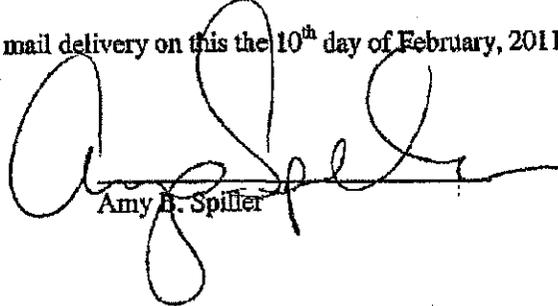
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following parties via ordinary mail delivery, postage prepaid, and/or electronic mail delivery on this the 10th day of February, 2011.



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Citation: **OHCode 4901.02**

ORC Ann. 4901.02

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129TH OHIO GENERAL ASSEMBLY
AND FILED WITH THE SECRETARY OF STATE THROUGH FILE
21 AND 23

The provisions of 2011 SB 5 are subject to referendum and
will not become effective unless approved
at the November 2011 general election. *

TITLE 49. PUBLIC UTILITIES
CHAPTER 4901. PUBLIC UTILITIES COMMISSION -- ORGANIZATION

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ORC Ann. 4901.02 (2011)

§ 4901.02. Public utilities commission; terms of office

(A) There is hereby created the public utilities commission of Ohio, by which name the commission may sue and be sued. The commission shall consist of five public utilities commissioners appointed by the governor with the advice and consent of the senate. The governor shall designate one of such commissioners to be the chairperson of the commission. The chairperson of the commission shall serve as chairperson at the governor's pleasure. The commissioners shall be selected from the lists of qualified persons submitted to the governor by the public utilities commission nominating council pursuant to section 4901.021 [4901.02.1] of the Revised Code. Not more than three of said commissioners shall belong to or be affiliated with the same political party. The commission shall possess the powers and duties specified in, as well as all powers necessary and proper to carry out the purposes of Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code.

(B) A majority of the public utilities commissioners constitutes a quorum.

(C) The terms of office of public utilities commissioners shall be for five years, commencing on the eleventh day of April and ending on the tenth day of April, except that terms of the first commissioners shall be for one, two, three, four, and five years, respectively, as designated by the governor at the time of appointment. Each commissioner shall hold office from the date of

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appointment until the end of the term for which the commissioner was appointed. Any commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which the commissioner was appointed shall hold office for the remainder of such term. Any commissioner shall continue in office subsequent to the expiration date of the term for which the commissioner was appointed until the commissioner's successor takes office, or until a period of sixty days has elapsed, whichever occurs first. Each vacancy shall be filled by appointment within sixty days after the vacancy occurs.

(D) Public utilities commissioners shall have at least three years of experience in one or more of the following fields: economics, law, finance, accounting, engineering, physical or natural sciences, natural resources, or environmental studies. At least one commissioner shall be an attorney admitted to the practice of law in any state or the District of Columbia.

(E) The chairperson of the commission shall be the head of the commission and its chief executive officer. The appointment or removal of employees of the commission or any division thereof, and all contracts for special service, are subject to the approval of the chairperson. The chairperson shall designate one of the commissioners to act as deputy chairperson, who shall possess during the absence or disability of the chairperson, all of the powers of the chairperson.

History:

139 v S 378. Eff 1-11-83; 153 v S 162, § 1, eff. 9-13-10.

Section Notes:

Analogous to former RC § 4901.02 (GC § 487; 103 v 804; Bureau of Code Revision, 10-1-53; 129 v 1601; 135 v S 131), repealed 139 v S 378, § 2, eff 1-11-83.

The effective date of S 378 is set by section 3 of the act.

EFFECT OF AMENDMENTS

153 v S 162, effective September 13, 2010, in (A), inserted "and 4927", and made stylistic changes.

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TITLE 49. PUBLIC UTILITIES
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§ 4903.13. Reversal of final order; notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

History:

GC §§ 544, 545; 103 v 804(815), §§ 33, 34; 116 v 104 (120), § 2; Bureau of Code Revision.

Eff 10-1-53.

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Appendix to the Merit Brief Submitted on Behalf of Appellant, Duke Energy Ohio, Inc., was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 8th day of August, 2011.


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