

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of)	
The Cincinnati Gas & Electric Company, now)	
known as Duke Energy Ohio, Inc.,)	
)	
Complainant,)	
)	
v.)	Case No. 05-75-EL-PWC
)	
The City of Forest Park,)	
)	
Respondent.)	

SECOND OPINION AND ORDER

The Commission, coming now to consider the testimony, and other evidence presented in this proceeding, hereby issues its second opinion and order.

APPEARANCES:

Paul A. Colbert, Associate General Counsel, and Rocco D'Ascenzo, Counsel, Duke Energy Ohio, Inc., 139 East Fourth Street, P.O. Box 960, Cincinnati, Ohio 45201, on behalf of the Cincinnati Gas & Electric Company.

Schottenstein, Zox & Dunn, by Christopher L. Miller and Daniel M. Anderson, 250 West Street, Columbus, Ohio 43215, on behalf of the City of Forest Park, Ohio.

OPINION:

I. HISTORY OF THE PROCEEDINGS

On November 1, 2004, the City of Forest Park (Forest Park or City) filed notice with the Commission, in accordance with Section 4939.05(E), Revised Code, in Case No. 04-1668-AU-PWN, of its intent to consider the enactment of a public way ordinance. On December 20, 2004, Forest Park enacted Ordinance No. 24-2004 (2004 Ordinance), an ordinance relating to the regulation of the public way, which became effective on January 19, 2005.

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On January 19, 2005, The Cincinnati Gas & Electric Company, now known as Duke Energy Ohio, Inc. (Duke),¹ filed a complaint pursuant to Sections 4939.06 and 4905.26, Revised Code, stating that it did not accept the 2004 Ordinance, and that the ordinance was unreasonable, unjust, and unjustly discriminatory in its assessment of public way fees. On March 7, 2006, the Commission issued its first Opinion and Order in this case, finding that the application fee provided for by the 2004 Ordinance was contrary to law and that the other issues presented by the complaint were not ripe for decision and should be dismissed.

Subsequently, on April 14, 2006, Forest Park filed notice in this case that it intended to consider enactment of a public way ordinance to establish public way fees, which it would begin to invoice and collect on May 18, 2006. Subsequently, Forest Park enacted Ordinances Nos. 08-2006 and 09-2006, which amended the provisions of the 2004 Ordinance regarding the regulation of the public way.

On May 15, 2006, Duke filed a second complaint in this case pursuant to Sections 4939.06 and 4905.26, Revised Code, stating that it does not accept the Ordinance Nos. 24-2004, 08-2006, and 09-2006 (collectively, Amended Ordinances) and alleging that the Amended Ordinances are unreasonable, unjust, unjustly discriminatory and unlawful in their assessment of public way fees.

On June 5, 2006, Forest Park filed its answer to the second complaint. Further, Forest Park filed a motion to dismiss the second complaint on June 5, 2006. The motion to dismiss was denied by the attorney examiner on July 11, 2006. On July 26, 2006, the Commission suspended the fee provisions of the Amended Ordinances.

The evidentiary hearing in this proceeding was held on July 14, 2006.² Two witnesses testified on behalf of Duke, and one witness testified on behalf of Forest Park. Following the evidentiary hearing, Duke and Forest Park both filed post-hearing briefs and reply briefs.

¹ On December 21, 2005, in Case No. 05-732-EL-MER, et al., the Commission approved the application for a change in control filed by Cinergy Corp., on behalf of The Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. The change in control having now been completed, The Cincinnati Gas & Electric Company is now known as Duke Energy Ohio, Inc.

² All transcript citations in this Second Opinion and Order refer to the transcript for the evidentiary hearing conducted on July 14, 2006.

II. APPLICABLE LAW

Chapter 4939, Revised Code, provides the statutory framework governing public way fees, establishing the parameters pursuant to which a municipal corporation may levy public way fees:

A municipal corporation . . . shall not levy a public way fee except in accordance with this section.

Section 4939.05(A), Revised Code.

Public way fees levied by a municipal corporation shall be based only on costs that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way. The costs shall be reasonably and competitively neutrally allocated among all persons occupying or using public ways owned or controlled by the municipal corporation

. . . .

Section 4939.05(C), Revised Code.

Section 4939.06(A), Revised Code, gives jurisdiction to the Commission to hear certain complaints regarding public way fees. It states that, if "a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation, the public utility may appeal the public way fee to the public utilities commission." That appeal is to be made by the filing of a complaint not later than 30 days after "the date the public utility first becomes subject to the ordinance."

The various applicable sections of the Chapter 4939, Revised Code, have been discussed and applied in previous public way cases before this Commission. *See, e.g., In the Matter of the Complaint of WorldCom, Inc., et al. v. City of Toledo*, Case No. 02-3207-AU-PWC, *et al.*, Opinion and Order (May 14, 2003); Entry on Rehearing (July 1, 2003)(*Toledo*); and *In the Matter of the Complaint of WorldCom, Inc., et al. v. City of Dayton*, Case No. 03-324-AU-PWC, Opinion and Order (June 26, 2003); Entry on Rehearing (August 19, 2003)(*Dayton*). In *Toledo*, the Commission announced a ten-part test to be used in determining the propriety of public way fees. For convenience, the test is repeated here and future references will be by test part number only:

In summary, the Commission finds that, for public way fees to be upheld under the terms of Section 4939.05(C), the following tests must be met:

- (1) The public way fees must be based on amounts paid by the municipal corporation.
- (2) The amounts paid, on which public way fees are based, must be real expenses to which the municipal corporation has already become subject.
- (3) The amounts paid, on which public way fees are based, must be incurred by a municipal corporation in its own right, not by a utility owned by that municipal corporation, and must be incurred as a result of activities of the municipal corporation which are associated with the public way.
- (4) The amounts paid, on which public way fees are based, must have been caused by the use or occupancy of the public way by one or more individual occupants or users, by one or more reasonable classifications of occupants or users, or by all of the occupants or users as a whole.
- (5) The amounts paid, on which public way fees are based, must be fairly allocated among the users or occupants.
- (6) The amounts paid, on which public way fees are based, must be allocated among the users or occupants in a manner that has no effect on competition among those users or occupants.
- (7) The public way fees can not result in the municipal corporation profiting financially from its public ways.
- (8) Any classification of users or occupants of the public way must be based on actual similarity of the members of the classes and must logically relate to a just purpose of the municipal corporation.
- (9) If there is a reasonable classification of users or occupants of the public way, the amount of the public way fee charged to any class of users or occupants of the public way may not exceed the amounts paid by the municipal corporation as a result of the use or occupancy of the public way by that class.
- (10) If there is no reasonable classification of users or occupants of the public way, the amount of the public way fee charged to any individual user or occupant of the public way may not exceed the amounts paid by the municipal corporation as a

result of the use or occupancy of the public way by that individual user or occupant.

Toledo, Opinion and Order (May 14, 2003) at 30-31.

III. THE AMENDED ORDINANCES

The Amended Ordinances establish public way fees to be assessed to occupants of the public way. These public way fees include an Application Fee, a Registration Maintenance Fee, and Right-of-Way Permit Fees. The Application Fee is intended to pay for the actual costs incurred by the City in receiving, processing and granting an application. Section 52.06(A), Codified Ordinances of the City of Forest Park. The Registration Maintenance Fee is intended to compensate the City for its costs to manage, administer and control its rights of way. Section 53.08(A). Registration Maintenance Fees are calculated by a mileage allocation methodology, under which the total costs allocated by the City are assigned to occupants of the public way based upon the total mileage of public way occupied by their facilities. Right-of-Way Permit Fees are paid by any occupant which need to construct facilities in the public way and are based on the City's actual costs related to the issuance, inspection, oversight, enforcement and regulation of permits. Section 156.14.

The Amended Ordinances also provide for Minor Maintenance Permits, but no fee is charged for the issuance of such permits. Section 52.19(A). The Amended Ordinances also require that public way occupants submit mapping information regarding facilities located in the public way and authorize Forest Park to bill occupants for costs which the City incurs to input mapping data into its mapping system. Section 52.07(B).

IV. DISCUSSION

A. Issues in the proceeding

In the complaint, Duke raised a number of issues, including: the determination of administrative costs incurred by the City; the mileage allocation methodology; the recovery of legal fees in the public way fees; street degradation and reduction in useful life; and mapping fees.

1. Determination of Administrative Costs

Duke challenges \$13,078.20 in administrative costs which are included in the Registration Maintenance Fee. Duke argues that such fees do not reflect actual costs incurred by the City in the management of its public way. Duke notes that Section 4939.05, Revised Code, and the Commission's ten-part test require that costs recovered through public way fees be known and actual. However, Duke contends that the evidence

of record demonstrates that Forest Park proposes to collect, through public way fees, costs which are inaccurately calculated and speculative. Duke notes that Forest Park's witness Buesking conceded that the employees of Forest Park were not given any directive or guidance on how to record their time (Tr. at 46). Thus, Duke concludes that the resulting time records are nothing more than speculative summaries of time spent performing some administrative function. Further, Duke claims that the alleged time submitted appears to be rounded to a minimum or maximum time charged per type of activity rather than the actual time spent administering Forest Park's public way. Duke notes, for example, that one of Forest Park's employees, Chip Berquist, recorded exactly 15 minutes for each electronic mail correspondence listed in the time records and that there are numerous instances where several of these activities take place at or near the same time.

Forest Park claims that, during 2005, its personnel tracked the costs imposed upon the City as a result of the management and administration of its public way. Forest Park states that those costs related to specific construction projects or permitting were allocated to the Right-of-Way Permit Fee charged to each individual permit holder. The remainder of the administrative costs, along with the legal costs from Duke's previous challenge, were attributed to the Registration Maintenance Fee, which was assessed based upon a mileage allocation methodology. In response to the arguments raised by Duke, Forest Park argues that its witness Buesking testified that he decided that a standardized time form need not be used after determining, with his staff, that they were already adequately tracking their time. Further, Forest Park argues that the specific instances raised by Duke where Mr. Berquist appeared to be recording multiple activities at the same time were simply the result of interruptions in his work day and his performing multiple tasks at roughly the same time.

In public way cases, the burden of proof generally lies with the complainant. However, the Commission has held that a "municipal corporation, faced with a challenge to its fees under [Section 4939.05, Revised Code] and presented with enough evidence that properly supports the allegation, must be able to *prove affirmatively* that the costs on which its fee are based 'are or can be properly allocated and assigned to the occupancy or use of a public way.'" Further, because we found that "proof requires more than a simple preponderance of the evidence," we held that Section 4939.05(C), Revised Code, requires that a municipal corporation prove by "*clear and convincing evidence*" that costs are properly allocated and assigned to the occupancy or use of the public way. *Toledo*, Opinion and Order (May 14, 2003) at 19 (emphasis added).

In this case, Forest Park seeks to recover, through its Registration Maintenance Fee, administrative costs involving the staff time required to administer and manage the public way and totaling \$13,078.20 (Forest Park Ex. 1 at 9). However, the Commission cannot find that Forest Park has proved by clear and convincing evidence that these

administrative costs are properly allocated and assigned to the occupancy of the public way.

As Duke notes, the evidence in the record indicates that the employees of Forest Park were not given any directive or guidance on how to record their time (Tr. at 45-46). Certain activities, such as electronic mail, appear to be consistently charged using a rounded or minimum amount, but Forest Park did not introduce any evidence of established policies setting such minimum amounts (Tr. at 46). Although Forest Park had distributed standardized forms to its employees, the employees did not use the standardized forms (Tr. at 48-49). Forest Park did not introduce any evidence that its time records had been subject to management review or otherwise audited in any manner. Forest Park did not demonstrate that the time records were kept contemporaneously rather than reconstructed at a later date (Tr. at 49). Further, Duke has identified several instances in the time records where the time charged for one activity overlaps with a second activity, resulting in a double recovery for the same time and, thus, the same costs. All of these factors, in combination, undermine Forest Park's ability to prove, by clear and convincing evidence, that the administrative costs are properly allocated and assigned to the occupancy of the public way.

Therefore, because Forest Park has not proven, by clear and convincing evidence, that administrative costs in the amount of \$13,078.20 are properly allocated and assigned to the occupancy of the public way, the Commission finds that Forest Park's Registration Maintenance Fee is unjust and unreasonable.

Finally, the Commission notes that Duke did not challenge the *amount* of the legal fees which Forest Park sought to recover through the Registration Maintenance Fee although Duke has challenged the *manner* in which those costs are allocated and whether *any* legal fees are properly included in the Registration Maintenance Fee. The Commission will address both of those questions below, but we note that, since Duke has not challenged the amount of the legal fees, Forest Park is not required to prove that the costs are properly allocated and assigned to the occupancy of the public way.

2. The Mileage Allocation Methodology

The Forest Park ordinance provides that an annual Registration Maintenance Fee be assessed against every provider using or occupying the right-of-way. Forest Park claims that only those costs that do not relate to specific one-time activities in the public way are recovered under the Registration Maintenance Fee. Costs related to one-time activities, primarily permitting and inspection, are recovered by the Right-of-Way Permit Fee. The amount of Registration Maintenance Fee that a provider using or occupying the right-of-way pays each year is based upon the total of such costs divided by the total miles of right-of-way occupied by all providers multiplied times the number of miles of right-of-way

occupied by a provider. Duke argues that Forest Park's assessment of costs based upon mileage is unreasonable. Duke claims that Forest Park's mileage allocation methodology is unrelated to costs caused by occupants. Duke argues that, although it is not opposed to paying for the actual costs it causes, there is no evidence that a mileage allocation methodology has any relation to the amount of administrative costs which Duke causes Forest Park to incur in maintaining its public way. Duke notes that Forest Park has not conducted a cost study and that Forest Park's witness Buesking testified that he was not aware of the existence of any such study (Tr. at 54). Therefore, Duke concludes that the mileage allocation fee structure has no nexus to cost causation and that the fee structure violates at least two parts of the Commission's ten-part test.

In addition, Duke argues that the Commission has not expressly approved a public way fee based upon a mileage allocation methodology. Duke notes that, in *Dayton*, the Commission stated that "[a] fee that is based on the amount of public ways occupied or used would be acceptable if it also reasonably and competitively neutrally allocates costs among users or occupants, and meets all other parts of Section 4939.05." *Dayton*, Entry on Rehearing (August 19, 2003) at 6. However, Duke contends that the Commission's clarification in *Dayton* was merely the Commission's opinion that a mileage allocation methodology is not *per se* unreasonable, provided that it is competitively neutral and complies with Chapter 4939, Revised Code. Further, Duke notes that the Commission limited its clarification to the facts presented on the record in that particular case.

Forest Park argues that the Registration Maintenance Fee methodology was derived directly from the Commission's first decisions interpreting Chapter 4939, Revised Code, in the *Toledo* and *Dayton* cases and that its fee methodology is identical to the methodology discussed by the Commission in *Dayton*. Forest Park notes that Duke's witness Wathen testified that he believed that *Dayton* was wrongly decided and that there was nothing factually to distinguish *Dayton* from this case (Tr. at 19-20).

In *Dayton*, the City of Dayton requested clarification from the Commission on how administrative costs should be allocated. We held that:

[B]ased upon the record before us, the only feasible method for apportioning the costs is on the basis of the number of miles of public way used or occupied by the public utilities. . . . [T]he city should require that the users or occupants of its public ways specify the number of miles of public way in which its facilities are located. The total costs incurred for public way administration should be divided by the total number of miles used or occupied by all users or occupants, and then multiplied by the mileage used or occupied by an individual user or

occupant in order to reach an appropriate fee for that user or occupant.

Dayton, Entry on Rehearing (August 19, 2003) at 5.

At the hearing, Duke's witness did not dispute Forest Park's claim that its allocation methodology is consistent with the Commission's holding in *Dayton*. Instead, Duke's witness proposed an alternative allocation methodology which he believed was more appropriate (Tr. at 19). However, according to parts five and six of our ten-part test, the question before the Commission is not whether a public way fee allocates the costs in *the optimal manner* but whether a public way fee allocates costs *fairly* and in a manner that has *no effect on competition* among those users or occupants. Based upon the record in this proceeding, the Commission finds that the allocation methodology used by Forest Park allocates costs *fairly* and in a manner that has no effect upon competition.

Duke correctly notes that our clarification in *Dayton* was limited to the facts and circumstances in that case and that the Commission, heretofore, has not expressly approved a public way fee based upon a mileage allocation methodology. However, Duke's witness could not distinguish the facts and circumstances in *Dayton* from the facts and circumstances in this case (Tr. at 19-20). Duke has not persuaded the Commission that our holding in *Dayton* was wrongly decided or otherwise should not be followed in this case. Therefore, the Commission finds that Forest Park's mileage allocation methodology is consistent with our clarification in *Dayton*, allocates costs fairly among the users or occupants, and allocates costs among the users or occupants in a manner that has no effect on competition among those users or occupants.

3. Legal Fees

Duke argues that Forest Park's registration maintenance fee improperly includes legal fees. Duke contends that the amount of legal fees to be recovered through the Registration Maintenance Fee is unreasonable because the majority of those costs are associated with the defense of Forest Park's 2004 Ordinance, which Duke contends was ultimately found to be unreasonable. Duke notes that, in the first Opinion and Order in this case, the Commission held that various public way fees were not ripe for a decision. Therefore, Duke claims that the only issue involving the 2004 Ordinance on which the Commission made a determination was the Application Fee, which the Commission determined to be unlawful. Duke argues that the Commission should not permit a municipality to recover, through a public way fee, legal costs which were incurred to defend an ordinance which was unreasonable and unlawful.

Duke further argues that the Commission did not approve the recovery of legal fees in *Dayton*. Instead, Duke believes that the Commission merely permitted the amortization of legal fees in the public way fees assessed by the City of Dayton because all parties

agreed that the recovery of some level of legal fees was reasonable and because no party contested the legal fees recovered in that case.

Forest Park claims that it designed its ordinance to reflect the Commission's decisions in *Toledo* and *Dayton*. Forest Park notes that the Commission has been clear that the legal costs incurred in defending a challenge to a public way fee are includable as a cost that can be recovered. Forest Park further notes that the Commission has held that extraordinary costs, such as a defense of a challenge of a public way fee, should be spread over a period of years, which Forest Park has done.

In addition, Forest Park denies Duke's claim that Duke was the prevailing party in the challenge to the 2004 Ordinance. Forest Park notes that the only area where Duke obtained any relief was the advance deposit portion of the Application Fee and that Duke's other challenges to the 2004 Ordinance were dismissed by the Commission for lack of jurisdiction or because they were not ripe for decision.

The Commission has not previously imposed a requirement that a municipality prevail before the Commission in order to recover the costs of legal fees incurred in defending a public way complaint case, and we decline to do so in this case. The legal costs at issue in this proceeding relate to Forest Park's defense of its public way fee following Duke's initial complaint in this case. Although Forest Park did not prevail on all counts raised by the complaint, Forest Park's defense to the initial complaint in this case was not frivolous. The Commission held in *Dayton* that extraordinary expenses, such as legal fees resulting from a challenge to a public way fee, should be recovered over a period of years. *Dayton*, Entry on Rehearing (August 19, 2003) at 3-4. Forest Park has spread the legal costs to be collected through the Registration Maintenance Fee over five years; the total legal costs included in the Registration Maintenance Fee for 2006 is \$21,750 (Forest Park Ex. 1 at 9). Therefore, consistent with our holdings in *Dayton* and *Toledo*, the Commission finds that the inclusion of \$21,750 per year, over five years, in legal costs in the Registration Maintenance Fee is not unjust, unreasonable or unlawful.

4. Degradation and Reduction in Useful Life

Duke argues that Forest Park's Amended Ordinances impermissibly assess costs for street degradation and reduction in useful life in violation of Chapter 4939, Revised Code and the Commission's ten-part test. Duke claims that street degradation is expressly included in the Right-of-Way Permit Fee calculation although the assessment for 2006 was zero. Duke notes that Forest Park's witness Buesking stated at the hearing that the City has authority to impose street degradation costs without further amendment to its ordinances (Tr. at 61). Duke concludes that the street degradation costs are ripe for review; Duke further argues that such costs fail the Commission's ten-part test because

they are not real expenses to which Forest Park has already become subject and the costs are not based upon amounts paid by Forest Park.

Forest Park claims that there are no costs included as a component of any of its public way fees that relate to degradation or reduction in the useful life of its streets. Forest Park states that, should it ever seek to recover such costs, it would first consult with the providers and that any dissatisfied provider would have the right to bring a new challenge under Chapter 4939, Revised Code. Moreover, Forest Park concedes that, if it ever sought to recover such costs, such a change would be subject to the notice requirements of Section 4939.05(E), Revised Code. Therefore, Forest Park concludes that the issue of street degradation is not ripe for review.

Section 4939.06(A), Revised Code, provides that a public utility, which does not accept a public way fee levied against it, must bring its complaint about such a matter not later than 30 days after it becomes "subject to the ordinance." However, the Commission has held that this statutory provision, which controls the timing for filing a complaint, must be read to base the deadline on the establishment of actual fees. If no fees have been determined, then there is nothing about which the utility can complain. *Forest Park v. The Cincinnati Gas & Electric Company*, Case No. 05-75-EL-PWC, Opinion and Order (March 7, 2006)(*Forest Park I*) at 9. In this case, no public way fees have been assessed by Forest Park for street degradation and reduction in useful life. Therefore, the Commission finds that the provisions of the Amended Ordinances related to street degradation and reduction in useful life are not ripe for review and that those counts of the second complaint should be dismissed without prejudice. In the event that Forest Park ever seeks to recover costs related to street degradation and reduction in useful life, the notice provisions of Section 4939.05, Revised Code, would apply, and any provider could file a challenge at that time.

5. Mapping Fees

Duke claims that Forest Park has reserved its right to assess fees to public way occupants to recover Forest Parks costs to review, input or convert mapping data provided by the occupant into the Forest Park mapping system. Duke alleges that mapping fees are public way fees and that the mapping fees provided for by the Amended Ordinances are in violation of the Commission's ten-part test.

Forest Park states that, while the Amended Ordinances give the City the ability to require submission of mapping data in an electronic format or to charge for staff time inputting data from paper maps into such an electronic system, neither of these events has occurred. Forest Park concedes that, should it ever charge a fee for inputting mapping data into an electronic system, any affected party would have the right to challenge that fee under Chapter 4939, Revised Code. However, Forest Park contends that, because no public way fee is being charged now, the issue is not ripe for review.

As we stated above, Section 4939.06(A), Revised Code, provides that a public utility, which does not accept a public way fee levied against it, must bring its complaint about such a matter not later than 30 days after it becomes "subject to the ordinance." This provision must be read to base the deadline on the establishment of actual fees. If no public way fees have been determined, then there is nothing about which the utility can complain. *Forest Park I* at 9. In this case, no public way fees, related to mapping, have been assessed by Forest Park. Therefore, the Commission finds that the provisions of the Amended Ordinances related to mapping fees are not ripe for review and that those counts of the second complaint should be dismissed without prejudice. In the event that Forest Park ever seeks to recover costs related to mapping, the notice provisions of Section 4939.05, Revised Code, would apply, and any provider could file a challenge at that time.

B. Suspension of public way fees.

By entry dated July 26, 20006, the Commission suspended the fee provisions of the Amended Ordinances pursuant to Section 4939.06, Revised Code. The suspension of the public way fees of Forest Park shall continue until February 12, 2007. As set forth above, the Commission has determined that the Registration Maintenance Fee is unlawful, unjust and unreasonable to the extent that it includes \$13,078.20 in administrative costs. Therefore, pursuant to Section 4939.06, Revised Code, the \$13,078.20 in administrative costs included in the Registration Maintenance Fee, which the Commission has found to be unlawful, unjust and unreasonable, shall not be collectible, either for the suspension period or subsequent thereto.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On April 14, 2006, Forest Park filed notice in this case that it intended to consider enactment of a public way ordinance to establish public way fees, which it would begin to invoice and collect on May 18, 2006.
- (2) On May 15, 2006, Duke filed a second complaint in this case pursuant to Sections 4939.06 and 4905.26, Revised Code, stating that it does not accept the Amended Ordinances and alleging that the Amended Ordinances are unreasonable, unjust, unjustly discriminatory and unlawful in their assessment of public way fees.
- (3) Forest Park filed a motion to dismiss the second complaint on June 5, 2006. The motion to dismiss was denied by the attorney examiner on July 11, 2006.

- (4) On July 26, 2006, the Commission suspended the public way fee provisions of the Amended Ordinances.
- (5) The evidentiary hearing in this proceeding was held on July 14, 2006.
- (6) In public way cases, the burden of proof generally lies with the complainant. However, Section 4939.05(C), Revised Code, requires that a municipal corporation prove by clear and convincing evidence that costs are properly allocated and assigned to the occupancy or use of the public way.
- (7) Forest Park has not proven, by clear and convincing evidence, that administrative costs in the amount of \$13,078.20 are properly allocated and assigned to the occupancy of the public way; therefore, Forest Park's Registration Maintenance Fee is unjust and unreasonable.
- (8) Forest Park's mileage allocation methodology allocates costs fairly among the users or occupants and allocates costs among the users or occupants in a manner that has no effect on competition among those users or occupants.
- (9) The recovery of legal costs of \$21,750 per year, over five years, through the Registration Maintenance Fee is not unjust, unreasonable or unlawful.
- (10) Section 4939.06(A), Revised Code, provides that a public utility which does not accept a public way fee levied against it must bring its complaint about such a matter not later than 30 days after it becomes subject to the ordinance. This statutory provision must be read to base the deadline on the establishment of actual fees.
- (11) The provisions of the Amended Ordinances related to street degradation and reduction in useful life are not ripe for review, and those counts of the second complaint should be dismissed without prejudice.
- (12) The provisions of the Amended Ordinances related to mapping fees are not ripe for review, and those counts of the second complaint should be dismissed without prejudice.

ORDER:

It is, therefore,

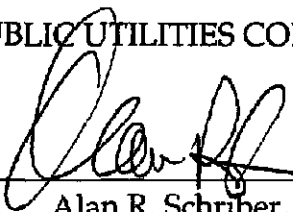
ORDERED, That the complaint filed by Duke on May 15, 2006, be granted in part and denied in part in accordance with this Second Opinion and Order. It is, further,

ORDERED, That the Registration Maintenance Fee prescribed by the Amended Ordinances be deemed unlawful to the extent that it includes recovery of \$13,078.20 in administrative costs incurred by the City of Forest Park in 2005. It is, further,

ORDERED, That the suspension of the public way fee provisions of the Amended Ordinances, previously ordered by this Commission, be terminated effective February 12, 2007, as set forth above. It is, further,

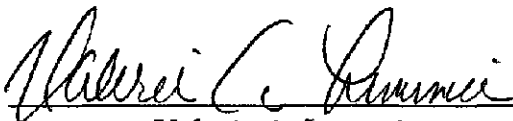
ORDERED, That a copy of this Second Opinion and Order be served upon all parties of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

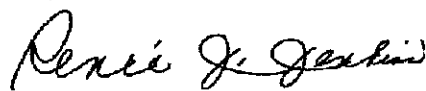
Valerie A. Lemmie

Donald L. Mason

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Entered in the Journal

JAN 10 2007



Renee J. Jenkins
Secretary