

**IN THE
SUPREME COURT OF OHIO**

Duke Energy Ohio, Inc.,

Appellant

v.

The Public Utilities Commission of Ohio,

Appellee

:
: Case No. 11-767
:
: On appeal from the Public Utilities
: Commission of Ohio, Case No. 09-
: 1946-EL-RDR, *In the Matter of the*
: *Application of Duke Energy Ohio, Inc.*
: *to Establish and Adjust the Initial Level*
: *of Its Distribution Rider.*

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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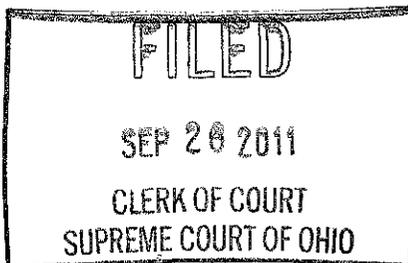


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	:	<i>to Establish and Adjust the Initial Level</i>
Appellee	:	<i>of Its Distribution Rider.</i>

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

Duke Energy Ohio, Inc.'s (Duke-Ohio) efforts to restore utility service following a bad windstorm may be laudable but that does not justify the costs of such efforts for rate recovery. Duke-Ohio wants its customers to pay some costs. It could not explain why they should, so the Public Utilities Commission of Ohio (Commission) said no. This case is just that simple.

The Commission's task is to be the finder of fact in cases before it. In the case below, the Commission held a hearing, took conflicting evidence, weighed it, and reached a decision. Appellant asks this Court to assume the Commission's role of weighing the evidence and establishing rates. The Court has repeatedly rejected such requests and should do so here.

STATEMENT OF FACTS AND CASE

A major windstorm, associated with Hurricane Ike struck Duke-Ohio's service area, as well as those of Duke-Kentucky and Duke-Indiana, with hurricane force winds in September 2008. Duke-Ohio Ex. 2 (Direct Test. of J. Mehring) at 2, Appellant's Supp. at 57; OCC Ex. 1A¹ (Direct Test. of A.J. Yankel) at 5, Appellant's Supp. at 274.² The storm caused substantial damage and resulted in Duke-Ohio and its affiliates, Duke-Kentucky and Duke-Indiana, implementing emergency plans to respond. Duke-Ohio Ex. 2 (Direct Test. of J. Mehring) at 2, 5, 8, Appellant's Supp. at 57, 60, 63; OCC Ex. 1A (Direct Test. of A.J. Yankel) at 5, Appellant's Supp. at 274. Working with affiliates and private contractors, Duke-Ohio spent 9 days restoring service. Duke Ex. 2 (Direct Test. of J. Mehring) at 6, 8, Appellant's Supp. at 61, 63. The restoration involved the employees of Duke-Ohio, its affiliates, and private contractors working in multiple jurisdictions. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 30-41, Appellant's Supp. at 299-310. Duke-Ohio set-up an accounting system to capture costs and instructed workers to charge a particular code for activity in each jurisdiction, intending to sort it later. *Id.* at 28,

¹ Per the official transcript, the public, non-confidential version of OCC witness A.J. Yankel's testimony was accepted as "OCC Ex. 1B." However, appellant denoted this testimony as "OCC Ex. 1A," and referred to it as such throughout its merit brief. For purposes of this brief and for consistency, we will also refer to the public version of A.J. Yankel's testimony as "OCC Ex. 1A."

² References to appellant's supplement are denoted "Appellant's Supp. at ____;" references to appellant's appendix are denoted "Appellant's App. at ____;" references to appellee's appendix attached hereto are denoted "App. at ____;" references to appellee's supplement are denoted "Supp. at ____."

Appellant's Supp. at 297. Confusion resulted and disputes existed. *Id* at 28-41, Appellant's Supp. at 297-310.

In July 2009, the Commission approved a stipulation submitted by Duke-Ohio and other parties resolving a Duke-Ohio rate case. *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.* (hereinafter *Duke 2008 Rate Case*) (Opinion and Order) (July 8, 2009), App at 5-24. The stipulation provided for a Distribution Reliability Rider (Rider DR-Ike) as a mechanism for Duke-Ohio to recover, from ratepayers, costs of responding to the storm. Recovery was conditioned on a Commission finding that the costs were reasonable and prudently incurred. *Duke 2008 Rate Case* (Stipulation and Recommendation at 7) (March 31, 2009), Appellant's Supp. at 619-653. The Stipulation also established a hearing process providing Duke-Ohio with an opportunity to prove its reasonable and prudently incurred costs, providing interested parties the opportunity to dispute those costs, and, ultimately, providing for the Commission's determination of the company's reasonable and prudently incurred costs. *Id.*

That process occurred. Duke-Ohio applied for cost recovery. Interested parties filed comments. Ultimately, a hearing was held involving several days of testimony followed by briefing. Conflicting evidence was submitted. Based on the evidence of record, the Commission determined the costs for which Duke-Ohio satisfied its burden of proof and authorized recovery of those costs. The Commission determined that Duke-Ohio did not meet its burden of proof with regard to certain other alleged costs and denied Duke-Ohio's requests to recover those alleged costs from ratepayers. *In the*

Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider (hereinafter *In re Duke Energy Ohio*), Case No. 09-1946-EL-RDR (Opinion and Order) (January 11, 2011), Appellant's App. at 7-32. Duke-Ohio sought rehearing that the Commission denied. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 2-10) (March 9, 2011), Appellant's App. at 33-46. Duke-Ohio then filed this appeal.

DISCUSSION

Proposition of Law No. I:

A decision of the Public Utilities Commission of Ohio will be reversed only where it is unlawful or so unsupported by the record that it is against the manifest weight of the evidence and results from mistake, misapprehension, or neglect of duty. *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d 123, 592 N.E.2d 1370 (1992).

The Court has articulated the standard for reviewing a Commission order many times over many years. *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d 123, 125, 592 N.E.2d 1370, 1373 (1992). R.C. 4903.13 requires this Court to affirm an order of the Commission unless the appellant shows that the order is unlawful or unreasonable. Ohio Rev. Code Ann. § 4903.13 (West 2011), Appendix at 1; *Consumers' Counsel v. Pub. Util. Comm'n*, 64 Ohio St. 3d 123, 125, 592 N.E.2d 1370, 1373 (1992).

Appellant bears the burden of proof in this appeal. *Constellation NewEnergy, Inc., v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 540, 820 N.E.2d 885, 894 (2004). Appellant must show the evidence of record does not support the Commission's factual determinations to satisfy its burden of demonstrating the Commission's order is unreasonable. *Id.*

This is not a *de novo* review and the Court does not second-guess the Commission's determinations. The Court upholds the Commission's determinations of fact where, as here, the record contains sufficient probative evidence to show that the Commission's decision was not against the manifest weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Id.*

This is a heavy burden. The Court will not weigh the evidence nor will it choose between debatable alternatives. *Consumers' Counsel v. Pub. Util. Comm'n*, 127 Ohio St. 3d 524, 526-527, 941 N.E.2d 757, 761 (2010); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 154, 555 N.E.2d 288 (1990). The Court consistently defers to the Commission's judgment in matters requiring special expertise and judgment regarding factual matters, such as those in this case. *Consumers' Counsel v. Pub. Util. Comm'n*, 117 Ohio St. 3d 289, 292, 883 N.E.2d 1025, 1028 (2008). The Court will not substitute its discretion for the Commission's discretion. *Stephens v. Pub. Util. Comm'n*, 102 Ohio St. 3d 44, 48, 806 N.E.2d 527, 531 (2004). The Court explained long ago: "The members of this court are neither accountants nor engineers, and manifestly it would be unfair to the litigants and to the commission for the court to pretend that it is in a position to better evaluate the evidence and determine the difficult questions of the reasonableness of the order than is the commission." *City of Dayton v. Pub. Util. Comm'n*, 174 Ohio St. 160, 162, 187 N.E.2d 150, 151 (1962).

Regarding questions of law, this Court has complete and independent power. *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n*, 115 Ohio St. 3d 208, 210,

874 N.E.2d 764, 767 (2007). Nevertheless, the Court gives substantial weight to the Commission's determinations in areas of its expertise. The Court may rely on the Commission's expertise in interpreting a law where highly specialized issues are involved and, therefore, where the Commission's expertise is helpful in discerning the intent of the General Assembly. *Id.*; *Consumers' Counsel v. Pub. Util. Comm'n*, 58 Ohio St. 2d 108, 110, 388 N.E.2d 1370, 1373 (1979). Additionally, this Court has noted that due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility, such as the Commission. *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 540, 820 N.E.2d 885, 894 (2004).

This case challenges Commission factual determinations establishing a Duke-Ohio rate, a matter particularly within the Commission's expertise. This complex area is one the General Assembly has entrusted to the Commission's oversight. *See e.g.*, Ohio Rev. Code Ann. § 4909.15 (West 2011), App. at 1. Discretionary decisions get deferential review. *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2011-Ohio-4129, ¶ 11.

The Commission made factual determinations based on an evaluation of the record evidence. This is what the Commission, by law, is charged with doing. This Court should affirm the orders issued below.

Proposition of Law No. II:

A Public Utilities Commission of Ohio order rejecting utility rate recovery of certain costs because the utility failed in its burden of proof to show the costs were reasonable and prudently incurred responding in Ohio to a storm event will not be reversed where the evidence of record supports the Commission's determination. *Constellation New-Energy Inc., v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 540, 820 N.E.2d 885, 894 (2004).

This is an appeal from Commission factual rate determinations. The decision below resulted from a contested hearing on Duke-Ohio's application to recover its reasonable and prudently incurred costs responding to Storm-Ike. Multiple parties presented evidence. While the Commission found many costs Duke-Ohio sought were reasonable and prudently incurred, the Commission disallowed costs that Duke-Ohio failed to justify on the record. Those costs fall into three categories: 1) bonus payments to salaried employees and associated fringe benefits and supervision costs; 2) affiliate labor costs; and 3) private contractor costs. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 9-18) (January 11, 2011), Appellant's App. at 15-24; *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 2-10) (March 9, 2011), Appellant's App. at 34-42.

Several factors are common to the disallowed costs and they are determinative. First, Duke-Ohio bore the burden to prove that the costs it sought to recover were reasonable and prudently incurred. Second, the Office of the Ohio Consumers' Counsel (OCC) objected to each of those costs and presented evidence contesting them. Third, the Commission found the evidence presented by OCC persuasive. Fourth, that evidence of

record supports each of the Commission's decisions that Duke-Ohio contests. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 9-18) (January 11, 2011), Appellant's App. at 15-24; *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 2-10) (March 9, 2011), Appellant's App. at 34-42.

At best, Duke-Ohio presents a patchwork of claims and asks the Court to reweigh the evidence. The evidence supporting the decision is far weightier and more compelling than Duke-Ohio's arguments. Duke-Ohio's position, even in the most favorable light, presents only an alternative result. This Court does not choose between debatable alternatives and such are not a basis for reversal. *Consumers' Counsel v. Pub. Util. Comm'n*, 127 Ohio St. 3d 524, 527, 941 N.E.2d 757, 761 (2010); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 154, 555 N.E.2d 288, 292 (1990).

The Court's attention should immediately be drawn to a decided lack of record citations accompanying many of Duke-Ohio's claims. There are no citations because Duke-Ohio's claims are not supported in the record. Rather Duke-Ohio attempts to fill evidentiary holes in its presentation through argument on brief which is not evidence. Simply, Duke-Ohio failed to shoulder its burden of proof to show the costs at issue here were reasonable and prudently incurred.

The Commission must base its decisions on the evidence of record. *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm'n*, 103 Ohio St. 3d 125, 128, 814 N.E.2d 829, 833 (2004); *Tongren v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 89-90, 706 N.E.2d 1255, 1257 (1999). The Commission's determinations are based on the evidence of record and supported by it. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and

Order at 12-13) (January 11, 2011), Appellant's App. at 18-19. Accordingly, the Commission's decision should be affirmed.

A. Duke-Ohio bore the burden of proof to show the costs it sought to recover were reasonable and prudently incurred in responding to Storm-Ike in Ohio.

Duke-Ohio bore the burden of proof to show the costs it sought to recover were reasonable and prudently incurred. The stipulation Duke-Ohio and others recommended and the Commission adopted so stated:

Upon approval of this Stipulation, DE-Ohio may file a separate application to establish the initial level of Rider DR and shall docket with its Rider DR application all supporting documentation. *DE-Ohio will bear the burden of proof of demonstrating that the costs were prudently incurred and reasonable.* Staff and any other interested parties may file comments on the Company's application If Staff or any other interested party files an objection that is not resolved in the opinion of the interested party ... *a hearing process, including an opportunity for discovery and the presentation of testimony, will be established in order to allow the parties to present evidence to the Commission.*

Duke 2008 Rate Case (Stipulation and Recommendation at 7) (March 31, 2009), Appellant's Supp. at 625 (emphasis added).

Nothing guaranteed Duke-Ohio recovery of any cost. *Id.* As the Commission described:

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. (Emphasis added).

In re Duke Energy Ohio, Case No. 09-1946-EL-RDR (Opinion and Order at 17) (January 11, 2011), Appellant's App. at 23 (emphasis added). The company could recover only those costs it proved were reasonable and prudently incurred responding to Storm-Ike in Ohio. *Id.*

B. The Commission determined that Duke-Ohio failed to satisfy its burden of proof to show extra, bonus, payments it gave salaried employees and associated fringe benefit and supervision costs were reasonable and prudently incurred. The decision is supported by the record.

1. The Commission's determinations that Duke-Ohio failed to show extra, bonus, payments it gave to salaried employees were reasonable and prudently incurred is supported by the record.

The evidence showed Duke-Ohio sought recovery of two types of payments it gave salaried employees beyond their salaries: supplemental pay and regular hourly pay.

OCC Ex. 1A (Direct Test. of A.J. Yankel) at 12, Appellant's Supp. at 281. The Commis-

sion found that Duke-Ohio failed to satisfy its burden to show these payments were reasonable and prudently incurred. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 11-13) (January 11, 2011), Appellant's App. at 17-19; *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 4) (March 9, 2011), Appellant's App. at 36. The Commission's decision enjoys ample record support:

- Duke-Ohio identified "two types of direct compensation that was paid to salaried employees because of the Hurricane Ike restoration: supplemental and regular hourly pay." OCC Ex. 1A (Direct Test. of A.J. Yankel) at 10-16, Appellant's Supp. at 279-285.
- The two were types of direct compensation noted by the company that were paid to salaried employees because of Storm-Ike restoration. *Id.*
- Some salaried employees received both an hourly wage and supplemental pay in addition to their salaries. *Id.*
- Additional salaried employees received a fixed amount of supplemental pay only. *Id.*
- Other salaried employees, received pay based on the number of hours worked only. *Id.*
- Salaried employees received supplemental pay totaling \$855,796 and pay based on the number of hours worked totaling \$371,196. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 12) (Janu-

ary 11, 2011), Appellant's App. at 18; OCC Ex. 1A (Direct Test. of A.J. Yankel) at 10, 15-16, Appellant's Supp. 279, 284-285.

- Mr. Yankel opined that "Any extra payment to salaried employees because of Hurricane Ike is inappropriate." OCC Ex. 1A (Direct Test. of A.J. Yankel) at 10, Appellant's Supp. at 279. He explained, "Traditionally, salaried employees are paid a base amount that is not directly tied to the hours worked." Additionally, he noted, "Most individuals that are paid based upon a salaried rate ... will tell you that overall they work more than a 40-hour week in order to get their salary." *Id.* Mr. Yankel explained: "The rules are different [for salaried employees as differentiated from hourly employees]." *Id.* at 13, Appellant's Supp. at 282.
- Mr. Yankel opined, further, that any supplemental pay and payment on an hourly basis to salaried employees was excessive and, accordingly, unreasonable. *Id.* at 15, Appellant's Supp. at 284.
- The evidence also showed that, as a general proposition, salaried employees are not paid overtime. Duke-Ohio Ex. 3 (Supplemental Test. of J. Mehring) at 8, Appellant's Supp. at 81.

While there is significant evidence supporting the Commission's decision, the same cannot be said of Duke-Ohio's case which does not provide any basis for individual payments. The broad, generic claims of Duke-Ohio do not change this fact. As Mr. Yankel testified: "Duke Ohio supplied no information or suggestion that these salaried employees did anything out of the ordinary or what would be expected in order to

receive supplemental compensation.” OCC Ex. 1A (Direct Test. of A.J. Yankel) at 11, Appellant’s Supp. at 280. The evidence did not show any factors management considered in awarding the bonuses. In effect, Duke-Ohio asked the Commission to *assume* the bonus payments were reasonable and prudently incurred despite testimony that they were “excessive” and “not reasonable.” *Id.* at 15, Appellant’s Supp. at 284. The Commission refused.

The Commission based its decision on the evidence. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 12-13) (January 11, 2011), Appellant’s App. at 18-19. The Commission’s determinations are supported by the evidence of record and the Court should affirm them.

Additionally, Duke-Ohio’s mischaracterizations do not fill the evidentiary void associated with Duke-Ohio’s application and they do not undermine the Commission’s decision. Incredibly, Duke-Ohio claims the Commission extrapolated Staff’s audit results. That is contrary to the Commission’s findings and orders that found its Staff’s audit insufficient and unpersuasive; the Commission did not follow the audit. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 4, 8) (March 9, 2011), Appellant’s App. at 36, 40.

2. The record supports the Commission's determination that Duke-Ohio failed to show recovery of fringe benefit and supervision costs associated with disallowed costs were reasonable and prudently incurred.

The Commission found that Duke-Ohio failed to show \$939,863 in labor loaders [additions for fringe benefits] and \$1,112,591 in supervision costs [also additions] were reasonable and prudently incurred expenses. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 4-5) (March 9, 2011), Appellant's App. at 36-37. This, also, is supported by the testimony:

- Duke-Ohio identified that it sought to recover “not only direct labor costs, but labor-loaders and supervision costs based on Duke's Peoplesoft program.” OCC Ex. 1A (Direct Test. of A.J. Yankel) at 16-17, Appellant's Supp. at 285-286.
- Amounts representing labor-loaders and supervision costs associated with the disallowed costs paid salaried employees [discussed in the previous sections of this brief] should be removed from the company's recovery. *Id.*
- An appropriate reduction from labor loaders was \$939,863. Because “the compensation paid salaried employees amounted to [a particular percentage] of the total direct employee payroll associated with [Hurricane] Ike, it would be appropriate to remove [that percentage] of the labor-loaders of \$4,504,551 Duke-Ohio attached to its labor expenses.” That totaled \$939,863 which “should be removed from labor loaders.” *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 4-5)

(March 9, 2011), Appellant's App. at 36-37; OCC Ex. 1A (Direct Test. of A.J. Yankel) at 16-17, Appellant's Supp. at 285-286.

- An appropriate reduction from supervision costs was \$1,112,591. He explained: “[T]he Supervision adder was [a stated percentage] of the combined Loaded Labor plus Fleet amounts. With the total loaded labor reduced to [stated amount] [for the disallowed costs paid salaried employees], the supervision adder would only be [stated amount] or a reduction of \$1,112,591.” OCC Ex. 1A (Direct Test. of A.J. Yankel) at 16-17, Appellant's Supp. at 285-286.
- Those amounts should be included in the reduction to Duke-Ohio's request associated with removing the extra compensation given to salaried employees. *Id.*

The testimony cited above supports the Commission's determination concerning labor loader and supervision costs that should be removed from overall labor costs the company sought to include in its rates. *Id.* The Commission's decision is supported by the evidence of record, and should be affirmed. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 13) (January 11, 2011), Appellant's App. at 19.

Duke-Ohio asks the Court to reweigh the evidence. Duke-Ohio does not identify any evidence compelling a different conclusion. Far from it, the company does not, and cannot, identify anyone testifying Mr. Yankel was wrong or that the calculation he proposed was inappropriate. Duke-Ohio merely noted the existence of labor loaders and supervision costs in its recovery request. Duke-Ohio Ex. 2 (Direct Test. of J. Mehring) at

9, Appellant's Supp. at 64. The company did not describe or demonstrate a method to calculate them or even identify the amounts associated with them. *Id.* Simply, the company does not identify any evidence with greater weight than the unrebutted testimony directed at the relevant issue, which the Commission relied on.

Even the company's few references to documents do not satisfy its burden of proof. The company does not identify any record explanation of the documents, the data they contain, or how the data might be manipulated. Additionally, Duke-Ohio is wrong when it claims Mr. Yankel did not consider a \$800,461 reduction in his recommended calculation. His testimony shows he considered it. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 21, Appellant's Supp. at 290. In sum, the company's arguments do not compel a result different from that supported by the evidence of record the Commission relied on.

The Commission's determinations resulted from the evidence of record and they are supported by it. They should be affirmed.

C. Duke-Ohio failed to justify recovery of all affiliate labor costs as reasonable and prudently incurred.

The Commission determined "Duke-Ohio did not sustain its burden to prove that all affiliate-related costs which it claimed should be recovered through Rider DR-Ike." *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 14) (January 11, 2011), Appellant's App. at 20. Specifically, the Commission found Duke-Ohio failed to satisfy its burden of proof as to a portion (\$1,371,657) of the approximately \$7,650,000, it sought in affiliate-related costs. *Id.* The evidence of record supports this

determination. *Id.* at 13-14, Appellant's App. at 19-20. Accordingly, the Court should affirm the Commission.

1. The Commission's determination is supported by the evidence of record.

a. The evidence of record shows that Duke-Ohio failed to prove that all affiliate-related labor costs it proposed were reasonable and prudently incurred responding to Storm-Ike in Ohio.

The evidence of record supports the Commission's determination that Duke-Ohio failed to show all affiliate-related labor costs it proposed were reasonable and prudently incurred. Once again, the testimony of OCC witness Yankel proved persuasive to the Commission:

- Duke-Ohio's request for affiliate labor charges was excessive. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 17-21, Appellant's Supp. at 286-290.
- Those charges were significant, representing approximately 50% of Duke-Ohio's request for internal labor charges. *Id.*
- That utilities were compensated, already, for their employee costs in the regular rates they charge ratepayers. *Id.*
- The utilities were compensated for their employees' services responding to Storm-Ike in any jurisdiction by their ratepayers. *Id.*
- The recovery should be a net amount as opposed to the gross amount Duke-Ohio sought. *Id.*

- Duke-Ohio's recovery for affiliate labor costs should be reduced by Duke-Ohio's charges to other Duke-Ohio jurisdictions for the services of Duke-Ohio employees in those jurisdictions responding to Storm-Ike. *Id.* at 19-20, Appellant's Supp. at 288-289.

The Commission agreed and adopted Mr. Yankel's recommendation. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 14) (January 11, 2011), Appellant's App. at 20.

Additionally, evidence showing that Duke-Ohio was charged more for affiliate employee services than other affiliates rendered the company's request even more suspect. Tr. Vol. III at 361, 363, 366-367, 374-376, Supp. at 11, 12, 13-14, 16-18. Evidence showing Duke-North Carolina, in particular, charged Duke-Ohio more than other affiliates for the same employee services suggests those charges were not reasonable or prudently incurred. *Id.* Moreover, the evidence showing Duke-Ohio was charged overtime rates while other affiliates were charged regular-time rates suggests those charges, also, were not reasonable or prudently incurred. *Id.* at 368, Supp. at 15. The difference in charges suggests the costs were not reasonable or prudently incurred, supporting the Commission's determination.

Finally, Duke-Ohio stands to obtain a windfall if they prevail on this issue. The reason is easy to see. Ratepayers pay for the services of Duke-Ohio employees even when those employees are sent to work in another state. If ratepayers must also pay for the services of replacements for those workers, ratepayers are paying twice, once for the

employee and again for the replacement. Ratepayers should not have to pay twice to get a job done once.

In sum, the record supports the Commission's decisions that Duke-Ohio failed to show the gross amount it sought was a reasonable and prudently incurred cost and the net approach resulted in a reasonable and prudently incurred amount. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 14) (January 11, 2011), Appellant's App. at 20.

b. The evidence of record supports the Commission's determination of the amount Duke-Ohio should recover for its affiliates' labor charges.

To make the discussed adjustment, from gross to net, the Commission needed to determine the amount representing Duke-Ohio employees working in affiliate jurisdictions. OCC's witness Yankel's testimony provided the support for the Commission's determination. He testified:

- \$1,371,657 was an appropriate amount associated with Duke-Ohio's employees working in affiliate jurisdictions to use in the netting calculation. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 14) (January 11, 2011), Appellant's App. at 20; OCC Ex. 1A (Direct Test. of A.J. Yankel) at 19-20, Appellant's Supp. at 288-289.
- It is an estimate, but a justified estimate, because Duke-Ohio refused to provide the amounts of its actual charges for its employees work responding to

Storm-Ike in affiliate jurisdictions. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 17-20, Appellant's Supp. at 286-289.

- He based the estimate of the Duke-Ohio charges for work in Kentucky on Duke-Kentucky's response to a Kentucky Public Service Commission Staff data request in which Duke-Kentucky claimed charges for Duke-Ohio work in Duke-Kentucky's jurisdiction were \$307, 872. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 14) (January 11, 2011), Appellant's App. at 20; OCC Ex. 1A (Direct Test. of A.J. Yankel) at 19, Appellant's Supp. at 288.
- He testified his estimated for the work of Duke-Ohio's employees in Duke-Indiana's jurisdiction according to a ratio of Duke-Indiana's total storm costs to those of Duke-Kentucky. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 19-20, Appellant's Supp. at 288-289.
- Accordingly, he applied that ratio to the Kentucky costs to arrive at an estimate in Indiana of \$1,063,785. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 14) (January 11, 2011), Appellant's App. at 20; OCC Ex. 1A (Direct Test. of A.J. Yankel) at 19-20, Appellant's Supp. at 288-289.
- He then combined the two results to determine the \$1,371,657 amount he recommended. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 20, Appellant's Supp. at 289.

Duke-Ohio did not rebut the figure Mr. Yankel proposed. The Commission adopted it. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 14) (January 11, 2011), Appellant's App. at 20.

Indeed, the evidence supports the Commission's determination 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." *Id.*

2. Duke-Ohio asks the Court merely to reweigh the evidence, second-guess the Commission's decision, and substitute the Court's discretion for the Commission's discretion.

Duke-Ohio asks the Court to reweigh the record evidence. Duke-Ohio challenges the testimony's factual basis all the while ignoring that it refused to provide actual data when OCC witness Yankel requested it. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 17-20, Appellant's Supp. at 286-289. Duke-Ohio had multiple opportunities to provide evidence it deemed relevant but did not provide any rebutting evidence the opinions and testimony of Mr. Yankel. Duke-Ohio cannot complain now about *its* decisions and the weight the Commission accorded the evidence of record. The Commission found Mr. Yankel's testimony, arguments, and rationale to be reasonable and compelling. The Commission's decision is supported by the best evidence of record and Duke-Ohio's argument does not change that.

Duke-Ohio's unsupported claims do not alter the evidence supporting the Commission's decision. Duke-Ohio did not provide testimony supporting any charges to other states. Moreover, the data bits Duke-Ohio cited do not outweigh the evidence the

Commission relied on; they do not even support the company's claims. Those bits did not warrant testimony explaining them or identifying and interpreting the data within them or explaining how to manipulate that data. Accordingly, their meaning is uncertain. Additionally, the associated citations do not show accounting adjustments and they do not show the monetary figures Duke-Ohio claims. The reference to Duke-Ohio 8A is an OCC discovery. Duke Ex. 8A at 1, Appellant's Supp. at 106. The rest of the document is approximately 140 pages of unexplained columns. The reference to OCC Exhibit 14 contains a single number that Duke-Ohio relies upon, 1182, but it is not an amount of money as Duke-Ohio claims. OCC Ex. 14A at 18, ln. 1028, Appellant's Supp. at 499. It appears under a column labeled "Reg. Hours." OCC Ex. 14A at 1, Appellant's Supp. at 482. Duke-Ohio's confused effort that misapplies another party's exhibit does not contradict any of the Commission's findings or any evidence supporting them and they do not provide a basis for reversal.

3. Duke-Ohio's affiliate agreements do not control the Commission's decision and the Court should not reweigh the evidence regarding them.

Duke-Ohio argued its affiliated agreements somehow affect recovery, even though they are not mentioned in the order or stipulation establishing the rider.

Duke-Ohio's affiliate agreements do not control the Commission's decision as Duke-Ohio suggests. The agreements were not even before the Commission as Duke-Ohio chose not to introduce them. Nothing in the Commission's Order establishing rider DR-Ike or the Stipulation the Order adopted support such a claim. *Duke 2008 Rate Case*

(Opinion and Order at 9-10, 19) (July 8, 2009), App. at 13-14, 23; *Duke 2008 Rate Case* (Stipulation and Recommendation at 7) (March 31, 2009), Appellant's Supp. at 625.

Neither even mentions Duke-Ohio's affiliate agreements. *Id.* Under the process Duke-Ohio agreed upon and recommended to the Commission, the Commission's determination of reasonable and prudently incurred costs controls the outcome of the proceeding. *Id.* Nothing imposed any special limitation on the Commission's discretion. *Id.* Accordingly, Duke's affiliate agreements do not control the Commission's decision. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 6) (March 9, 2011), Appellant's App. at 38.

Moreover, the Commission's decision does not affect the affiliate agreements. *Id.* The Commission's decision does not direct Duke-Ohio to modify its affiliate agreements. As the Commission stated, its "determinations in this case in no way affects the company's affiliate transaction agreements or how the affiliates credit each other for work performed." *Id.*

D. Duke-Ohio failed to show the third-party contractor costs it sought were reasonable and prudently incurred responding to Storm-Ike in Ohio.

- 1. The record supports the Commission's determination that Duke-Ohio's reliance on Staff's audit is not persuasive and did not satisfy Duke-Ohio's burden of proof.**

The Commission found that its Staff's audit did not modify or discharge Duke-Ohio's burden to show the private contractor costs the company sought to recover were reasonable and prudently incurred responding to Storm-Ike in Ohio. *In re Duke Energy*

Ohio, Case No. 09-1946-EL-RDR (Entry on Rehearing at 4, 8) (March 9, 2011), Appellant's App. at 36, 40. The Commission discussed the audit's weaknesses that led to its determinations. *Id.* The Commission found the audit reviewed only a very small portion of Duke's expenses. *Id.* The record showed its Staff sampled and reviewed "a couple hundred" of more than 8,000 expense items. Tr. Vol. I at 135, Supp. at 3. That equates to 2.5% of the expense items, a small portion. That meant the audit did not review 97.5% of Duke-Ohio's expense items, the vast majority.

The evidence of record additionally showed the audit ignored the unaudited expenses. The audit did not attempt to extrapolate the results of the limited review to the unaudited 97.5% of the expense items. *Id.* at 141, Supp. at 6. Staff did not attempt to employ a sampling methodology allowing for an extrapolation. Staff did not follow a sampling procedure with more specific criteria than what the investigator considered an appropriate expense item to investigate. While Staff's investigator tried to look at larger expense items, he did not follow a statistical sampling method. *Id.* at 139-141, Supp. at 4-6. Accordingly, the audit did not indicate anything about the overwhelming majority of Duke-Ohio expense items.

Staff admitted the possibility of undiscovered discrepancies as the Commission found. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 4, 8) (March 9, 2011), Appellant's App. at 36, 40; Tr. Vol. 1 at 100, Supp. at 2. The existence of such additional discrepancies is the only logical conclusion from the evidence; the discrepancies Staff found in its limited sampling suggest only that more discrepancies exist

in the unaudited expenses. The lack of an attempt to extrapolate the audit results evidences such discrepancies went unaddressed.

The Commission reviewed its Staff's audit objectively and did not find it to be persuasive. Duke-Ohio's apparent reliance upon Staff's recommendations that were rejected by the Commission obviously does nothing to satisfy Duke-Ohio's burden of proof. *Id.*

2. Duke-Ohio failed to show that private contractor invoices designating Duke-Indiana and Duke-Kentucky as the responsible affiliate were reasonable and prudently incurred expenses of Duke-Ohio.

It would seem self-evident that Duke-Ohio must incur costs for its customers to be responsible for them. Nevertheless, the company seeks recovery of \$2,748,442 associated with invoices indicating Duke-Indiana and Duke-Kentucky as the responsible affiliate, not Duke-Ohio. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 7-8) (March 9, 2011), Appellant's App. at 39-40. The record did not even show that the costs reflected in those invoices were incurred in Ohio. *Id.* at 8, Appellant's App. at 40; OCC Ex. 1A (Direct Test. of A.J. Yankel) at 29-30, Appellant's Supp. at 298-299. In fact, the evidence of record rebutted Duke-Ohio's responsibility for, and payment of, those invoices. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 29-30, Appellant's Supp. at 298-299.

The record showed the invoices listed Duke-Indiana or Duke-Kentucky as "PayCo" or "Pay Company." *Id.* at 29, Appellant's Supp. at 298. According to Duke-Ohio, part of the "financial system that is tied with responsibility" automatically assigned

those designations. Tr. Vol. III at 333-334, Supp. at 8-9. Despite Duke-Ohio's contrary claims, that suggests, at least, the financial system recognized reasons to identify Duke-Indiana and Duke-Kentucky as the responsible entities, not Duke-Ohio.

Beyond that, additional evidence showed Duke-Ohio did not pay the invoices. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 29-30, Appellant's Supp. at 298-299. The evidence showed Duke-Ohio did not identify any of those invoices on its "detail list of invoices paid for contract labor," responding to a Staff Data Request. *Id.* The absence of the invoices from that list shows Duke-Ohio did not pay the invoices and led OCC's witness Yankel to recommend the invoices should be removed from Duke-Ohio's recovery request. *Id.* at 30, Appellant's Supp. at 299. At the very least, the absence of the invoices from that list contradicts Duke-Ohio's claim for recovery and requires affirmative evidence substantiating the claim, evidence Duke-Ohio did not provide. Accordingly, the Commission's decision is based on, and supported by, the evidence of record, as well as the lack thereof.

The company's testimony in this regard is unconvincing. Duke-Ohio's witness Clippinger's testimony did not show Duke-Ohio incurred all the contractor expenses it sought. Ms. Clippinger's testimony addressed only the "PayCo" designation. It did not address all the evidence showing Duke-Ohio did not incur the contractor expenses and it did not provide affirmative evidence Duke-Ohio incurred the expenses. Ms. Clippinger's testimony attacked only a portion of the evidence the Commission relied on.

Additionally, the significance of Ms. Clippinger's testimony is a matter of weight and Ms. Clippinger demonstrated little knowledge about the "PayCo" designation. She

claimed, incredibly, Duke-Ohio's financial system assigns meaningless designations to financial information. Tr. Vol. III at 334, Supp. at 9. She acknowledged Duke-Ohio's financial system automatically assigned "PayCo" designations stating "there is a table in the financial system that is tied to financial responsibility and it will automatically generate PayCo for any transaction." *Id.* She then claimed, aside from internal labor, that designation "has no meaning," and described it as "just something the [financial] system spits out." *Id.* Those claims seem contradicted by the obvious importance of the information supplied by any company's financial system. Additionally, she did not attempt to explain why the financial system might make meaningless designations. Whatever the extent of Ms. Clippinger's knowledge, her testimony, and Duke-Ohio's position based on it, appear inconsistent with Duke-Ohio's financial system. Moreover, her testimony, even if accepted, did not affirmatively show Duke-Ohio incurred the expenses. Her testimony does not constitute *manifest* evidence overwhelming the significance of the evidence supporting the Commission's determinations.

Duke-Ohio's tree trimming argument does not provide the needed support. Like the rest of Duke-Ohio's argument concerning the "PayCo" designation, it does not address Duke-Ohio's affirmative burden of proof. Additionally, the record citations do not appear to support Duke-Ohio's textual claims. The documents cited do not appear to provide any information on tree trimming, much less information meeting Duke-Ohio's burden of proof. Duke-Ohio Ex. 10A, Appellant's Supp. at 246; OCC Ex. 12A Supp. at 377.

The Commission explained fully its determination. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 8) (March 9, 2011), Appellant's App. at 40. The Commission based it on Duke-Ohio's burden of proof and the absence of affirmative evidence meeting that burden as well as the evidence of record supporting Duke-Ohio's lack of responsibility for the costs. *Id.* The evidence of record supports the Commission's decision and, accordingly, it should be affirmed.

3. Duke-Ohio failed to prove the private contractor costs it sought were reasonable and prudently incurred expenses responding to Storm-Ike in Ohio.

a. Duke-Ohio failed to prove the amounts it sought for private contractor expenses represented reasonable and prudently incurred costs responding to Storm-Ike in Ohio.

Duke-Ohio, again, asks the Court to reweigh the evidence in arguing about the Commission's determination of the remaining private contractor costs, for which the company sought \$10,455,169. Duke-Ohio calculated the private contractor cost by aggregating the contractor invoices charged to the storm event, as the Commission found. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 14) (January 11, 2011), Appellant's App. at 20; Duke-Ohio Ex. 2 (Direct Test. of J. Mehring) at 9, Appellant's Supp. at 64. The Commission determined the evidence of record did not support that amount, finding: "The bottom line is that the evidence presented on the record reflected numerous discrepancies in Duke-Ohio' documentation of contractor expenses and Duke-Ohio did not sustain its burden to proof [sic] with regard to the contractor costs attributed to Ohio." *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR

(Entry on Rehearing at 9-10) (March 9, 2011), Appellant's App. at 41-42. The evidence of record led to, and supports, that determination.

OCC witness Yankel investigated contractor invoices and discovered many discrepancies. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 30-40, Appellant's Supp. at 299-309. His testimony concerning his investigation of those invoice samples is telling:

- The investigation revealed repeated conflicts between invoices and supporting field material; while the invoices suggested work in Ohio, the supporting field materials suggested work in another state. *Id.* at 37-39, Appellant's Supp. at 306-308.
- The investigation also revealed invoices where "little or nothing" providing a clear demarcation of the state where work was performed. *Id.* at 39, Appellant's Supp. at 308.
- He found "many invoices and back-up provided, strongly suggest that the work was not done in Ohio." *Id.*
- He found that other invoices were vague, indicating the work possibly done in another state. *Id.* at 39-40, Appellant's Supp. at 308-309.
- His investigation demonstrated contractors worked in multiple jurisdictions and portions of the invoices charged Ohio when another state was appropriate. *Id.* at 40, Appellant's Supp. at 309.
- He found some supporting material contained erasures, including associated with the location of work. *Id.* at 32, Appellant's Supp. at 301.

- He opined Duke-Ohio did not satisfy its burden of proof regarding the amounts it sought for the contractor invoices. *Id.* at 41, Appellant’s Supp. at 310.
- The problems with contractor invoices and supporting materials led Mr. Yankel to opine: “[I]t is clear that many of these costs [private contractor invoices] are not reasonable, definitely belong to other jurisdictions, and that in most cases Duke Ohio did not fulfill its burden of proof regarding where the work was done.” *Id.*

The Commission was not persuaded by the storm codes Duke-Ohio asked contractors to use in accounting for Ike-related actions. Duke-Ohio does not provide any evidence showing their proper use but, instead, it claims the burden to show improper use falls on others. That is not true. Duke-Ohio bears the burden to show the costs it seeks to recover were reasonable and prudently incurred in Ohio. However the record shows discrepancies that suggest improper use, contrary to Duke-Ohio’s argument. The only real evidence on the point indicates doubt, not certainty. Duke-Ohio failed in its burden to show it’s reasonable and prudently incurred contractor costs in responding to Storm-Ike in Ohio.

b. The record supports the Commission’s determination of the appropriate amount to award Duke-Ohio for private contractor costs associated with responding to Storm-Ike in Ohio.

Duke-Ohio’s failure to prove its reasonable and prudently incurred private contractor costs and its failure to provide a basis to determine those costs left the Commission with the choice of “disallowing all contractor costs or decreasing the requested contractor costs based on the record of evidence.” *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 9-10) (March 9, 2011), Appellant’s App. at 41-42. Those were the only options because Duke-Ohio’s evidentiary failure made it “impossible to determine from the record the actual dollar amount of the costs incurred.” *Id.* at 9, Appellant’s App. at 41. The Commission concluded it was appropriate to use the record before it and make a downward adjustment. *Id.* at 9-10. The Commission chose an amount based on the record and explained that it rejected Duke-Ohio’s proposal because that proposal was not supported in the record. *Id.*

The Commission’s decision is supported by the record. The Commission followed the recommendation of OCC’s witness Yankel. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Opinion and Order at 16) (January 11, 2011), Appellant’s App. at 22. He opined Duke-Ohio could recover appropriately one-third of private contractor costs; one-third of \$10,455,169. OCC Ex. 1A (Direct Test. of A.J. Yankel) at 41, Appellant’s Supp. at 310. Accordingly, the Commission observed 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.” *In re Duke Energy Ohio*, Case No. 09-1946-EL-

RDR (Opinion and Order at 16) (January 11, 2011), Appellant's App. at 22. The Commission also found that Duke-Ohio's recovery should not recover for the remainder because it failed in its burden of proof as discussed above. *Id.* In sum, the Commission's determination sprang from the record and it is supported by the record.

The Commission rejected the calculation Duke-Ohio advances to the Court. *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR (Entry on Rehearing at 10) (March 9, 2011), Appellant's App. at 42. The Commission explained Duke-Ohio sought recovery of 58% of the contractor costs. The Commission observed the 58% Duke-Ohio sought "was in relation to the operations and maintenance (O&M) costs incurred by Duke-Ohio and not the contractor costs." *Id.* Further, the Commission observed the lack of evidentiary support of Duke-Ohio's proposal. Specifically, the Commission observed: "Duke-Ohio has pointed to no evidence on the record that would indicate that percentage of O&M costs [58%] related to the 2008 Storm is comparable to the percentage of contractor costs related to the 2008 Storm." *Id.* Finally, the Commission noted "there is no way to compute the actual percentage of costs attributable to Duke-Ohio versus its affiliates in Indiana and Kentucky." *Id.* Accordingly, the Commission concluded "the record does not support Duke-Ohio's assertion that 58 % is an appropriate proxy for the contractor costs that were incurred in Ohio." *Id.* Simply, Duke-Ohio's proposal lacked record support.

Duke-Ohio placed the Commission in a difficult position. The Commission found the resolution through the only means available to it – the evidence of record. That record support shows the Commission should be affirmed.

Finally, appellant must show that it was prejudiced by any errors it demonstrates. This Court will not reverse a Commission order absent appellant showing that it is harmed or prejudiced by the order. *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n*, 115 Ohio St. 3d 208, 874 N.E.2d 764, 767 (2007); *Myers v. Pub. Util. Comm'n*, 64 Ohio St. 3d 299, 302, 595 N.E.2d 873 (1992). The Commission's options were \$0 for Duke-Ohio and the amount it awarded. The Commission awarded the higher amount. Appellants have shown no harm.

CONCLUSION

The determinative factor in this appeal is the evidence of record supporting the Commission's decisions. The Commission's decisions are supported fully in the record. Duke-Ohio, at best, argues only an alternative result. There is no basis for reversal and, accordingly, the Commission's decision should be affirmed.

Respectfully submitted,

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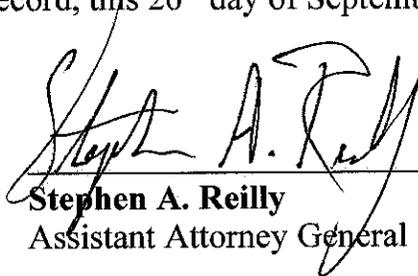
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PROOF OF SERVICE

I certify that a true copy of the foregoing Merit Brief submitted on behalf of Appellee, the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid upon the following parties of record, this 26th day of September, 2011.



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APPENDIX

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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.

4909.15 [Effective Until 9/9/2011] Fixation of Reasonable Rate.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (J) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital, as determined by the commission. The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete. In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff. A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress. Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclu-

sion of the offset period for purposes of division (J) of section 4909.05 of the Revised Code. From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division. The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change. In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown. In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation. In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected. In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the

treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(c) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost of rendering the public utility service for the test period under division (A)(4) of this section.

(C) The test period, unless otherwise ordered by the commission, shall be the twelve-month period beginning six months prior to the date the application is filed and ending six months subsequent to that date. In no event shall the test period end more than nine months subsequent to the date the application is filed. The revenues and expenses of the utility shall be determined during the test period. The date certain shall be not later than the date of filing.

(D) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (F) and (G) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(E) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

Effective Date: 11-24-1999

This section is set out twice. See also § 4909.15, as amended by 129th General Assembly File No. 20, HB 95, § 1, eff. 9/9/2011.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

- In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates.) Case No. 08-709-EL-AIR
- In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.) Case No. 08-710-EL-ATA
- In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.) Case No. 08-711-EL-AAM
- In the Matter of the Application of the Cincinnati Gas & Electric Company for Approval of its Rider BDP, Backup Delivery Point.) Case No. 06-718-EL-ATA

OPINION AND ORDER

The Commission, considering the above-entitled applications, the testimony, the applicable law, the proposed stipulation, and other evidence of record, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Amy B. Spiller, Associate General Counsel, Rocco O. D'Ascenzo, Senior Counsel, and Elizabeth H. Waits, Assistant General Counsel, Duke Energy Business Services, Inc., 2500 Atrium II, 139 East Fourth Street, P.O. Box 960, Cincinnati, Ohio 45201-0960, and Kravitz, Brown & Dortch, by Michael P. Dortch, 145 East Rich Street, Columbus, Ohio 43215, on behalf of Duke Energy Ohio, Inc.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Stephen Reilly, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Ann M. Hotz, Jeffrey L. Small, and Larry S. Sauer, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential utility consumers of Duke Energy Ohio, Inc.

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

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

Chester Wilcox & Saxbe, LLP, by John W. Bentine, Mark S. Yurick, and Matthew S. White, 65 East State Street, Suite 1000, Columbus, Ohio 43215, on behalf of the Kroger Co.

Christensen, Christensen, Donchatz, Kettlewell, & Owens, by Mary W. Christensen, 100 E. Campus View Boulevard, Suite 360, Columbus, Ohio 43235, on behalf of People Working Cooperatively, Inc.

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

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

Vorys, Sater, Seymour & Pease, by Benita A. Kahn and Steven M. Howard, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43215-3108, and Hogan & Hartson, LLP, by Gardner F. Gillespie, 555 13th Street NW, Washington, DC 20004, on behalf of the Ohio Cable Telecommunications Association.

Pamela Sherwood, 4625 W. 86th Street, Suite 500, Indianapolis, Indiana 46268, on behalf of tw telecom of ohio llc.

Albert E. Lane, 7200 Fair Oaks Dr., Cincinnati, Ohio 45237, on his own behalf.

OPINION:

I. HISTORY OF THE PROCEEDINGS

The applicant, Duke Energy Ohio, Inc., (Duke or company) is an electric company, as defined by Section 4905.03(A)(4), Revised Code, and a public utility, as defined by Section 4905.02, Revised Code. Accordingly, the company is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code. Duke is engaged in the business of the production, transmission, distribution, and sale of electricity to approximately 690,000 consumers. Duke's current base rates were established by the Commission in Case No. 05-59-EL-AIR, Opinion and Order (December 21, 2005).

On June 25, 2008, Duke filed a notice of intent to file an application for an increase in rates for electric distribution service for its service territory. Duke requested that the test year begin January 1, 2008, and end December 31, 2008, and that the date certain be March 31, 2008. Also on June 25, 2008, the company requested waivers of various standard filing requirements contained in Rule 4901-7-01, Appendix A, Chapter II, Ohio Administrative Code (O.A.C.). By entry of July 23, 2008, the Commission approved the requested date certain and test year and granted the request for waivers. On July 25, 2008, the company filed, in Case Nos. 08-709-EL-AIR, 08-710-EL-ATA, and 08-711-EL-AAM (collectively, rate cases), an application to increase its electric distribution rates, effective April 1, 2009, and for approval of tariff amendments and approval of a change in accounting methods. In its application, Duke requested an increase of approximately \$86,000,000. By entry of August 12, 2008, a technical conference on the rate case and related applications was scheduled for August 21, 2008. Proofs of publication were filed on April 30, 2009. A motion for admission of the proofs of publication as an exhibit in the proceeding was filed with the proofs. Correspondence opposing the admission on various grounds not related to the veracity, relevance, or appropriateness of the admission was filed by Mr. Lane. The Commission finds that the motion is reasonable and should be granted.

On September 10, 2008, the Commission issued an entry that accepted the application for filing as of July 25, 2008. By entry of September 12, 2008, *In the Matter of the Application of the Cincinnati Gas & Electric Company for Approval of its Rider BDP, Backup Delivery Point*, Case No. 06-718-EL-ATA, was consolidated with the rate cases.

On December 22, 2008, Duke filed a motion for approval of a change in accounting methods to defer and create a regulatory asset for storm restoration costs stemming from the September 14, 2008, windstorm and incurred during the test year and for a recovery mechanism for storm restoration costs. By entry of January 14, 2009, the Commission approved Duke's application to modify accounting procedures to defer incremental operation and maintenance costs related to the windstorm service restoration expenses with carrying costs; however, the Commission stated that the reasonableness and recovery of said deferred amounts would be examined and addressed in a future proceeding.

On December 31, 2008, Mr. Albert E. Lane filed a letter in the docket, asking to be placed on the service list in these cases and providing several comments for consideration. On January 13, 2009, as corrected on January 15, 2009, Mr. Lane filed a motion to intervene in these proceedings, together with additional comments.

Pursuant to Section 4909.19, Revised Code, staff conducted an investigation of the matters set forth in the company's applications. On January 27, 2009, staff filed with the Commission its written report of investigation (staff report). By entry dated February 5, 2009, persons wishing to file objections to the staff report and those wishing to intervene

were directed to file objections pursuant to statutory requirements and motions to intervene by February 26, 2009. This entry also scheduled a prehearing conference for March 17, 2009, and the evidentiary hearing for March 31, 2009.

The Commission granted motions to intervene filed by Ohio Consumers' Counsel (OCC); Ohio Partners for Affordable Energy (OPAE); Ohio Energy Group; the Kroger Company (Kroger); People Working Cooperatively, Inc. (PWC); the Greater Cincinnati Health Council (GCHC); the city of Cincinnati; the Ohio Cable Telecommunications Association (OCTA); tw telecom of ohio, llc (TWTC); and Albert E. Lane. Additionally, motions to admit David C. Rinebolt, Gardner F. Gillespie, and Pamela H. Sherwood to practice *pro hac vice* before the Commission in this proceeding were granted on February 5, 2009.

On February 3, 2009, Mr. Lane filed objections to the staff report. On February 25, 2009, Mr. Lane filed corrections to certain aspects of his objections. On February 26, 2009, objections to the staff report were filed by Duke, Kroger, GCHC, OPAE, PWC, OCTA, and OCC.

On March 2, 2009, the attorney examiner issued an entry scheduling three local public hearings and ordered Duke to publish notice of the local public hearings. On May 1, 2009, proofs of publication of notice of the public hearings were filed in the docket.

On March 4, 2009, Mr. Lane filed a document posing 27 questions, directed at staff and Duke. On March 26, 2009, Mr. Lane filed an additional document, asking for answers to his 27 questions and posing supplemental issues for consideration.

Local public hearings were held on March 14, 16, and 24, 2009. The evidentiary hearing commenced on March 31, 2009. A stipulation and recommendation (stipulation), signed by all of the parties except TWTC and Mr. Lane, was also filed on March 31, 2009. Neither TWTC nor Mr. Lane was present at the hearing. Testimony in support of the stipulation was offered by one staff witness and one Duke witness and all parties present waived cross-examination of those witnesses. Thereafter, the testimony was admitted into the record. By entry of March 31, 2009, parties not present were given the opportunity to file a request to cross-examine the two witnesses; however, no requests were filed.

On May 1, 2009, as corrected on May 4, 2009, Mr. Lane filed a request for additional local public hearings, also discussing other issues.

On May 8, 2009, Duke filed a motion for admission of Schedule A-1 to the stipulation as a late-filed exhibit, explaining that it should have been included with the stipulation. Duke indicated that counsel for staff, OCC, city of Cincinnati, OCTA, OPAE, and GCHC had no objection to this document being admitted and that counsel for the

remaining parties did not respond to Duke. On May 12, 2009, Mr. Lane filed an objection to the admission of the Schedule A-1.

On May 19, 2009, Mr. Lane filed a copy of an e-mail that had previously been distributed to parties in these proceedings, as well as various legislative and media persons.

On May 29, 2009, all of the stipulating parties other than OCC filed a letter clarifying the meaning of the Schedule A-1 that was included with Duke's motion of May 8, 2009. On June 1, 2009, OCC filed a letter indicating that OCC would not oppose the May 29, 2009, letter.

By entry of May 29, 2009, parties were given the opportunity to file a request for a hearing on the proposed Schedule A-1 and the clarifying letter of May 29, 2009. On June 1, 2009, Mr. Lane filed a motion for an extension of the deadline for filing such a request, and for an extension of the proposed hearing date. He also requested that the hearing not be held until his previously posed 27 questions were answered by the Commission, staff, and Duke. On June 2, 2009, Duke filed a memorandum contra Mr. Lane's request for an extension, together with a motion to strike certain portions of Mr. Lane's filing. On June 2, 2009, Duke also filed a copy of its May 30, 2009, response to Mr. Lane's 27 questions. On June 3, 2009, the examiner issued an entry, rejecting the motion to extend the deadline to request a hearing but agreeing to continue the hearing date to June 17, 2009. On June 4, 2009, as corrected on June 8, 2009, and as further corrected on June 9, 2009, Mr. Lane filed a request for a hearing, together with a list of requested witnesses. Also on June 9, 2009, Duke filed a motion to strike Mr. Lane's witness list and to limit cross-examination at the hearing. On June 10, 2009, Mr. Lane filed a memorandum contra Duke's motion to strike. The Commission finds that there is no good cause to grant Duke's motion and that it should therefore be denied.

On June 17, 2009, a hearing was held with regard to the Schedule A-1 submitted by Duke, together with the clarifying letter of May 29, 2009. At that hearing, Mr. William Don Wathen, Jr., testified on behalf of Duke and was cross-examined by Mr. Lane. At the conclusion of the hearing, all parties who were present at the hearing indicated a desire not to file briefs in this matter.

II. SUMMARY OF THE EVIDENCE AND DISCUSSION

A. Summary of the Local Public Hearings

Three local public hearings were held in order to allow Duke's customers the opportunity to express their opinions regarding the issues in these proceedings. At the first public hearing, in the Union Township Civic Center Hall, on March 16, 2009, at 6:00 p.m., 22 witnesses testified. At the second public hearing, at Cincinnati City Hall

Council Chambers, on March 19, 2009, at 12:30 p.m., 18 witnesses testified. At the third public hearing, at the Lakota East High School Auditorium, on March 24, 2009, at 6:00 p.m., 11 witnesses testified. At these hearings, members of the public testified concerning issues such as high rates for service, riders, difficulties faced by consumers on fixed incomes, service quality, maintenance, the economy, executive salaries, business planning, competition, billing, and recovery for storm damage.

B. Intervenor Issues

Throughout the course of these proceedings, Mr. Lane raised a number of issues, through the filing of correspondence, comments, and questions. While he did not attend the initial evidentiary hearing in these proceedings, at which the stipulation was admitted, he did attend and cross-examine Duke's witness at the final hearing. Although the parties chose not to file post-hearing briefs that would have set forth their positions in a comprehensive fashion, we will address the relevant issues raised by Mr. Lane.

Mr. Lane raised the issue of Mr. Wathen's qualifications as an expert, pointing out that he is not a certified public accountant. (Tr. II at 26-28.) We would note that Mr. Wathen has testified in numerous proceedings before this Commission and that his qualifications as an expert were well-established in his testimony admitted at the initial evidentiary hearing in these proceedings and in numerous other proceedings involving Duke.

Mr. Lane cross-examined Mr. Wathen regarding the sources and meaning of the information set forth in Schedule A-1, especially focusing on the difference between the increases requested by Duke in the application, as compared with the amounts stipulated by the parties. He also questioned how the numbers in Schedule A-1 could be precise when they were calculated as averages. Mr. Wathen explained that Schedule A-1 was arranged in four columns. The first column duplicates the information set forth in the application, the second column is a numerical average of the high and low figures recommended in the staff report, the third column represents the position of OCC, and the fourth column shows the amounts agreed to by the parties to the stipulation. He also testified that the numbers in Schedule A-1 were from numbers in the staff report and that only some of the numbers in the stipulation column of Schedule A-1 were averages of the low and high ranges from certain numbers in the staff report; but, in any event, that all of the numbers were accurate and appropriately determined. (Tr. II at 14-20, 27-28, 73-80, and 92-93.) We believe that Duke's witness fully explained the sources and meaning of the information contained in Schedule A-1.

From an accounting standpoint, Mr. Lane questioned how Duke and its affiliates accurately determined the sharing of costs among themselves and whether air travel incurred in the preparation of the Schedule A-1 is included. He also cross-examined

Mr. Wathen regarding the source and accuracy of information used by Duke in its application and supplied by Duke to the Commission. Mr. Wathen confirmed that employees keep records of their time, indicating the nature of the work done and the affiliate for whom it was performed. He also noted that time spent in preparation of the Schedule A-1 was outside the test year and that, in any event, no air travel was involved in the preparation of the Schedule A-1. Although agreeing that Duke's information occasionally includes an error, he testified that Duke employees do review the information in an attempt to correct any such errors. He also agreed that Commission staff reviews Duke's information and further corrects any errors discovered. Finally, Mr. Wathen stated that Duke pays an annual fee to the Commission. (Tr. II at 28-41, 109-111.) We find that Duke's witness fully responded to Mr. Lane's questions in this area and that there are no outstanding matters related to accounting issues raised by Mr. Lane.

In various filings made by Mr. Lane prior to the second hearing, he referenced his opposition to the merger that gave rise to Duke, in *In the Matter of the Joint Application of Cinergy Corp., on Behalf of the Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER (merger case). We would note that the merger case is not an open proceeding and that the time for opposing either the merger or the Commission's determination in that proceeding is long since past. Mr. Lane has also indicated his belief that Commissioners who voted in favor of approving the merger, in the merger case, have a current conflict of interest and should not vote in these proceedings. (E-mails docketed on March 26, 2009; May 1, 2009.) As to Mr. Lane's assertions regarding conflicts of interest, he provided no evidence or testimony to support his contention that any member of the Commission who voted in favor of the merger application should recuse himself from these proceedings.

Mr. Lane also requested that this case be consolidated with the proceeding in *In the Matter of the Commission Investigation into the Reliability of the Electric Distribution Service Provided by Ohio's Investor-Owned Electric Companies*, Case No. 08-1299-EL-UNC. The Commission believes that such a consolidation would likely extend the consideration of those cases in question and would combine cases unique to Duke with a generic proceeding applicable to all electric utilities. This would not be in the interest of administrative economy. In addition, we do not believe that there is any benefit to such a consolidation. Duke will be subject to the Commission's investigation and order in that case, as well as in these proceedings. Therefore, we do not find that it would be reasonable or appropriate to consolidate these cases and decline to do so.

An additional set of issues raised by Mr. Lane relates to various aspects of Duke's internal operations. In various filings, he raised issues relating to maintenance, tree trimming, reliability, and customer calls. Additionally, Mr. Lane called for an independent audit, by an outside accountant. (See filings dated December 31, 2008;

January 13, 2009; February 3, 2009.) These issues were addressed in the staff report. Mr. Lane presented insufficient evidence to convince us to reach different conclusions than were proposed by staff.

Mr. Lane was also concerned that one of the local public hearings was held without the presence of a Commissioner and while certain parties to the proceedings engaged in private settlement discussions. He asked that the Commission order Duke to pay for additional advertisements and hold new local public hearings. (Correspondence docketed May 19, 2009.) No Ohio statute or administrative rule requires the presence of a Commissioner at a local public hearing or prohibits the holding of such a hearing while settlement discussions are occurring or without public announcement of such discussions. The Commission finds no necessity for the holding of additional local public hearings.

Additionally, Mr. Lane raised a question regarding the timing of Duke's repairs after a recent windstorm and the appropriate accounting for the cost of those repairs. (Comments docketed December 31, 2008.) With regard to this issue, the Commission would point out that the stipulation in these proceedings addresses windstorm costs.

Mr. Lane has also raised several issues that are outside the Commission's jurisdiction, including more funding for OCC, beneficial effects of certain federal legislation that is no longer in effect, and recommended publications by media.

C. Summary of the Proposed Stipulation

As noted above, certain of the parties entered into a stipulation that was filed on March 31, 2009. Pursuant to the stipulation, the stipulating parties agreed, *inter alia*, that:

- (1) Duke shall receive a retail electric distribution revenue increase of \$55.3 million. For purposes of any riders that require a rate of return, the calculation of the rate of return shall be made on the basis of Duke's actual adjusted capital structure and a return on equity of 10.63 percent (which is the midpoint of staff's recommended return on equity).
- (2) The retail electric distribution revenue increase should be distributed as shown on Stipulation Attachment 1.
- (3) Duke's monthly residential service customer charge should be \$5.50 per bill for rates RS, ORH, and CUR.
- (4) Duke shall make its three-phase residential rate (Rate RS3P) available throughout its service territory to residential customers, where (A) building demand load exceeds standard

single-phase Duke equipment or the building is a multi-use building requiring three-phase service for the commercial space; (B) distribution lines are adjacent to the premises; (C) the building demand load requires three-phase service; and (D) additional distribution line extensions are not required as Duke's existing distribution facilities are capable of supporting three-phase distribution service. In other instances, Duke will make three-phase service available to residential customers at the customer's sole expense and pursuant to a three-year service agreement.

- (5) Duke's proposed rate design for nonresidential rates shall be implemented as set forth on the Stipulation Attachment 2.
- (6) Duke will implement new depreciation rates consistent with the staff report and as outlined by OCC in its objections to the staff report.
- (7) Duke's pole attachment (PA) rate shall be \$6.40 per wireline attachment. Duke's conduit occupancy rate shall be \$1.26 per linear foot as defined in the PA tariff appended to Stipulation Attachment 3. Duke agrees to the system inventory as recommended in the staff report. Duke also agrees to file a letter in this docket, upon completion of the inventory, affirmatively indicating that the baseline contemplated in Stipulation Attachment 3 has been established.
- (8) Rider DR shall be approved as a mechanism to recover reasonable and prudently incurred storm restoration costs relative to the September 2008 windstorm associated with Hurricane Ike only. Recovery shall be limited to the operating costs identified in paragraph 16 of Duke's December 22, 2008, motion for approval of a change in accounting methods, which motion was approved by the Commission on January 14, 2009. The rider shall initially be set at zero. Following the Commission's approval of this stipulation, Duke may file a separate application to establish the initial level of Rider DR and shall docket, with its Rider DR application, all supporting documentation. Duke will bear the burden of proof of demonstrating that the costs were prudently incurred and reasonable. Staff and any other interested parties may file comments on the application within 60 days after Duke docketed the application. If staff or any other interested party files an

objection that is not resolved in the opinion of the objecting party within 30 days thereafter, a hearing process, including an opportunity for discovery and presentation of testimony, will be established, in order to allow the parties to present evidence to the Commission.

- (9) The parties will not oppose Duke's request to eliminate its customer-owned street lighting rate SC tariff.
- (10) The parties will recommend to the Commission that Rider BDP (regarding backup delivery point capacity) shall be approved in accordance with the recommendations contained in the staff report, except that Rider BDP capacity reservation charges shall not apply to the Greater Cincinnati Health Council member hospitals' existing load through 2011, consistent with the stipulation in Case No. 08-920-EL-SSO et al. (ESP case).
- (11) The parties will support the withdrawal from this case of Duke's request to eliminate Rider SC and agree to the continuation of Rider SC as effective pursuant to the stipulation in the ESP case.
- (12) The parties will support the recommendation of staff, set forth in the staff report, to exclude the minimum load requirement and Duke's proposed changes to its brownfield development program. Customer credits applied pursuant to this tariff shall not be recoverable from customers.
- (13) Duke shall implement the rates authorized by the Commission in these proceedings on a services-rendered basis, effective upon Commission approval.
- (14) An electric distribution uncollectible expense rider (Rider UE-ED) will be created. Rider UE-ED shall recover incremental net uncollectible expense (above the baseline amount established in the test period as reflected on Stipulation Attachment 4) related to Duke's provision of electric distribution service and all percentage of income payment plan (PIPP) installment payments not recovered through the universal service fund rider (USR) or from the customer net of any unused low-income credit funds as described in paragraph 14 of the stipulation. The amounts in the rider, exclusive of PIPP, will only be collected from the class that created the bad debt expense. Bad debt expense associated with PIPP uncollectibles will be allocated in

the manner of the universal service fund rider. Duke may recover any installment payment amounts, not recovered through the USR or from the customer, through Rider UE-ED where Duke demonstrates that it has made reasonable attempts to collect said amounts. Rider UE-ED shall be set at zero in this proceeding and Duke's initial application to set the rider shall be filed in the second quarter of 2010 and shall include incremental net uncollectible expenses and eligible PIPP amounts above the baseline incurred after the effective date of the rate increase granted in these proceedings. Duke will not accrue carrying charges on the monthly unrecovered balance of incremental net uncollectible expense and PIPP installment payments for which recovery is sought through Rider UE-ED. Duke shall make annual filings for Rider UE-ED, which shall be subject to a review and true-up proceeding before the Commission. All interested parties will have the right to due process, including an opportunity for discovery, hearing, and Commission approval. If the Commission chooses to order an independent audit of the uncollectible expense, such audit will be conducted under the direction of staff and the cost of the audit will be recoverable through Rider UE-ED. Duke shall include, within the competitive retail electric service provider tariff, the formula it uses to determine the discount at which it purchases receivables from competitive retail electric service providers.

- (15) The agreement reached with Kroger, Inc., in the ESP case, shall be extended for an additional 90 days from the Commission's approval of the stipulation.
- (16) Duke and the city of Cincinnati will enter into a PA agreement that clarifies that the city of Cincinnati will not be responsible for paying PA fees for existing or new attachments that are made in accordance with the processes set forth in the stipulation. All other Ohio political subdivisions shall be exempt from paying attachment fees, provided that such municipalities timely remove life safety signs, equipment, and lights from Duke's utility poles, enter into PA agreements, or otherwise submit to an application and permit process for any future pole attachments; submit any existing, non-permitted attachments to an application and permit process; and timely correct any attachments that violate applicable regulations. The foregone revenue from these exemptions will not be recoverable from other customers.

- (17) Up to 10,000 electric customers who are at or below 200 percent of the federal poverty level and who do not participate in the PIFP program shall be entitled to receive electric service under rate RSLI (regarding residential low income) and receive a \$4.00 per month credit. All gas customers who are currently eligible for Duke's low income credit gas program will be automatically enrolled in Duke's low income electric program and will be credited the \$4.00 per month on their electric bill. To the extent that less than a total of \$40,000 is credited to customers during each month, the excess of the monthly proceeds shall be used to fund the payment of the amounts that would otherwise be collected through Rider UE-ED.
- (18) Duke shall provide \$200,000 per year for four years toward a study that PWC will design and manage, employing its proprietary tools, testing a range of home energy improvements and focusing on critical home repairs and energy efficiency, for eligible low-income residential consumers in Duke's service territory. PWC will report to Duke and other parties regarding the results of this project.
- (19) To assist with the implementation, administration, staffing, and outreach of its income credit program, Duke shall contribute a total of \$50,000 per year for four years, to be paid directly to identified agencies, with OP&E and such agencies agreeing to the amounts to be distributed to each agency. Such funding may also be used for the purchase or development of a market research database, in order to more effectively target participants for low-income programs in Duke's territory.
- (20) All other elements in Duke's applications in these proceedings shall be resolved as set forth in the staff report. Duke shall allow the payment of electric account deposits by residential customers in installments, over three consecutive months, and will not seek recovery from customers for the billing and or information technology costs associated with the change. Duke will use its best efforts to effectuate this change but will complete the process no later than December 31, 2009.
- (21) Duke will correct the phone number for OCC's call center on both gas and electric disconnect notices immediately.

D. Consideration of the Stipulation

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such agreements are accorded substantial weight. See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978).

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 547 (1994) (citing *Consumers' Counsel*, supra, at 126). The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission (*Id.*).

The signatory parties agree that the stipulation is supported by adequate data and information, represents a just and reasonable resolution of the issues that are proposed to be resolved by the stipulation in these proceedings, violates no regulatory principle, and is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process undertaken by the parties to settle such contested issues. (Jt. Ex. 1, at 2.) David R. Hodgden, Capital Recovery and Financial Analysis Division, Utilities Department, testified that the settlement was a product of serious bargaining among capable, knowledgeable parties; the settlement, as a package, benefits ratepayers and is in the public interest; and the settlement does not violate any regulatory principle or practice.

He indicated that the parties involved in the negotiations of the stipulation included representatives of residential customers, industrial customers, and commercial customers. He also indicated that the parties in these proceedings have been involved in prior proceedings before the Commission and were knowledgeable and experienced in utility cases, generally, and in Duke rate setting matters, specifically. Mr. Hodgden noted that all the parties were invited to participate in the negotiations. According to his testimony, some participated in person and some by phone, while some chose not to participate directly but communicated their views by electronic mail. He indicated that the parties put forward and discussed a variety of proposals, that all parties had the ability to discuss the issues and present their views, and that the settlement reflected a consensus on the part of the signatories to the settlement. Mr. Hodgden also testified that the settlement is in the public interest because it allows Duke the ability to earn a reasonable rate of return while holding the rate increase to approximately three percent of Duke's current total retail revenue, while also providing funds to aid low-income customers who are not involved in the PIPP program and allowing customers to pay customer deposits over a three-month period. (Staff Ex. 2, at 2-5.)

Paul G. Smith, Duke's Vice President, Rates - Ohio and Kentucky, testified that the stipulation is the product of serious bargaining among capable, knowledgeable parties, does not violate any important regulatory principles or practice, and will benefit customers and the public interest. He indicated that the parties to the stipulation regularly participate in rate proceedings before the Commission, are knowledgeable in regulatory matters, and were represented by experienced, competent counsel. Mr. Smith testified that there were a total of four settlement conferences and that all parties were invited to attend all of the settlement discussions regarding the applications. He also noted that all of the issues in these cases were addressed during these meetings and that the stipulation is a compromise resulting from those discussions and represents a product of capable, knowledgeable parties. He indicated that the stipulation complies with all relevant and important principles and practices and is fully supported by all of the evidence presented in these cases. He further indicated that the stipulation is consistent with the principle of cost causation in rate design in that it reduces the subsidy/excess between nearly all rate classes in order to reduce or eliminate cross-subsidies between classes. Mr. Smith also stated that the stipulation provides numerous significant benefits across all customer groups, including the availability of three-phase residential service in areas beyond where it is currently offered, a reduced depreciation rate, a lower pole-attachment charge than supported in the application, a new tracking mechanism to recover uncollectible expenses, the establishment of two new low-income programs, and allowing residential customer deposits to be funded over a three-month period. (Duke Ex. 9, at 1; Duke Ex. 18, at 1-7.)

Upon review of the stipulation, we find that it is the product of serious bargaining among capable, knowledgeable parties. The Commission also finds that many items in the stipulation will benefit the ratepayers and the public interest. Specifically, the stipulation

in these proceedings, while allowing Duke the opportunity to earn a reasonable rate of return, holds the rate increase to approximately three percent of total retail revenue. It provides an additional benefit to residential customers by giving them the ability to fund deposits over a three-month period. In addition, it assists low-income customers through the establishment of new programs. Further, as noted by Mr. Smith, three-phase residential service is expanded, the depreciation rate is reduced, and the pole-attachment charge is established at a lower rate than was supported in the application. Further, the stipulation provides the important benefit of reducing or eliminating cross-subsidies between classes by being consistent with the principle of cost causation. Finally, with regard to our review of the stipulation,¹ there is no evidence that it violates any regulatory principle or precedent.

Accordingly, we find that the stipulation entered into by the parties should be approved and adopted. Duke shall have the necessary accounting authority to fulfill the terms of the stipulation.

III. RATE DETERMINANTS

As agreed to by the parties to the stipulation, the date certain value of Duke's property used and useful in the rendition of electric service is \$963,787,307. The Commission finds the rate base stipulated by the parties to be reasonable and proper, and adopts the valuation of \$963,787,307 as the rate base for purposes of these proceedings.

The stipulation recommends that rates be approved that would enable Duke to earn a rate of return of 8.61 percent. The Commission finds that a rate of return of 8.61 percent is fair and reasonable for Duke and should be authorized for purposes of these cases.

Applying a rate of return of 8.61 percent to the value of the used and useful property as of the date certain results in required operating income of \$82,962,087. Under the stipulation, the parties agreed that the adjusted operating income of Duke during the test year was \$47,759,653. This results in an operating income deficiency of \$35,222,434, which, when adjusted for uncollectibles and taxes, results in an income deficiency of \$55,300,000 and, therefore, a recommended revenue increase of \$55,299,335. Therefore, we find that a revenue increase of \$55,299,335 is reasonable and should be approved.

¹ We interpret the language of paragraph three of the stipulation to mean that Duke will implement depreciation rates set forth in the staff report, modified so that such rates do not reflect depreciation expense on plant that will be fully depreciated by the end of the test year, as set forth in OCC's objections.

EFFECTIVE DATE AND TARIFFS

As part of its investigation in this matter, the staff reviewed Duke's various rates and charges, and the provisions governing terms and conditions of service. As part of the stipulation, the parties filed proposed tariffs that reflect the rates, at the revenue requirement agreed to by the stipulating parties, as well as the remaining tariff matters agreed to by the parties. The Commission has reviewed the proposed tariffs and found that they correctly incorporate the provisions of the stipulation. Therefore, the Commission finds that Duke should file, in final form, four complete, printed copies of the final tariffs with the Commission's docketing division, consistent with this order. Duke shall also submit a proposed customer notice or notices. Duke shall review the customer notices with Commission staff and make whatever changes are recommended by staff. The effective date of the increase shall be a date not earlier than the date upon which final tariffs and the proposed customer notices are filed with the Commission. The new tariffs shall be effective for service rendered on or after such effective date.

FINDINGS OF FACT

- (1) Duke is an electric light company within the meaning of Sections 4905.03(A)(4) and 4928.01(A)(7), Revised Code, and, as such, is a public utility as defined by Section 4905.02, Revised Code, subject to the jurisdiction and supervision of the Commission. Duke is also an electric utility within the meaning of Section 4928.01(A)(6), Revised Code.
- (2) On June 25, 2008, Duke filed a notice of intent to file an application for an increase in rates for electric distribution service for its service territory.
- (3) Also on June 25, 2008, Duke requested waivers of various standard filing requirements contained in Rule 4901-7-01, Appendix A, Chapter II, O.A.C. Duke's waiver requests were granted on July 23, 2008.
- (4) Duke requested that the test year begin January 1, 2008, and end December 31, 2008, and that the date certain be March 31, 2008. By entry of July 23, 2008, the Commission approved the requested date certain and test year.
- (5) On July 25, 2008, Duke filed applications, in Case Nos. 08-709-EL-AIR, 08-710-EL-ATA, and 08-711-EL-AAM, to increase its electric distribution rates, effective April 1, 2009, for tariff approval, and for approval of a change in accounting methods.

- (6) By entry of August 12, 2008, a technical conference concerning the rate case and related applications was scheduled for August 21, 2008.
- (7) On September 10, 2008, the Commission issued an entry that accepted the applications for filing as of July 25, 2008.
- (8) On April 30, 2009, proofs of publication of the application were filed in the docket, together with a motion for admission as a late-filed exhibit.
- (9) By entry of September 12, 2008, Case No. 06-718-EL-ATA was consolidated with the rate cases.
- (10) On December 22, 2008, Duke filed a motion for approval of a change in accounting methods to defer and create a regulatory asset for storm restoration costs incurred during the test year and a recovery mechanism for storm restoration costs.
- (11) By entry of January 14, 2009, the Commission approved Duke's application to modify accounting procedures to defer incremental operation and maintenance costs related to the September 14, 2008, wind storm service restoration expenses with carrying costs; however, the reasonableness and recovery of said deferred amounts would be examined and addressed in a future proceeding.
- (12) On January 27, 2009, staff filed its staff report.
- (13) By entry dated February 5, 2009, persons wishing to file objections to the staff report and those wishing to intervene were directed to file motions to intervene by February 26, 2009. This entry also scheduled a prehearing conference for March 17, 2009, and the evidentiary hearing for March 31, 2009.
- (14) Intervention was granted to OCC, Kroger, PWC, GCHC, the city of Cincinnati, OCTA, TWTC, and Albert Lane.
- (15) Motions to admit David C. Rinebolt, Gardner F. Gillespie, and Pamela H. Sherwood to practice pro hac vice before the Commission in this proceeding were granted on February 5, 2009.
- (16) Objections to the staff report were filed by Mr. Lane on February 3, 2009, and by Duke, Kroger, Greater Cincinnati Health Council, OP&E, PWC, OCTA, and OCC on February 26, 2009.

- (17) A prehearing conference was held on March 17, 2009.
- (18) The evidentiary hearings were held on March 31, 2009, and June 17, 2009.
- (19) Three local public hearings were held at various locations from March 16, 2009, through March 24, 2009, pursuant to published notices. Approximately 51 members of the public attended the three public hearings and gave sworn testimony.
- (20) A stipulation was filed and admitted into evidence on March 31, 2009.
- (21) The value of all of the company's jurisdictional property used and useful for the rendition of electric distribution service to their customers affected by this application, determined in accordance with Section 4909.15, Revised Code, is not less than \$963,787,307.
- (22) The current net operating income for the 12-month period ended December 31, 2008, is \$47,759,653. The net operating income realized by Duke represents a rate of return of 4.96 percent. The stipulating parties have recommended a rate of return of 8.61 percent.
- (23) A rate of return of 4.96 percent is insufficient to provide Duke reasonable compensation for the service it provides.
- (24) A rate of return of 8.61 percent is fair and reasonable under the circumstances presented by these cases and is sufficient to provide Duke just compensation and return on the value of its property used and useful in furnishing electric distribution service to its customers.
- (25) A rate of return of 8.61 percent applied to the jurisdictional rate base of \$963,787,307 results in allowable net operating income of \$82,962,087. This results in an operating income deficiency of \$35,222,434, which, when adjusted for uncollectibles and taxes, results in a revenue increase of \$55,299,335.

CONCLUSIONS OF LAW

- (1) Duke's application to increase rates was filed pursuant to, and this Commission has jurisdiction of the application under, the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code, and the application complies with the requirements of these statutes.

- (2) A staff investigation was conducted, reports of that investigation were duly filed and mailed, and public hearings were held, the written notice of which complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.
- (3) The stipulation submitted by a majority of the parties, and supported by staff, is reasonable and, as indicated herein, shall be adopted in its entirety.
- (4) The existing rates and charges for electric distribution service are insufficient to provide Duke with adequate net annual compensation and return on its property used and useful in the provision of electric distribution service.
- (5) A rate of return of 8.61 percent is fair and reasonable under the circumstances of this case and is sufficient to provide Duke just compensation and return on its property used and useful in the provision of electric distribution services to its customers.
- (6) Duke is authorized to withdraw its current tariffs and to file, in final form, revised tariffs as approved by the Commission herein.

ORDER:

It is, therefore,

ORDERED, That the stipulation be adopted in its entirety. It is, further,

ORDERED, That the application of Duke for authority to increase its rates and charges for electric distribution service, and related applications considered herein, be granted to the extent provided in this opinion and order. It is, further,

ORDERED, That Duke be authorized to file in final form four complete copies of its tariffs consistent with this opinion and order, and to cancel and withdraw its superseded tariffs upon the effective date of the revised tariffs. One copy shall be filed with this case docket, one copy shall be filed with Duke's TRF docket, and the remaining two copies shall be designated for distribution to the rates and tariffs division of the Commission's utilities department. Duke shall also update its tariffs previously filed electronically with the Commission's docketing division. It is, further,

ORDERED, That Duke 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

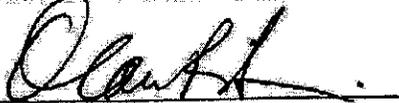
Enforcement Department, Reliability and Service Analysis Division, at least 10 days prior to its distribution to customers. It is, further,

ORDERED, That the effective date of the revised tariffs shall be a date not earlier than the date of this opinion and order, the date upon which four complete copies of final tariffs are filed with the Commission, and the date on which the proposed customer notice is filed with the Commission. The revised tariffs shall be effective for services rendered on or after such effective date. It is, further,

ORDERED, That Duke's motion for admission of proofs of publication be granted and that Duke's motion to strike be denied. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Fergus

Valerie A. Lemmie


Cheryl L. Roberto

SEF/JWK:ct:geb

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Renee J. Jenkins
Secretary