FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Duke Energy Ohio, Inc.,	:	
Complainant,	:	
v.	:	Case No. 05-75-EL-PWC
The City of Forest Park	:	
Respondent.	:	

APPLICATION FOR REHEARING OF COMPLAINANT, DUKE ENERGY OHIO, INC.

On or about January 10, 2007, the Public Utilities Commission of Ohio (Commission) issued its Second Opinion and Order in the above captioned case finding, among other things, that Forest Park's mileage allocation methodology of its public way fees, fairly allocates costs among users or occupants and has no effect on competition, and that Duke Energy Ohio, Inc.'s (DE-Ohio) challenge regarding street degradation and mapping fees was not ripe.[1] The Commission's Entry is unreasonable and unlawful for the following reasons:

1. The Commission unreasonably and unlawfully failed to consider all of the pertinent facts and circumstances;
2. The Commission unreasonably and unlawfully approved an allocation methodology contained in a municipal ordinance that is

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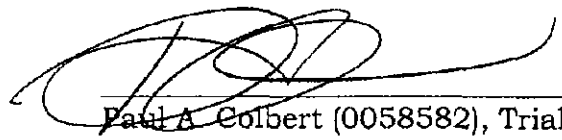
[1] *In re Forest Park*, Case No. 05-75-EL-PWC (January 10, 2007) (Second Opinion and Order) at 13.

in direct violation of R.C. 4939.05 because it does not allocate costs in a manner that is related to costs caused by occupants.

3. The Commission acted unreasonably and unlawfully in holding that the street degradation and mapping fees provisions contained Forest Park's Second Ordinance, were not ripe for review.

For the foregoing reasons as well as those stated in the accompanying memorandum in support, DE-Ohio respectfully requests that the Commission reverse its decision upholding Forest Park's per mile based allocation methodology.

Respectfully Submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION:

On December 20, 2004, Forest Park's City Council passed, Ordinance 24-2004[2] (First Ordinance). Among other things, the Ordinance repealed Forest Park's previously Codified Ordinance Chapter 52, as enacted on September 17, 2001, and established regulations and fees relating to the management, administration and control of the use of its public right of way.[3] The First Ordinance went into effect on January 19, 2005.[4] Pursuant to R.C.4939.06 and R.C.4905.26, DE-Ohio timely filed a complaint challenging the various fees, related classifications, and assignments and allocations of costs of the public way fees imposed by Forest Park as a result of the First Ordinance.

On March 7, 2006, the Commission issued its Opinion and Order finding that Forest Park's Application Fee was unlawful and unreasonable, and did not represent actual costs. Further, the Commission deferred ruling upon the propriety of the remainder of Forest Park's proposed public way fees, finding them not ripe for consideration because Forest Park had not yet assessed fees.[5] The Commission directed Forest Park to provide DE-Ohio at least 30 days written notice prior to the assessment of any additional fees.[6]

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2 Passed on December 20, 2004.
3 Ordinance 24-2004.
4 Ordinance in effect 30 days after its passage on December 20, 2004.
5 *In re Forest Park*, Case No. 05-75-EL-PWC (Opinion and Order at 8-11) (March 7, 2006).
6 *Id.* at 9.

On April 14, 2006, Forest Park filed with the Commission, and noticed DE-Ohio, that it would assess public way fees against DE-Ohio and other public way occupants.[7] On May 16, 2006, DE-Ohio timely filed its second complaint with the Commission. Subsequently, Forest Park billed DE-Ohio for payment of the fees assessed in Ordinances No. 08-2006 and 09-2006 (Second Ordinance) modifying the fees set forth in the Initial Ordinance.

On or about January 10, 2007, the Commission issued its Second Opinion and Order, which granted DE-Ohio's Complaint in part and denied it in part.[8] Specifically, the Commission found that like the previously held invalid application fee,[9] Forest Park's newly assessed public way fees were invalid in that they were not based upon actual costs.[10] Additionally, the Commission upheld Forest Park's inclusion of attorney fees and found that issues raised by DE-Ohio regarding mapping fees and street degradation were not ripe for review given that there were no actual costs assessed by Forest Park in its Ordinance.[11] Most significantly, the Commission upheld Forest Park's cost assessment methodology which allocated all administrative costs among right of way occupants based upon a per mile of occupation equation.[12]

The Commission acted unlawfully and otherwise erred in approving the per-mile allocation methodology set forth in Forest Park's Second Ordinance, which allocate costs in a manner in violation of R.C. 4939, and in ruling that

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7 Forest Park's Notice of Public Way Fee Assessment, April 14, 2006.
8 *In re Forest Park*, Case No. 05-75-EL-PWC (January 10, 2007) (Second Opinion and Order).
9 *In re Forest Park*, Case No. 05-75-EL-PWC (Opinion and Order at 8-11) (March 7, 2006).
10 *In re Forest Park*, Case No. 05-75-EL-PWC (January 10, 2007) (Second Opinion and Order) at 13.
11 *Id.*
12 *In re Forest Park*, Case No. 05-75-EL-PWC (Second Opinion and Order at 9) (January 10, 2007).

issues involving street degradation and mapping fees were not ripe. The evidence of record showed that the Second Ordinance does not allocate costs among occupants in a manner that is reasonable or competitively neutral.[13] Furthermore, the per-mile allocation does not allocate costs directly to the cost causer or to a reasonable classification of cost causers as is required under R.C. 4939. Based on the evidentiary record, the Commission should declare that Forest Park's Second Ordinance is unlawful, unjust, and unreasonable.

II. LAW AND ARGUMENT:

A. The Commission unlawfully and unreasonably approved an allocation methodology contained in a municipal ordinance that is in direct violation of R.C. 4939.05 and its Ten Part Test.[14]

In its Second Opinion and Order, the Commission approved Forest Park's per mile allocation methodology, finding it to be a fair allocation of costs among users or occupant of the public way.[15] The Commission's holding is unlawful and contrary to R.C. 4939.05. The allocation of administrative fees assessed by Forest Park does not comply with Chapter R.C. 4939 or the Commission's precedent, which require that assessed costs must be properly allocated and assigned to the use of the public way. Revised Code Section 4939.05(C) imposes specific standards for determining whether the allocation of public way fees imposed by a municipal ordinance are just and reasonable and not

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[13] *Id*

[14] See *In re Worldcom v. City of Toledo,* Case No. 02-3207-AU-PWC (Opinion and Order)(May 13, 2003); *In re Worldcom v. City of Dayton,* Case No. 03-324-AU-PWC (Opinion and Order)(June 26, 2003).

[15] *In re Forest Park,* Case No. 05-75-EL-PWC (Second Opinion and Order at 9) (January 10, 2007).

discriminatory or unlawful.[16] With respect to proper allocation of public way costs, Revised Code 4939.05(C) provides as follows:

> 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, including, but not limited to, persons for which payments are waived as authorized by division (B) of this section or for which compensation is otherwise obtained. No public way fee shall include a return on or exceed the amount of costs reasonably allocated by the municipal corporation to such occupant or user pursuant to any reasonable classification of occupants or users.[17]

Accordingly, pursuant to R.C.4939.05, a public way fee allocation must be based on; (1) actually incurred costs; (2) which are fairly, properly, and neutrally allocated and assigned to the occupancy or use of the public way. By statute, there must be a nexus between the allocation method employed by the municipality and the costs caused by an occupant or reasonable classification of occupants.[18]

This Commission has previously recognized the required nexus between actual costs caused by a public way occupant and the allocation of those costs.[19] In its *Entry on Rehearing* in the *Dayton Case,* the Commission stated that a municipality's goal in allocating administrative costs *"should be to*

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16 Ohio Rev. Code Ann. § 4939.05 (C) (Baldwin 2005).
17 *Id.* Emphasis Added.
18 *Id.*
19 *In re Worldcom v. City of* Dayton, Case No. 03-324-AU-PWC (Entry on Rehearing at 4) (August 19, 2003).

determine an allocation method that will distribute costs to users of the public way in reasonable proportion to the costs caused by those users."[20] In other words, the overarching statutory requirement and goal expounded by the Commission in allocating a municipality's actual administrative costs is that a municipality's cost allocation must be related to the actual costs caused by an occupant or reasonable classification of occupants of the municipality's public way.

To reach this goal and comply with the statutory requirement for a proper allocation of actual costs, the Commission set forth basic principles for municipalities to follow.[21] The Commission developed the following ten-part test (Ten Part Test) to determine whether the fees assessed by a municipal ordinance and the corresponding allocation thereof, comply with the requirements of 4939.05 (C):[22]

> 1. The public way fees must be based on amounts paid by the municipal corporation.
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> 2. The amounts paid, on which public way fees are based, must be real expenses to which the municipal corporation has already become subject.
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> 3. The amount 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.

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[20] *Id. Emphasis added.*

[21] See *In re Worldcom v. City of Toledo,* Case No. 02-3207-AU-PWC (Opinion and Order)(May 13, 2003); *In re Worldcom v. City of Dayton,* Case No. 03-324-AU-PWC (Opinion and Order)(June 26, 2003).

[22] *Id.* at 30-31.

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 the 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 cannot result in the municipal corporation profiting financially from its public way fees.

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. [23]

In the above styled matter, Forest Park enacted an ordinance that allocates its administrative costs among public way occupants based upon the

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[23] *Id.*

individual occupant's per mile of facilities located in the public way. In its Second Opinion and Order, the Commission upheld this allocation methodology as being consistent with its "clarification in *Dayton.*"[24] The Commission's decision in this regard is unreasonable and unlawful. The overwhelming and undisputed evidence presented shows that Forest Park's per mile allocation is unreasonable, unfair, unsupported, not related to actual costs caused by an occupant and in direct opposition to R.C. 4939.05.

In its *Entry on Rehearing* in *Dayton,* the Commission responded to a request for clarification by the city of Dayton, and stated that a per mile allocation is not per se unreasonable providing it is competitively neutral and complies with R.C. 4939.[25] In reaching that conclusion, the Commission cited to the lack of any record evidence that a per-mile allocation was unreasonable or that another methodology would be more accurate.[26] The propriety of a general per mile allocation was not before the Commission.

In its Second Opinion and Order in the case sub judice, the Commission upheld Forest Park's mileage based allocation scheme by citing to DE-Ohio's witness Mr. Wathen's testimony at the hearing that Forest Park's allocation methodology is consistent with the Commission's opinion in Dayton.[27] The Commission's opinion in that regard is unreasonable in that it misconstrues Mr. Wathen's testimony. In its *Dayton Opinion,* The Commission stated that "[a] fee that is based on the amount of pubic ways occupied or used would be

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24 *In re Forest Park*, Case No. 05-75-EL-PWC (Second Opinion and Order at 9) (January 10, 2007).
25 *Id.*
26 *Id.*
27 *Id.*

acceptable if it also reasonably and competitively neutrally allocates costs among the users or occupants, and meets all other parts of Section 4939.05."[28] Certainly, this opinion is correct. Mr. Wathen does not dispute that finding.

However, in *Dayton*, the Commission did not expressly approve a per mile allocation. Rather, the Commission unambiguously stated that it was not striking down the concept of a per mile allocation because the evidentiary record was void of any evidence showing it was unreasonable or inaccurate.[29] In Dayton, there was no record evidence for Commission consideration that a strict per mile allocation is always reasonable and fair or is per se reasonable. The propriety of a strict per mile allocation methodology was never brought before the Commission for review in *Dayton*. The Commission recognized that fact and stated unequivocally that its clarification was limited solely to the facts presented in the *Dayton* record.[30] Therefore, there can be no confusion as to the weight of the clarification provided by the Commission's Entry on Rehearing in *Dayton*.

In the present matter, DE-Ohio's witness Mr. Wathen did not concede that a per-mile allocation was fair, reasonable or properly allocated costs in a manner consistent with 4939.05. The distinction between the Forest Park Case and the Commission's clarification in the *Dayton Case*, is that in the present matter, the only evidence in the record and presented at hearing supported the unreasonable nature of a per mile allocation.

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28 *In re Worldcom v. Dayton*, Case No. 03-324-AU-PWC (Entry on Rehearing) (August 17, 2003) at 6.
29 *Id.*
30 *Id. at 5.*

As revealed in the hearing of this matter, Forest Park did not conduct a single study to determine whether the per mileage allocation in any way relates to the administrative costs caused by right of way occupants.[31] In fact, the only evidence of record shows just the opposite.

In his testimony, Forest Park's witness Mr. Buesking, concedes that the occupant's level of activity in the Right of Way, rather than the number of miles of facilities in the public way, directly affects the administrative costs placed upon the City.

> Q. ... What I am trying to get at is if one entity has significantly more *activity* in the right of way than another entity even though they have the same number of miles *would the administrative costs associated with both of those entities be different?*
>
> A. *They would be different.*[32]

The administrative costs which Forest Park conceded are affected by the level of public way activity, are precisely what is being allocated by Forest Park on a per mile of occupancy basis. There is no nexus between the miles of facilities owned by an occupant in a public way and the amount of administrative costs incurred by a municipality in maintaining its right of way. There was no evidence presented at this hearing and nothing in the record that would support such a finding. Therefore, based upon the evidence presented in the record, the Commission's holding that Forest Park's mileage allocation

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31 TR at 53-54. (July 14, 2006).

32 TR at 55, lines 6-12. *Emphasis added.* (July 14, 2006).

methodology assesses costs fairly among the users or occupants is incorrect, unreasonable and contrary to law.

Further, DE-Ohio's witness Mr. Wathen testified that mileage allocations, such as Forest Park's, have no relationship to administrative costs caused by right-of-way occupants and such an allocation methodology is therefore, inconsistent with traditional regulatory ratemaking principles.[33] As such, Forest Park's per-mile allocation is in direct conflict with the Commission's articulated cost causation goal in *Dayton.*[34]

The evidence or record demonstrates that Forest Park's per mile allocation fails parts five[35] and six[36] of the Commission's ten-part test. Forest Park's per mileage allocation is unreasonable and unrelated to the proportion of costs caused by users of the Right of Way resulting in an unfair allocation of costs. It does not allocate costs among users in a manner that has no effect on competition. Rather, it creates a situation where larger and established occupants are subsidizing newer or expanding occupants whose level of activities drive up the overall administrative costs incurred by the municipality.

For example, an occupant of the right of way, such as DE-Ohio, has an established infrastructure with a substantial number of system miles already located in the right of way. On the other hand, another occupant who may be building out its system will have substantially more right of way activities

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33 DE-Ohio Supplemental Exhibit 1, at 6, lines 11-14.

34 *In re Worldcom v. City of Dayton*, Case No. 03-324-AU-PWC (Opinion and Order)(June 26, 2003).

35 The amounts paid, on which the public way fees are based, must be fairly allocated among the users or occupants.

36 The amounts paid, on which the 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.

through construction, general contacts with the municipality, and general inspections. These additional activities de-facto create additional general administrative costs for the municipality such as time keeping requirements, administrative paperwork processing, record keeping and general inspections. The administrative burden that the latter company is likely to place on the city is much greater than the burden associated with an existing occupant, thereby creating market subsidies among public way occupants and directly affecting competition.

The Commission correctly pointed out in its Second Opinion and Order, "a municipal corporation faced with a challenge to its fees and presented with enough evidence that properly supports the allegation, *must be able to prove affirmatively* that the costs on which its fees are based *are or can be properly allocated and assigned to occupancy or use of a public way,"* and that R.C. 4939.06(C) 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."[37]

In the hearing of this matter, Forest Park offered no factual evidence in support of its mileage allocation methodology. Forest Park did not affirmatively prove anything with respect to allocation. Forest Park merely advocated that it was merely following the Commission's dicta in the *Dayton Case*, which incidentally, was not founded upon any record evidence or in determination of

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[37] *In re Forest Park*, Case No. 05-75-EL-PWC (Second Opinion and Order at 9) (January 10, 2007) at 6.

any issue directly before the Commission.[38] In approving Forest Park's mileage based allocation, the Commission acted unlawfully in that it ignored its own requirement that a municipality support its allocation methodology through clear and convincing evidence. Instead, the Commission found in favor of Forest Park despite there being no evidence supporting a per-mile allocation. Accordingly, DE-Ohio should be granted rehearing on the per mile allocation of administrative costs.

B. The Commission Acted Unreasonably and Unlawfully in Finding that the Street Degradation and Mapping Fees Provisions Contained Forest Park's Second Ordinance Were Not Ripe for Review.

In its Second Opinion and Order, the Commission found that DE-Ohio's challenge to Forest Park's fee components relating to street degradation and mapping were not ripe for review because Forest Park has not yet included actual costs for those components.[39] The Commission further stated that in the event Forest Park ever seeks to recover actual street degradation or mapping fees in its Second Ordinance, the notice provisions of R.C. 4939.05 would apply and DE-Ohio could make a new challenge.

The Commission's finding is unreasonable and unlawful in that neither R.C. 4939.05(E) nor the Second Ordinance require the filing of notice before existing fees are increased.[40] Further, pursuant to R.C. 4939.06, a utility must

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38 City of Forest Park's Reply Memorandum, *Case No 05-75-EL-PWC,* June 27, 2006 at 2.

39 *In re Forest Park*, Case No. 05-75-EL-PWC (Second Opinion and Order at 11-12) (January 10, 2007).

40 Ohio Rev. Code Ann. § 4939.05 (E) (Baldwin 2006).

file its complaint "no later than thirty days after the date the public utility first becomes subject to the ordinance."[41] Accordingly, the Commission has erred in finding that DE-Ohio even has the ability to raise a subsequent challenge of the fees alone.

With respect to a municipality's notice requirement relied upon by the Commission in its Second Opinion and Order, R.C. 4939.05(E) provides that "[a]t least forty-five days prior to the date of *enactment of a public way ordinance* by a municipal corporation, the municipal corporation shall file with the [Commission] a notice that the ordinance is being considered."[42] Accordingly, the only notice requirement imposed upon a municipality is prior to the enactment of an ordinance.

On April 14, 2006, Forest Park filed with the Commission and provided notice to DE-Ohio, that it would assess public way fees against public way occupants.[43] Upon receiving that notice, DE-Ohio became subject to the Second Ordinance. Pursuant to R.C. 4939.05(E), DE-Ohio had thirty days to file its complaint.[44] DE-Ohio timely filed the present complaint with the Commission on May 15, 2006.

There is no additional notice requirement in R.C. Chapter 4939, which requires a municipality to provide additional notice once it has already enacted an ordinance and before it assesses or increases an underlying fee or cost component. The evidence presented at the trial of this matter confirms this.

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41 Ohio Rev. Code Ann. § 4939.06 (A) (Baldwin 2006).
42 Ohio Rev. Code Ann. § 4939.05 (E) (Baldwin 2006). *Emphasis added.*
43 Forest Park's Notice of Public Way Fee Assessment, April 14, 2006.
44 Ohio Rev. Code Ann. § 4939.05 (E) (Baldwin 2006).

Upon questioning by the Attorney Examiner, Forest Park's witness Mr. Buesking stated in testimony that the Second Ordinance provides the city with the authority to impose street degradation costs and mapping fees without further amendment or approval.[45] More specifically, Section § 52.091 of Forest Park's Second Ordinance, entitled "ADOPTION OF RULES AND REGULATIONS" provides in pertinent part:

> (A) In accordance with the provisions of this chapter, the Public Works Director may promulgate administrative rules and regulations, as the Public Works Director deems appropriate, to carry out the express purposes and intents of this chapter.
>
> (B) Such rules and regulations shall not materially increase the obligation of any provider hereunder, provided however that:
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> > *(1) The adoption of rules and regulations increasing fees; or*
> >
> > *(2) The requiring of the placement of facilities in designated portions of the rights-of-way, underground; or,*
> >
> > *(3) The requiring of the overbuilding of facilities or joints builds shall not be construed as materially increasing the obligation of the provider.*[46]

The clear and unambiguous language in the Second Ordinance provides that a fee increase is not a material alteration. Forest Park's witness stated that the city could assess street degradation and mapping fees without amending its

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45 TR at 61. (July 14, 2006).

46 Forest Park Chapter 52.091(emphasis added).

Second Ordinance or getting any additional approval. Accordingly, Forest Park may begin assessing these costs at its whim and without Commission notice.

By statute, DE-Ohio must challenge an ordinance and the underlying cost components within thirty days of becoming subject to said ordinance. R.C. Chapter 4939 does not expressly vest a utility with the ability to challenge an incremental cost increase in an enacted ordinance, except within thirty days of becoming subject to the ordinance itself.

As set forth in the evidentiary record of this matter and as fully explained on brief, Chapter 52.17 of Forest Park's Second Ordinance specifically identifies and expressly includes street degradation as a component of its annual calculation of its Permit Fee.

> The City, on or about January 1st of each year, *shall calculate all the actual and incurred* Right of Way Permit issuance, inspection, oversight, enforcement and regulation *costs* for the previous calendar year *including the value of the degradation and reduction in the useful life of the Rights of Way that will result from Construction that takes place therein...*[47]

The very inclusion of street degradation in the Second Ordinance is in violation of Ohio law. R.C. 4939.05 requires the basis for public way fees to be actual costs.[48] Speculative street degradation costs directly conflict with statute and the Commission's ten-part test because; (1) they are not real expenses to which the municipal corporation has already become subject; and (2) are not based upon amounts paid by the municipal corporation.[49]

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47 Forest Park Chapter 52.17(D)(2) (emphasis added).

48 Ohio Rev. Code Ann. § 4939.05 (Baldwin 2006).

49 *Id.*

Forest Park has not performed any study nor has it determined any engineering standard that would even prove street degradation occurs.[50] Further, the evidence is undisputed that even if degradation does exist, it is not an actual expense incurred by the City.[51] By the terms of the Second Ordinance, street degradation cannot occur because a utility that makes repairs is required to return the street to "a condition at least as good as its condition immediately prior to Construction."[52]

Similarly, with respect to mapping fees, the fact that these fees are undetermined and yet without notice, assessable against DE-Ohio without amendment to the Second Ordinance, results in those costs being unreasonable speculative costs incurred by the city. These speculative costs are not real and actual costs that the municipality has already incurred. It is unreasonable and unlawful for this Commission to permit any municipality to include the ability to assess such fees within an ordinance absent actual knowledge of the nature of the associated costs.

Accordingly, the Commission erred and acted unreasonably and unlawfully in finding that DE-Ohio's claims related to street degradation and mappings fees were not ripe for review. The Commission should grant rehearing on these issues.

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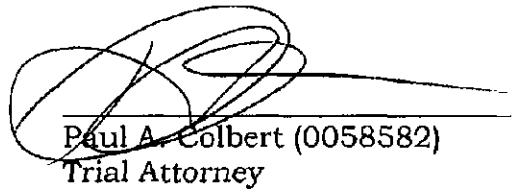
50 TR at 55. (July 14, 2006).
51 Merit Brief at 22- 27. (August 21, 2006).
52 Ordinance Section 52.18(I).

III. CONCLUSION

For the foregoing reasons, DE-Ohio respects that Commission grant rehearing with respect to Forest Park's per-mile allocation and the issue of ripeness of street degradation and mapping fees.

Respectfully submitted,



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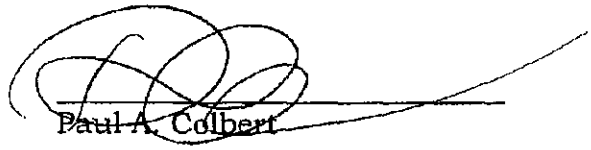
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application for Rehearing was served via ordinary mail on the following parties this 9th day of February, 2007.



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