

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,	)	
	)	Case No. 05-75-EL-PWC
v.	)	
	)	
The City of Forest Park,	)	
	)	
Respondent.	)	

ENTRY ON REHEARING

The Commission finds:

- (1) On January 19, 2005, The Cincinnati Gas & Electric Company, now known as Duke Energy Ohio, Inc. (Duke),<sup>1</sup> filed a complaint pursuant to Sections 4939.06 and 4905.26, Revised Code, stating that it did not accept The City of Forest Park, Ohio (Forest Park) Ordinance No. 24-2004 (2004 Ordinance), and that the 2004 Ordinance was unreasonable, unjust, and unjustly discriminatory in its assessment of public way fees. On March 7, 2006, the Commission issued its Opinion and Order in this proceeding, finding that the application fee provided for by 2004 Ordinance was contrary to law and that the other issues presented by the complaint were not ripe for decision and should be dismissed.
- (2) Subsequently, on April 14, 2006, Forest Park filed notice in this proceeding 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 Ordinance Nos. 08-2006 and 09-2006,

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<sup>1</sup> 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 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.

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which amended the provisions of the 2004 Ordinance regarding the regulation of the public way.

- (3) On May 15, 2006, Duke filed a second complaint in this proceeding pursuant to Sections 4939.06 and 4905.26, Revised Code, stating that it does not accept Ordinance No. 24-2004, 08-2006 and 09-2006 (Amended Ordinances) and alleging that the Amended Ordinances are unreasonable, unjust, unjustly discriminatory and unlawful in their assessment of public way fees. On January 10, 2007, the Commission issued its Second Opinion and Order in this proceeding, granting in part and denying in part the second complaint filed by Duke.
- (4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (5) On February 9, 2007, Duke filed an application for rehearing alleging that the Second Opinion and Order was unreasonable and unlawful on the following grounds.
  - (a) The Commission unreasonably and unlawfully failed to consider all of the pertinent facts and circumstances.
  - (b) The Commission unreasonably and unlawfully approved an allocation methodology contained in a municipal ordinance that is in direct violation of Chapter 4935, Revised Code, because it does not allocate costs in a manner that is related to costs caused by occupants.
  - (c) The Commission acted unreasonably and unlawfully in holding that the street degradation and mapping fee provisions contained in Forest Park's Ordinances were not ripe for review.
- (6) On February 26, 2007, Forest Park filed a memorandum contra the application for rehearing. However, Forest Park did not file its memorandum contra within ten days after the filing of the application for rehearing, as required by Rule 4901-1-35(B), Ohio Administrative Code. Therefore, Forest Park's

memorandum contra will not be considered by the Commission. Further, on March 6, 2007, Duke filed a reply to Forest Park's memorandum contra. Rule 4901-1-35, O.A.C., does not provide for the filing of a reply to a memorandum contra an application for rehearing. Accordingly, Duke's reply will not be considered by the Commission. The Commission notes that, even if we were to consider the memorandum contra or the reply, our decisions in this entry on rehearing would not change.

- (7) In first assignment of error, Duke argues that the Commission unreasonably and unlawfully failed to consider all of the pertinent facts and circumstances.

Section 4903.10, Revised Code, requires that an application for rehearing "shall set forth specifically the ground or grounds on which the applicant considers [the Commission's] order to be unreasonable or unlawful." However, in its application for rehearing, Duke fails to specify which facts and circumstances it believes that the Commission failed to consider. Therefore, rehearing on this assignment of error should be denied.

- (8) In its second assignment of error, Duke alleges that the Commission unreasonably and unlawfully approved an allocation methodology contained in a municipal ordinance that is in direct violation of Chapter 4935, Revised Code, because it does not allocate costs in a manner that is related to costs caused by occupants. Duke contends that Forest Park's administrative costs are affected by the level of public way activity and that 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.

However, as the Commission noted in the Second Opinion and Order, the costs related to one-time activities are recovered under the Amended Ordinances by the Right-of-Way Permit Fee rather than the Registration Maintenance Fee. Only those costs that do not relate to specific one-time activities, such as legal fees and administrative costs, are recovered through the Registration Maintenance Fee. The amount of the Registration Maintenance Fee for each occupant is determined based upon the total of such costs divided by the total miles of public way

occupied by all occupants multiplied times the number of miles of public way occupied by the occupant.

In the Second Opinion and Order, we found that the allocation methodology used by Forest Park was consistent with our prior holding in *In the Matter of the Complaint of WorldCom, Inc., et al. v. City of Dayton*, Case No. 03-324-AU-PWC, Entry on Rehearing (August 19, 2003)(*Dayton*). Although Duke correctly notes that our clarification in *Dayton* was limited to the facts and circumstances in that case, Duke's witness could not distinguish the facts and circumstances in *Dayton* from the facts and circumstances in the present case (Tr. at 19-20, 32).

Moreover, in the Second Opinion and Order, we determined, based upon the record in this proceeding, that the 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. In making this determination, the Commission fully considered the arguments raised by Duke. Duke raised no new arguments regarding this issue in its application for rehearing. Therefore, rehearing on this issue should be denied.

- (9) In its third assignment of error, Duke claims that the Commission acted unreasonably and unlawfully in holding that, because Forest Park has not assessed any public way fees related to street degradation or mapping, the street degradation and mapping fee provisions contained in Forest Park's Ordinances were not ripe for review.

The Commission thoroughly addressed this issue in our Second Opinion and Order, where we held that:

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.

Second Opinion and Order (January 10, 2007) at 11.

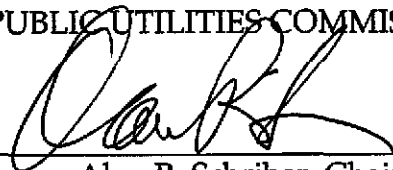
Duke raised no new arguments regarding this issue in its application for rehearing. Therefore, rehearing on this assignment of error should be denied.

It is, therefore,

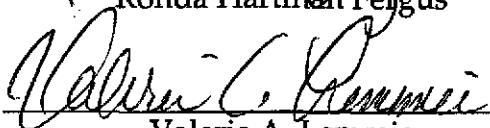
ORDERED, That the application for rehearing filed by Duke Energy Ohio, Inc., be denied. It is, further,


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

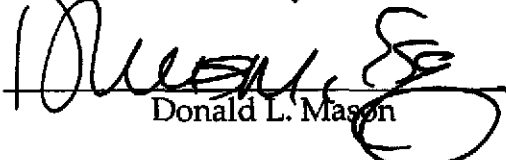
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Ronda Hartman Fergus

  
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Judith A. Jones

  
Donald L. Mason

GAP:ct

Entered in the Journal

MAR 07 2007

  
Renee J. Jenkins  
Secretary