

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

TIME WARNER CABLE LLC,)
)
 Complainant,)
)
 v.)
)
 DUKE ENERGY OHIO, INC.,)
)
 Respondent.)
)

Case No. 11-3797-EL-CSS

PUCO

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COMPLAINT

Time Warner Cable LLC ("TWC"), complaining of Respondent Duke Energy Ohio, Inc. ("Duke"), alleges and states as follows:

NATURE OF ACTION

TWC brings this action pursuant to Ohio Revised Code ("ORC") Sections 4905.71 and 4905.26 and Ohio Administrative Code ("OAC") Section 4901-9-01 to resolve a dispute concerning rates charged by Duke for TWC's occupancy of its conduit. TWC is dependent on conduit owned by Duke in Cincinnati to provide cable television, Internet access, and other communications services to its customers. Since 1994, TWC has occupied this conduit pursuant to a Conduit Lease Agreement ("Lease Agreement") (attached as Attachment 1), a Conduit Lease Assignment and Consent ("Assignment") (attached as Attachment 2), and an Installation and Operating Agreement ("Operating Agreement") (attached as Attachment 3). The Lease Agreement, Assignment, and Operating Agreement expired on June 30, 2010. Between September 2, 1994 and July 13, 2009, Duke did not charge its conduit access rates under tariff and did not otherwise obtain approval from the Public Utilities Commission of Ohio ("Commission" or "PUCO") for its agreements with TWC or its conduit rates. On July 8, 2009,

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the PUCO approved Duke's tariff for a conduit rate at \$1.26 per linear foot, which became effective on July 13, 2009. Also on July 8, 2009, the PUCO adopted a Stipulation and Recommendation ("Stipulation") entered into by the parties to Duke's tariff case, stating that "Duke's conduit occupancy rate shall be \$1.26 per linear foot as defined in [Duke's Pole Attachment] tariff."

Consistent with the Stipulation, TWC paid Duke the tariff conduit rate of \$1.26 for the period July 1, 2009 through June 30, 2010. Yet Duke seeks an additional \$750,000 (plus the associated 3-percent franchise fee), which it alleges is due under the Lease Agreement and the Assignment. In this Complaint, TWC seeks a determination by the Commission that Duke is not entitled to any amounts that would exceed the Stipulation or its tariffed conduit rate for TWC's conduit occupancy from July 1, 2009 to June 30, 2010, and that all conduit occupancy rates charged by Duke to TWC must comply with the Stipulation and with its tariff. The Commission has exclusive jurisdiction over this dispute because use of the conduit space and the rates to be charged constitutes a practice normally authorized by the utility and the Commission's administrative expertise is required to interpret and enforce the Stipulation that it approved and adopted.

PARTIES AND JURISDICTION

1. Complainant Time Warner Cable LLC ("TWC" or "Complainant") is a Delaware limited liability corporation with its principal place of business in New York, New York.
2. Respondent Duke Energy Ohio, Inc. ("Duke" or "Respondent") is a for-profit corporation registered to do business in the State of Ohio.

3. Duke is a public utility and electric light company as those terms are defined by ORC §§ 4905.02 and 4905.03(A)(3), and therefore is subject to the jurisdiction of the PUCO under ORC §§ 4905.04 and 4905.05.

4. Duke owns conduit duct space in the City of Cincinnati.

5. Pursuant to ORC § 4905.71(A), Duke must permit an authorized entity to place its wires, cables, facilities, or apparatus in Duke's conduit upon reasonable terms, conditions, and charges, which must be contained in a tariff filed with the Commission.

6. TWC is a cable system operator that runs its communications wires and other facilities through Duke's conduit duct space in the City of Cincinnati, pursuant to several agreements between the companies.

7. In addition to a tariff conduit rate of \$1.26 per linear foot, Duke has charged TWC \$750,000 (plus an associated 3% franchise fee) for conduit access for the period July 1, 2009 to June 30, 2010. TWC has disputed Duke's entitlement to this additional charge for conduit access and has refused to pay any amount invoiced by Duke above its tariff conduit rate.

8. Pursuant to ORC §§ 4905.71(B) and 4905.26, the Commission is authorized to investigate Duke's charges, terms, and conditions for conduit access, to conduct a hearing and to resolve any controversy which arises among the parties with respect to the use of the conduit space.

9. Under Ohio law, the Commission has exclusive jurisdiction over matters where its administrative expertise is required to resolve the issue in dispute and where the act complained of constitutes a practice normally authorized by the utility. ^{1/} The Commission has exclusive

^{1/} See *Corrigan v. Illum. Co.*, 910 N.E.2d 1009, 1012 (Ohio 2009) (describing two-part test for exclusive jurisdiction); *State ex rel. Illum. Co. v. Cuyahoga County Court of Common Pleas*, 776 N.E.2d 92, 96 (Ohio 2002) ("The commission has exclusive jurisdiction over various matters

jurisdiction over this dispute because its administrative expertise is required to resolve the dispute between TWC and Duke related to the conduit access rates charged by Duke and the Stipulation approved by the Commission.

BACKGROUND ON CONDUIT AGREEMENTS AND REGULATION OF RATES

10. Access to utility poles and conduit space is essential for cable operators, such as TWC, to deliver communications services to their subscribers. Cable operators lack any practical, economical alternative to relying on existing pole plant and conduit space owned and controlled by utilities like Duke because of economic, environmental, zoning, and rights-of-way restrictions. Cable operators' dependence on the existing pole and conduit networks constructed by utility companies has been repeatedly acknowledged by courts and lawmakers. For example, the United States Supreme Court has observed that "[c]able operators, in order to deliver television signals to their subscribers, must have a physical carrier for the cable; in most instances underground installation of the necessary cables is impossible or impracticable. Utility companies' poles provide, under such circumstances, virtually the only practical medium for installation of television cables." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).

11. Cable operators' historic dependence on the use of existing utility poles and conduit space – and the utilities' abuse of "superior bargaining power" in light of that critical dependence – gave rise to federal regulation of pole attachments and conduit space, beginning in 1978. *See Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002). In 1978 Congress enacted the Federal Pole Attachment Act, conferring on the Federal Communications Commission ("FCC") regulatory oversight over pole attachment issues involving investor-owned

involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except [the Ohio Supreme Court]) any jurisdiction over such matters.").

utilities. *See* Pub. L. No. 95-234, 92 Stat. 35 (1978) (codified at 47 U.S.C. § 224, hereinafter “Section 224”). Section 224 directed the FCC to “regulate rates, terms and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.” 47 U.S.C. § 224(b)(1). ^{2/}

12. Section 224 requires the FCC to regulate charges for pole attachments based on the costs of the pole or conduit owner in providing service to the attacher. The statute establishes a formula for determining a just and reasonable rate:

[A] rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole.

47 U.S.C. § 224(d)(1).

13. In accordance with the Section 224, the FCC has established formulas for calculating the maximum permissible rate for pole attachments, including for the placement of facilities in conduit duct space, based on an appropriate allocation of the utility’s pole- or conduit-related costs. The FCC’s conduit formula is used to determine the maximum permissible rate that a utility can charge a cable operator like TWC. *See* 47 C.F.R. § 1.1409(e)(3). This formula considers the owner’s cost in owning and maintaining the conduit and the conduit space utilized by the attaching party in comparison to the total space available. Based on these factors, a per-linear foot rate is derived that allows the conduit owner to recover from the attaching party the attaching party’s portion of the fully-allocated costs associated with owning and maintaining the conduit.

^{2/} Section 224(a)(4) defines “pole attachment” to include “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” 47 U.S.C. § 224(a)(4).

14. As allowed by Section 224's "reverse preemption clause," twenty-one states, including Ohio, have displaced FCC jurisdiction over pole attachments with their own regulations. *See* 47 U.S.C. § 224(c); *States That Have Certified That They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 2010 WL 202063 (May 19, 2010). Although states are entitled to adopt other rate calculation formulas, every state exercising pole attachment jurisdiction uses the FCC's formula to set reasonable pole attachment rates for cable operators or similar formulas based on it.

15. ORC § 4905.71(A) provides that "[e]very . . . electric light company that is a public utility . . . shall permit, upon reasonable terms and conditions and the payment of reasonable charges, the . . . placement of [any wire, cable, facility, or apparatus] in conduit duct space, by any person or entity other than a public utility that is authorized" and has received required permissions for the placement of such facilities.

16. Section 4905.71(A) further provides: "Every such . . . electric light company shall file tariffs with the public utilities commission containing the charges, terms, and conditions established for such use." 3/

17. Additionally, ORC § 4905.30 provides that "[a] public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them." Under this "filed rate" requirement, therefore, a public utility must charge the tariff rates approved by the PUCO. 4/

3/ *See also Ohio Cable Telecomms. Ass'n v. Columbus S. Power Co.*, Case No. 96-1309-EL-CSS, Opinion & Order, at 18-19 (Aug. 27, 1997) (holding Section 4905.71 requires utility pole attachment tariffs to "incorporate all terms and conditions governing pole attachments").

4/ *See Gary Phillips & Assoc. v. Ameritech Corp.*, 144 Ohio App. 3d 149, 153 (Ohio App. Ct. 2001).

18. ORC § 4905.71(B) requires the Commission to “regulate the justness and reasonableness of the charges, terms, and conditions contained in any such tariff,” and permits it, “upon complaint of any persons in which it appears that reasonable grounds for complaint are stated, or upon its own initiative,” to “investigate such charges, terms, and conditions and conduct a hearing to establish just and reasonable charges, terms, and conditions, and to resolve any controversy that may arise among the parties as to such [conduit placement].”

19. Based on the authority granted by ORC § 4905.71, the PUCO has certified to the FCC that the PUCO regulates the pole attachment and conduit rates applied to cable operators and telecommunications companies in Ohio. 5/

20. The PUCO relies on the FCC’s methodology for calculating maximum just and reasonable pole attachment and conduit rates. 6/

FACTS

21. Duke operates a public utility providing electric service to local residents and businesses. Duke has constructed a conduit network to deliver electric service to its customers in the City of Cincinnati. Like other utility service providers that own conduit, Duke rents excess space in its conduit to providers of communications services for them to use to construct their networks.

5/ Letter from Donn D. Rosenblum, Assistant Attorney General, Public Utilities Section, State of Ohio, to William Tricarico, Secretary, Federal Communications Commission, WC Docket No. 10-101 (Oct. 29, 1981); *States That Have Certified That They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 2010 WL 202063 (May 19, 2010) available at http://transition.fcc.gov/eb/Public_Notices/DA-10-893A1.html.

6/ *In re Cincinnati Bell for Authority to Adjust its Rates & Charges & to Change its Tariffs*, Case No. 81-1338-TP-AIR, Opinion & Order, 42 (Mar. 9, 1982) (adopting FCC formula); *Columbus & Southern Ohio Elec. Co.*, Case No. 81-1058-EL-AIR (Nov. 5, 1982) (same).

22. TWC is a cable system operator that provides cable service, Internet access service, and other advanced communications services to businesses and residents throughout Ohio, including in the downtown area of Cincinnati. To deliver these services, TWC depends upon the use of poles and conduit owned by local electric utilities. The public interest favors the common use of conduit by communications service providers.

23. TWC currently occupies over 100,000 linear feet of conduit owned or controlled by Duke. Some of TWC's fiber optic cables in Duke's conduit are used by tw telecom of ohio LLC ("tw telecom") to provide telecommunications services to its customers. ^{7/}

24. TWC runs its communications wires and other facilities through Duke's conduit space pursuant to several agreements executed by TWC's predecessor-in-interest, Warner Cable Communications of Cincinnati, Inc. (hereinafter "TWC") and Duke's predecessors-in-interest, Cincinnati Gas & Electric Company ("CG&E") and Enertech Associates International, Inc. ("Enertech"). Through a series of acquisitions, Enertech is now Duke Technologies, Inc. ("Duke Technologies"), a Duke subsidiary.

25. On September 1, 1994, CG&E and Enertech executed a Conduit Lease Agreement ("Lease Agreement"), pursuant to which CG&E leased space to Enertech in its Cincinnati conduit system for the sole purpose of installing fiber optic cable and related equipment. To the best of TWC's knowledge, Enertech was a commonly-owned affiliate of CG&E – and is now a commonly-owned affiliate of Duke. Enertech agreed to pay CG&E annual lease payments for the space it occupied within CG&E's conduit. The Lease Agreement also required Enertech to enter into a separate Installation and Operating Agreement with CG&E prior to the installation of any portion of Enertech's network in the conduit.

^{7/} tw telecom is not affiliated with TWC.

26. The next day, September 2, 1994, TWC, CG&E, and Enertech executed a Conduit Lease Assignment and Consent ("Assignment"), pursuant to which Enertech assigned its rights and obligations under the Lease Agreement to TWC. Under the Assignment, TWC was required to make annual payments to Enertech in amounts that ranged from \$100,000 to \$750,000. The Assignment also required TWC to enter into a separate Installation and Operating Agreement with Enertech and CG&E prior to the installation of any portion of TWC's network in the conduit.

27. Also on September 2, 1994, TWC, CG&E, and Enertech entered into an Installation and Operating Agreement ("Operating Agreement"), pursuant to which CG&E agreed to install TWC's network in the conduit at prices or rates generally and reasonably charged by Enertech or its affiliates for such services. The Operating Agreement also provided that Enertech shall perform all services provided under the Operating Agreement and that all amounts due and payable by TWC under the Operating Agreement shall be made to Enertech. It further stipulated that CG&E would provide or procure, on behalf of Enertech, all services to be performed under the Operating Agreement.

28. The initial term of the Lease Agreement expired on June 30, 1999. CG&E, Enertech, and TWC amended the Lease Agreement and Assignment on or about August 8, 1995, extending the initial term to June 30, 2000. TWC subsequently extended the Lease Agreement for two five-year terms, until June 30, 2010.

29. From 1994 until 2009, TWC paid Duke for access to its conduit based on the rate provided in the Lease Agreement (specifically, \$0.99 per linear foot, subject to an adjustment capped by the Consumer Price Index) and the rate dictated by the Assignment (between \$100,000 and \$750,000 per year).

30. Despite Duke's clear obligation to tariff conduit access rates, terms, and conditions, for years its pole attachment tariff did not include any rate for conduit occupancy. Duke first tarified conduit occupancy as part of its 2009 rate case, *Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates* (Case Nos. 08-709-EL-AIR; 08-710-EL-ATA; 08-711-AAM), only after the Ohio Cable and Telecommunications Association ("OCTA") complained that Duke previously had failed to comply with its obligation to tariff its conduit charges.

31. As part of Duke's 2009 rate case before the Commission, the parties to that case agreed to the Stipulation that, among other things, provided that Duke's "Conduit Occupancy rate shall be \$1.26 per linear foot as defined in the PA Tariff appended to Stipulation Attachment 3."

32. Stipulation Attachment 3 provided, "The Parties agree to a conduit occupancy rate of \$1.26 per linear foot. Occupancy shall be pursuant to a conduit occupancy agreement."

33. The PUCO adopted the Stipulation in its entirety on July 8, 2009, stating, "Duke's conduit occupancy rate shall be \$1.26 per linear foot as defined in the PA tariff appended to Stipulation Attachment 3." *In re Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case Nos. 08-709-EL-AIR; 08-710-EL-ATA; 08-711-AAM, Opinion & Order, at 9, 19 (July 8, 2009). The Commission further ordered that "[t]he revised tariffs shall be effective for services rendered after such effective date."

34. The effective date of Duke's conduit access tariff was July 13, 2009.

35. Prior to the effective date of Duke's tariff, on or about May 14, 2009, TWC notified Duke that it would not renew the Lease Agreement beyond June 30, 2009. TWC stated

that it intended to retain access to the conduit system pursuant to the terms of Duke's pole and conduit attachment tariff pending at that time before the Commission.

36. Duke responded to TWC's letter on or about June 19, 2009, clarifying that pursuant to the parties' 1995 amendment and TWC's subsequent renewals, the Lease Agreement was not set to expire until June 30, 2010. Duke understood TWC's letter, however, as indicating that TWC did not intend to renew the Lease Agreement.

37. After Duke's tariff went into effect on July 13, 2009, TWC sought confirmation from Duke that it would invoice TWC for conduit occupancy based on the tariff rate of \$1.26 per linear foot, notwithstanding that the Lease Agreement would remain in effect for another year.

38. On or about July 21, 2009, Assistant General Counsel for Duke, Elizabeth H. Watts, emailed Ed Kozelek, Vice President, Government Affairs at TWC, confirming that Duke's tariff addressed conduit occupancy rates. Ms. Watts further stated that in the absence of a provision indicating that the Lease Agreement supersedes the tariff, "the tariff likely controls." Neither the Lease Agreement, tariff, or the Stipulation provides that the Lease Agreement supersedes the tariff.

39. On or about August 25, 2009, TWC sent a letter to Duke confirming that the expiration date specified in the Lease Agreement was June 30, 2010, but restating its intent not to renew the Lease Agreement and reiterating its intent to rely on Duke's conduit tariff rate of \$1.26 per linear foot. TWC requested that Duke base its next invoice to TWC for conduit occupancy on the tariff rate. TWC further advised Duke that it wanted to renegotiate an agreement consistent with Duke's tariff prior to June 30, 2010, and requested that Duke send a new draft agreement for conduit access well in advance of that date.

40. Despite several nudges from TWC, Duke did not provide a draft of a new conduit agreement until mid-June in 2010. The draft provided for an annual conduit rate of \$1.26 for “occupancies used for non-Telecommunications services” and \$10 per linear foot for any occupancy “used to provide Telecommunications.”

41. TWC sent a revised agreement on August 27, 2010, relying on the Stipulation rate of \$1.26 per linear foot for conduit occupancy. Duke responded with a further red-line on September 17, 2010, that addressed only occupancies for non-telecommunications uses.

42. On or about July 1, 2010, Duke invoiced TWC for its conduit occupancy from July 1, 2009 to June 30, 2010. Duke included a charge for \$750,000 related to TWC’s use of Duke’s conduit for that period. That portion of the invoice was labeled “lease charge current year increase per contract.” The other charges in the invoice were based on the tariff charge of \$1.26 per linear foot.

43. Counsel for TWC sent a letter to Duke on or about December 22, 2010 (attached as Attachment 4), objecting to its invoice. TWC’s counsel indicated it would pay \$188,441.85 – the \$1.26 per linear foot tariff charge plus the 3% franchise fee – but that it would not pay the \$750,000 charge (or the 3% franchise fees associated with that charge). TWC asserted that Duke’s \$750,000 charge was contrary to the plain terms of the Stipulation, violated Ohio’s “filed rate doctrine,” and exceeded the maximum rate Duke was permitted to charge under its tariff or, alternatively, federal law. TWC also reiterated an earlier proposal to meet in early January to finalize terms of the parties’ conduit agreement.

44. Duke responded to TWC’s letter on February 14, 2011 (attached as Attachment 5), demanding immediate payment of the \$750,000 charge. Duke did not respond to TWC’s assertion that the Stipulation controls Duke’s conduit rates, apparently confusing the Stipulation

language quoted by TWC with language contained in the parties' new, draft conduit lease agreement. Duke did respond that it believed the filed rate doctrine was inapplicable, asserting that it could hide behind Duke Technologies to charge unregulated conduit rates and that the existence of a tariff regime would not supersede Duke's previous, non-tariffed charges, terms, and conditions for conduit access, including the \$750,000 charge in its Assignment. Duke also suggested that the tariff was not applicable because the conduit was being used by TWC to provide a public utility service.

45. On March 2, 2011, TWC replied by letter (attached as Attachment 6) to Duke's February 14, 2011 letter, reiterating the plain requirement of the Stipulation that Duke's conduit occupancy rate "shall be \$1.26 per linear foot as defined in the PA Tariff appended to Stipulation Attachment 3." TWC reminded Duke that the Stipulation – which was adopted and approved by the Commission – sets Duke's conduit rate based on its tariff, superseding the Lease Agreement and the Assignment. ^{8/} TWC also explained that the \$750,000 is indeed a rate for conduit occupancy, as Enertech gave its rights to lease conduit capacity from CG&E to TWC in exchange for annual payments for the conduit space leased to TWC. The Assignment did not impose any other obligations on Enertech. TWC further explained that Duke cannot hide behind a subsidiary to circumvent its obligation to tariff rates for conduit occupancy, and that it is well-settled that a tariff supersedes a pre-existing contract. TWC also explained that Duke's annual payments are inconsistent with the Commission's regulatory regime, which follows the methodology established by the FCC to set the maximum just and reasonable rates for conduit occupancy. A \$750,000 charge on top of the maximum rate generated under the FCC conduit formula is plainly unlawful under the Commission's regulatory regime. Finally, TWC pointed

^{8/} See, e.g., *In re Orwell Natural Gas Co.*, 2007 WL 2042577 (PUCO 2007) (holding previous contracts overridden by PUCO-approved tariff).

out to Duke that if the PUCO did not regulate the rates charged by Duke for its conduit, the FCC would do so. And, in either case, the conduit charge would be limited to \$1.26 a conduit foot.

46. Later in March, Duke requested a meeting “next month” with TWC to discuss the matter further. TWC proposed several specific dates in early April. Duke responded in late April, saying that the date for a meeting would have to be pushed off until May. But Duke never responded with a proposed date, and on June 10, sent an email to TWC’s counsel “insist[ing]” that it pay the invoice for \$750,000. If TWC did not pay within 5 business days, Duke said it was prepared to file its “complaint.” In a final effort, TWC proposed that the parties meet on June 17, 20 or 21.

47. The parties met on June 20 in Cincinnati at Duke’s offices but were unable to resolve their differences. At that meeting, Duke refused to discuss any issues related to the parties’ conduit occupancy agreement. Because TWC believes that this dispute must properly be resolved by the Commission, it has now brought this complaint to the PUCO.

FIRST CLAIM FOR RELIEF
(Violation of Stipulation – Conduit Occupancy Rate)

48. The allegations contained in paragraphs 1 through 47 of this Complaint are re-alleged and incorporated by reference here.

49. The parties to the proceeding before the Commission styled *Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, (Case Nos. 08-709-EL-AIR; 08-710-EL-ATA; 08-711-AAM), relating to Duke’s tariffed rates, including its pole and conduit rates, entered into a Stipulation that provided that Duke’s conduit occupancy rate “shall be \$1.26 per linear foot.”

50. The Commission approved and adopted the parties' Stipulation in its entirety on July 8, 2009, stating that "Duke's conduit occupancy rate shall be \$1.26 per linear foot," effective July 13, 2009.

51. Neither the Stipulation nor the Commission's Opinion and Order approving and adopting the Stipulation provided for any exceptions to the \$1.26 per linear foot conduit rate or permitted any additional charges for conduit occupancy.

52. Duke's proposed additional charge of \$750,000 over and above the \$1.26 per linear foot conduit rate provided in the Stipulation violates the Stipulation and is unlawful.

53. The Commission has exclusive jurisdiction to enforce the Stipulation it adopted and approved related to the rates Duke may charge for conduit occupancy.

SECOND CLAIM FOR RELIEF
(Violation of Stipulation – Conduit Occupancy Agreement)

54. The allegations contained in paragraphs 1 through 53 of this Complaint are re-alleged and incorporated by reference here.

55. On August 25, 2009, TWC sought negotiation of a conduit occupancy agreement under the terms of the Stipulation prior to June 30, 2010.

56. Duke did not send a draft agreement until June 2010. Duke's draft agreement did not comply with the terms of the Stipulation or its tariff.

57. TWC sent a revised agreement on August 27, 2010, containing charges and terms consistent with the Stipulation and Duke's tariff. Later in 2010, TWC requested to meet with Duke to discuss the draft conduit occupancy agreement. TWC again requested a meeting with Duke to discuss a new conduit occupancy agreement under the tariff in April and June 2011.

58. Duke has refused to engage in any further discussions regarding the draft conduit occupancy agreement.

59. Duke has violated the requirements of the Stipulation by refusing to negotiate the rates, terms, and conditions of a proposed conduit occupancy agreement with TWC, and by refusing to propose or accept terms for conduit occupancy consistent with the Stipulation and its tariff.

**THIRD CLAIM FOR RELIEF
(Unjust and Unreasonable Conduit Rate)**

60. The allegations contained in paragraphs 1 through 59 of this Complaint are re-alleged and incorporated by reference here.

61. Duke is required to “permit, upon reasonable terms and conditions and the payment of reasonable charges,” TWC access to its conduit duct space. ORC § 4905.71(A).

62. Duke “shall file tariffs with the public utilities commission containing the charges, terms, and conditions established” for use of its conduit. *Id.*; ORC § 4905.30.

63. Duke’s tariff rate for conduit occupancy, effective July 13, 2009, is \$1.26 per linear foot.

64. Duke’s proposed “lease charge current year increase per contract” of \$750,000 over and above its tariff conduit rate is unjust and unreasonable, exceeds its tariff conduit rate, and exceeds the maximum rate it may charge for conduit occupancy.

65. Duke’s proposed \$750,000 charge violates ORC §§ 4905.71(A) and 4905.30.

66. The Commission has exclusive jurisdiction to determine whether a public utility’s conduit rate violates its tariff.

**FOURTH CLAIM FOR RELIEF
(Issues in Dispute)**

67. The allegations contained in paragraphs 1 through 66 of this Complaint are re-alleged and incorporated by reference here.

68. The Commission's administrative expertise is required to resolve the following issues related to Duke's conduit access charges:

Issue Number 1

69. Duke asserts that its \$750,000 charge is not regulated by the Commission, and need not be tarified or approved by the Commission, because it is charged by an unregulated subsidiary.

70. The Commission should clarify that Duke cannot escape its agreement under the Stipulation to charge \$1.26 for conduit access or its obligation under ORC §§ 4905.71(A) and 4905.30 to tariff its conduit access rates, terms, and conditions, by hiding behind a subsidiary, particularly where Duke – not its subsidiary – collects the charges from TWC.

Issue Number 2

71. Duke asserts that the conduit access charge contained in the Assignment is not superseded by its tariff.

72. The Commission should clarify that a tariff prescribing the maximum just and reasonable rate a public utility may charge supersedes a pre-existing contract.

Issue Number 3

73. Duke asserts that the Assignment sets forth a valid conduit access rate under ORC § 4905.31, which permits utilities to enter into reasonable agreements with a customer under some circumstances.

74. The Commission should clarify that charges assessed under the Assignment are not enforceable under ORC § 4905.31 because Duke did not file the Assignment with the Commission or otherwise obtain the Commission's approval of the Assignment. Furthermore, the Commission should clarify that the Assignment's additional charge of \$750,000 for conduit

access, over and above the maximum permissible conduit access rate, is not a reasonable agreement under ORC § 4905.31.

Issue Number 4

75. Duke asserts that its charge of \$750,000 for conduit access is permissible under the Commission's regulatory regime.

76. The Commission should clarify that its methodology establishes the maximum just and reasonable rate for conduit occupancy, and that any rate or charge that exceeds the maximum rate generated under its formula is unjust and unreasonable. Therefore, the Commission should clarify that Duke's additional charge of \$750,000 above its tariff conduit rate of \$1.26 per linear foot is unlawful and inconsistent with its regulatory regime.

Issue Number 5

77. Duke asserts it may charge any rate it desires for conduit access where used to provide telecommunications services.

78. The Commission should clarify that it has certified to the FCC that it regulates pole and conduit access rates for both cable operators and telecommunications providers and that it has the authority and obligation to regulate such rates. Even though TWC uses some of Duke's conduit to provide capacity to tw telecom, a telecommunications provider, the Commission has authority to determine that the conduit rate is limited to \$1.26 a linear foot. Were the Commission to determine that it does not have authority to regulate Duke's conduit rate as charged to TWC, the FCC would retain jurisdiction over that matter under 47 U.S.C. § 224.

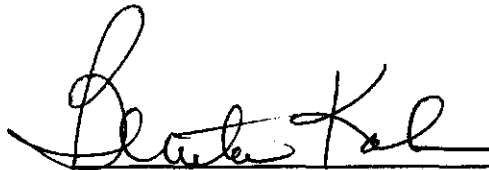
WHEREFORE, Plaintiff Time Warner Cable LLC, respectfully prays that the Commission:

1. Declare that the Stipulation and Recommendation entered into by the parties to the proceeding before the Commission styled *Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, (Case Nos. 08-709-EL-AIR; 08-710-EL-ATA; 08-711-AAM), which was approved and adopted by the Commission, establishes that \$1.26 per linear foot is the maximum conduit occupancy rate that Duke may charge TWC.

2. Declare that, consistent with Ohio law, the maximum rate Duke may charge for TWC's conduit occupancy is its tariff conduit rate of \$1.26 per linear foot.

3. Declare that Duke has no right to the additional \$750,000 (or the associated 3 percent franchise fee) over its tariff conduit rate it seeks for the period between July 1, 2009 to June 30, 2010, and declare that charge of \$750,000 to be an unreasonable and unjust conduit access rate.

This the 21st day of June, 2011.



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CONDUIT LEASE AGREEMENT

This Conduit Lease Agreement is effective as of the 1st day of September, 1994 and is by and between The Cincinnati Gas & Electric Company ("Lessor"), an Ohio corporation with an office at 139 East Fourth Street, Cincinnati, Ohio 45202, and Enertech Associates International, Inc. ("Lessee"), an Ohio Corporation with an office at 139 East Fourth Street, Cincinnati, Ohio 45202 (collectively, the "Parties" and each, a "Party").

1. Lessor owns a conduit system, as such system may be modified and augmented from time to time during the term of this Conduit Lease Agreement (the "Conduit"), in the "Downtown Cincinnati Area", which, for the purposes of this Conduit Lease Agreement, is defined as the downtown area of Cincinnati, Ohio bordered by Broadway Street on the east, Liberty Street on the north, Central Avenue on the west, and Mehring Way on the south; including buildings and facilities with addresses on the foregoing named streets, all as more particularly shown on Exhibit A incorporated herein by reference.
2. Lessor hereby leases to Lessee space in the Conduit, which consists of the underground network of ducts, conduits, manholes, pullboxes, transformer vaults, and other structures that make up the raceway system for installing cables throughout the Downtown Cincinnati Area. The space in the Conduit is hereby leased to Lessee in accordance with the terms and conditions of this Conduit Lease Agreement for the sole purpose of installing within the Conduit specific fiber optic cable and related equipment of Lessee ("FOC Network"), which Lessee may use for any purpose; provided, however, that (i) Lessor shall have the right to examine the components of the FOC Network prior to any installation thereof in the Conduit, and (ii) if Lessor reasonably determines that the operation or presence of any such component of the FOC Network will interfere with Lessor's use of the Conduit, Lessee will replace such cable or

equipment with cable or equipment that, in Lessor's reasonable judgment, will not interfere with Lessor's use of the Conduit. Lessor represents and warrants that as of the date on which this Conduit Lease Agreement is executed, except as otherwise indicated on Exhibit A, ~~adequate space exists~~ in every portion of the Conduit in the Downtown Cincinnati Area for the installation of the fiber optic cable component of the FOC Network. Lessor shall promptly prepare and provide to Lessee a drawing that shows the installation locations of the FOC Network after installation is complete (together with Exhibit A, the "Conduit Drawings"). Lessor shall update the Conduit Drawings during the term of this Conduit Lease Agreement, as needed, and shall provide Lessee with copies of any and all such revisions.

3. Lessor shall reserve space throughout the Conduit, except in those locations in which such space presently is not available, as indicated on Exhibit A, during the term of this Conduit Lease Agreement for use by Lessee for its FOC Network, unless such space is required by Lessor for its own business purpose, not including leasing of space or similar arrangements with unaffiliated third parties; provided, however, that (i) such business purposes of Lessor shall not include the installation by Lessor, or any of Lessor's affiliates, of any fiber optic or other cable in order to provide to any third party any similar services to be provided hereafter by Lessee through the FOC Network; and (ii) ~~at the request of Lessee, Lessor shall use its commercially reasonable efforts to make space available to Lessee for the installation of the fiber optic cable component of the FOC Network in such portions of the Conduit designated by Lessee in which such space presently is not available, as indicated by Exhibit A.~~ In the event any portion of the FOC Network occupies space in the Conduit that becomes needed by Lessor for its own business purposes, Lessor shall have the right, upon not less than 30 days' prior written notice to Lessee, to remove and relocate that portion of the FOC Network occupying such space in accordance with the Installation and Operating Agreement described in Paragraph 11 below; provided, however, that Lessor may not remove or relocate any portion

of the FOC Network to provide space for Lessor, or any of Lessor's affiliates, to install any fiber optic or other cable in order to provide to any third party any of the same services to be provided hereafter by Lessee through the FOC Network; and provided, further, that Lessor shall keep Lessee fully informed with respect to any planned relocation of the FOC Network pursuant to this Paragraph 3. Lessor shall arrange for other space in the Conduit to accommodate such relocation and shall use commercially reasonable efforts to minimize the disruptions in service to the customers of Lessee during any such removal and relocation. Lessee shall provide any necessary additional fiber optic cable and Lessee shall be responsible for all splicing costs, resulting from such removals and relocations, and Lessor shall be responsible for all other related costs. Provided that space in the Conduit remains available to Lessee pursuant to the terms of this Conduit Lease Agreement, Lessor shall have the right to lease any other available space in the Conduit to any third party for any purpose. This Conduit Lease Agreement shall not be exclusive and the Parties may enter into similar arrangements with other parties, provided such arrangements are entered into without breaching this Conduit Lease Agreement or any other obligation owed to the other Party. *Replacement*

4. For the lease of the space in the Conduit, Lessee shall pay to Lessor the annual lease payments described in this Paragraph 4. Such annual lease payments shall accrue annually and shall be based upon the linear footage of the space within the Conduit that contains the installed FOC Network during the preceding 12-month period. Lessee acknowledges that such lease payments shall be to cover the occupancy and maintenance costs of the Conduit and to provide Lessor with a fair rate of return. The initial annual lease rate of \$0.99 per linear foot of space the FOC Network occupies within the Conduit shall be effective through June 30, 1995. The annual lease payment shall be prorated on a monthly basis (\$0.0825 per foot per month), so that Lessee shall be charged for the space the FOC Network occupies within the Conduit during any portion of any month within the 12-month period. As long as this Conduit

Lease Agreement remains in effect and subject to the terms of this Paragraph 4, the annual lease payments hereunder shall be due and payable in full from Lessee to Lessor on the later of (a) each July 1, upon receipt of an invoice on or prior to June 1 of that year, or (b) thirty (30) days after receipt of such invoice. Such invoice shall include a statement of the calculation showing the lease rate and the amount of linear footage of the FOC Network upon which such payment is based. A monthly charge of 1.5% shall apply to all past due amounts. Lessee's payment obligations under this Conduit Lease Agreement, which have accrued prior to any termination or expiration of this Conduit Lease Agreement, shall survive any such termination or expiration. If Lessor complies in all material respects with its obligations herein, Lessee shall make such lease payments, which payments shall not be subject to any set-offs or credits. The lease rate shall be subject to adjustment prospectively by Lessor, increased or decreased, each July 1. Such adjustment shall be determined by Lessor upon review of its plant in service and based on its net book value. The percentage increase in any new adjusted lease rate, as compared to the lease rate immediately preceding such adjustment, shall not be greater than the percentage increase in the Consumer Price Index for all Urban Consumers (CPI-U) for the month of May immediately prior to the July 1 adjustment, as compared to the CPI-U for the month of May of the preceding calendar year; provided, however, that in each lease year for which the percentage increase in the lease rate is less than the percentage increase in the CPI-U, such difference shall be carried forward and added, on a cumulative basis, to the CPI-U limit applicable to the next lease year. The CPI-U shall be as published by the United States Bureau of Labor Statistics. In the event of the discontinuance of the CPI-U, another index shall be substituted that is also a general indicator of inflation.

5. This Conduit Lease Agreement shall be effective as of the date first written above and shall continue, subject to earlier termination as set forth below in this Paragraph 5, for an initial term of approximately five (5) years, through June 30, 1999. Lessee may, at its option, extend the

term of this Conduit Lease Agreement beyond the initial term for additional five-year periods up to three times, so that the total duration of this Conduit Lease Agreement may be five (5), ten (10), fifteen (15), or twenty (20) years, with such additional periods to be as follows: July 1, 1999 through June 30, 2004; July 1, 2004 through June 30, 2009; and July 1, 2009 through June 30, 2014. Lessee shall exercise its option to extend the term by providing notice to Lessor by the end of the then-current term. The terms and conditions of this Conduit Lease Agreement shall apply during the initial term and during each additional five-year period. Either Party may terminate this Conduit Lease Agreement upon the failure of the other Party to perform or observe any material provision of this Conduit Lease Agreement and such failure remains unremedied for a period of sixty (60) days after written notice is given to the defaulting Party. Lessee may also terminate this Conduit Lease Agreement by providing written notice to Lessor if (a) no later than ninety (90) days after the initial installation of the FOC Network is deemed completed under the Installation and Operating Agreement, Lessee reasonably determines that the FOC Network cannot be made fully operational as a result of the condition or environment of the Conduit, (b) at any time thereafter, Lessee reasonably determines that the condition or environment of the Conduit is materially and adversely affecting the performance of FOC Network, and Lessor has failed to remedy such condition or environment within 30 days of written notice from Lessee, or (c) Lessee determines that any amount payable by Lessee or its affiliates pursuant to Paragraph 12 below that was not payable as of the effective date of this Agreement, or any federal, state, or local law, rule, or regulation, or any governmental interpretation or action of or pursuant to any federal, state, or local law, rule, or regulation, whether enacted or promulgated prior to or after the effective date of this Conduit Lease Agreement, materially and adversely affects the economic or legal substance of the transactions contemplated by this Conduit Lease Agreement or related transactions or Lessee's, or its assignee's, use of the FOC Network. However, such termination by Lessee shall not relieve Lessee of any obligation to make any payment under

this Conduit Lease Agreement or comply with any law, rule, or regulation if such payment or compliance obligation was due and payable or existing prior to such termination.

6. Upon any termination or expiration of this Conduit Lease Agreement for any reason, the Parties shall discuss the removal of the FOC Network from the Conduit and any alternatives to removal, including but not limited to: selling the FOC Network to Lessor; transferring to Lessor, at no cost, full title and ownership in the FOC Network; or abandoning the FOC Network in place. Lessee shall have the right, absent any other agreement among the Parties, to have the FOC Network removed in accordance with the Installation and Operating Agreement. In the event Lessee does not so desire and Lessor elects not to take title or to allow Lessee to abandon the FOC Network in place, Lessor shall have the right to require Lessee to have the FOC Network removed from the Conduit, at the sole expense of Lessee. Any such removal shall be in accordance with the Installation and Operating Agreement described in Paragraph 11 below. This Paragraph 6 shall also apply to any portion of the FOC Network that Lessee considers abandoning during the term of this Conduit Lease Agreement.

7. (a) Lessee may assign its rights and delegate its duties under this Conduit Lease Agreement at any time by providing prior written notice to Lessor, provided: (i) such assignee agrees in writing to accept such rights and duties of Lessee under this Conduit Lease Agreement and the related Conduit Lease Assignment and Consent and Installation and Operating Agreements (the "Related Agreements"), to assume all obligations of Lessee under the Related Agreements, and to otherwise abide by the terms and conditions of the Related Agreements; (ii) such assignee agrees not to make any further assignment, except as otherwise provided below in Paragraph 7(b) or except to a company that is controlling, controlled by, or under common control with such assignee, in which event Paragraph 7(b) shall not apply; (iii) any assignment does

not materially and adversely affect the interests of Lessor (and it is acknowledged that assignment to a company controlling, controlled by, or under common control with Lessee or a permitted assignee under Paragraph 7(b) below shall have no such effect); and (iv) Lessor may require such assignee to remain obligated for the payments under this Conduit Lease Agreement.

(b) In the event Lessee desires to sell or transfer the FOC Network to an unaffiliated third party, either alone or in connection with a sale or transfer of all or part of Lessee's business in the Greater Cincinnati area, to the extent Lessee may do so without violating any applicable federal, state, or local law, rule, or regulation and without being in breach of any of its obligations to any third party, Lessee shall notify Lessor of such desire in a timely manner and Lessee shall provide to Lessor a reasonable opportunity to discuss with Lessee the possible purchase by Lessor of the FOC Network or such business from Lessee. After providing Lessor with such reasonable opportunity, Lessee may nonetheless sell or transfer the FOC Network, either alone or in connection with a sale or transfer of all or part of Lessee's business in the Greater Cincinnati area, to a third party. Lessee may also sell or transfer the FOC Network to a third party together with any portion of the business of Lessee and its affiliates beyond the Greater Cincinnati area, without providing Lessor the notice or opportunity described in the first sentence of this Paragraph 7(b). In any such event, Lessee may assign its rights and delegate its duties under this Conduit Lease Agreement to such third party upon prior written notice to Lessor, provided that:

(i) such purchaser or transferee is capable of immediately assuming and performing all of Lessee's duties under this Conduit Lease Agreement;

- (ii) either (A) the positive difference between the assets and liabilities of such purchaser or transferee exceeds \$10,000,000 as of the end of the last two fiscal years of such purchaser or transferee immediately prior to such sale or transfer, (B) the net sales of such purchaser or transferee during the last two fiscal years ending immediately prior to such sale or transfer exceed \$50,000,000, or (C) Lessee agrees to guarantee performance by such purchaser or transferee of all of its obligations under this Conduit Lease Agreement; and
- (iii) such purchaser or transferee is not, and no entity controlling, controlled by, or under common control with such purchaser or transferee is, a competitor of Lessor that is engaged in the business of generating or distributing power (other than generating or distributing power in connection with the transmission of voice, data, or video signals) to commercial, industrial, or residential users in Ohio, Indiana, or Kentucky.

Any prohibited assignment shall be void. The terms and conditions of this Conduit Lease Agreement shall be binding upon any permitted assignees and upon any successors.

- 8. The lease rate, the limitation on the increases of the lease rate, and all other provisions of this Conduit Lease Agreement shall at all times be subject to any applicable review and approval of the Public Utilities Commission of Ohio, the Securities and Exchange Commission, and any other regulatory or governmental entity with applicable authority and shall at all times be subject to any and all applicable laws, rules, and regulations.

9. The Conduit shall be and shall remain at all times the sole property of Lessor. Except for the rights granted under this Conduit Lease Agreement, Lessee shall have no rights or interests relating to the Conduit. Except as provided in this Conduit Lease Agreement, the FOC Network shall remain the sole property of Lessee and Lessee may use the FOC Network as it determines, including lease of the FOC Network.
10. Neither Party shall, directly or indirectly, commit an act or omission that creates or imposes any lien on the property of the other Party or on the other Party's rights, interests, or title relating to such property. Each Party shall promptly, at its own expense, take such actions as may be necessary to duly discharge any such lien created by it or as a result of its actions. Lessee shall likewise keep the FOC Network free and clear of all liens and similar encumbrances.
11. Lessee shall hereby be required to enter into a separate Installation and Operating Agreement with Lessor ("Installation and Operating Agreement") prior to the installation of any portion of the FOC Network in the Conduit.
12. Lessee, or its affiliates, shall be solely responsible for the payment of any and all taxes, assessments, fees, charges, costs, expenses, and other payments relating to or arising out of the purchase, installation, ownership, operation, maintenance, lease, or use of the FOC Network or relating to or arising out of Lessee's lease of the Conduit space under this Conduit Lease Agreement. In addition, Lessee shall pay or reimburse Lessor for any and all fees, charges, or other payments required by any municipality, regulatory agency, or other governmental entity to the extent such fees, charges, or other payments are created by the purchase, installation, ownership, operation, maintenance, lease, or use of the FOC Network in the Conduit. Lessor shall be responsible for the payment of any and all taxes, assessments, and other costs relating solely to the ownership of the Conduit and that are unrelated to

Lessee's lease of the Conduit space, and any and all applicable income taxes payable by Lessor, including income taxes resulting from the lease payments made by Lessee to Lessor.

13. Lessor represents and warrants that:

- (a) it is duly organized, validly existing, and in good standing under the laws of the State of Ohio;
- (b) this Conduit Lease Agreement has been duly authorized by all necessary corporate action, and it has full power and authority to execute and deliver this Conduit Lease Agreement and perform the obligations of Lessor under this Conduit Lease Agreement;
- (c) it has good title to the Conduit; and
- (d) there is nothing to prevent the leasing of the space within the Conduit to Lessee as provided under this Conduit Lease Agreement.

Lessee represents and warrants that:

- (a) it is duly organized, validly existing, and in good standing under the laws of the State in which it was organized; and
- (b) this Conduit Lease Agreement has been duly authorized by all necessary internal action of Lessee, and it has full power and authority to execute and deliver this Conduit Lease Agreement and perform the obligations of Lessee under this Conduit Lease Agreement.

14. EXCEPT AS EXPRESSLY PROVIDED IN THIS CONDUIT LEASE AGREEMENT, LESSOR MAKES NO WARRANTY, GUARANTEE, OR REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE CONDUIT, INCLUDING BUT NOT LIMITED TO MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, QUALITY, OR USE OF THE CONDUIT. LESSOR SHALL ONLY BE LIABLE FOR PHYSICAL DAMAGE TO LESSEE'S FIBER OPTIC CABLE IN THE CONDUIT, INCLUDING LABOR AND MATERIALS TO REPAIR OR REPLACE SUCH FIBER OPTIC CABLE,

DIRECTLY CAUSED BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF LESSOR. EXCEPT AS EXPRESSLY PROVIDED IN PARAGRAPHS 2 AND 12 OF THE INSTALLATION AND OPERATING AGREEMENT, IN NO EVENT SHALL LESSOR OR LESSEE BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES.

15. Lessee represents and warrants that it will use commercially reasonable efforts to secure and maintain any and all required franchises, easements, rights-of-way, permits, licenses, and approvals for the installation, operation, and maintenance of the FOC Network. Lessee and Lessor each represents and warrants that it shall at all times be in material compliance with any and all federal, state, and local laws, rules, and regulations applicable to this Conduit Lease Agreement.

16. In the event the FOC Network causes any interference or otherwise disturbs the Conduit or the other facilities or property of Lessor or the facilities or property of other lessees in the Conduit, Lessee shall, at its sole cost and expense, promptly take corrective action to eliminate such interference or disturbance to the reasonable satisfaction of Lessor. Access to the FOC Network to make such correction shall be in accordance with the Installation and Operating Agreement. In the event Lessee fails to promptly make such corrections, Lessor may make such corrections and Lessee shall fully reimburse Lessor for all costs incurred by Lessor in making such corrections.

17. Lessee shall be solely responsible for the purchase, operation, maintenance, lease, and use of the FOC Network. Lessee shall indemnify and hold harmless Lessor for any and all liability, damages, losses, claims, costs, attorney fees, and expenses relating to or arising out of Lessee's negligence or willful misconduct. Lessor shall indemnify and hold harmless Lessee for any and all liability, damages, losses, claims, costs, attorney fees, and expenses relating

to or arising out of Lessor's negligence or willful misconduct. If any indemnity claim arises out of a claim by a third party against an indemnitee, the indemnitee shall afford the indemnitor, at the indemnitor's sole cost and expense, the opportunity to defend, discharge, or settle such indemnity claim. The indemnitor shall advise the indemnitee in writing within ten days of receipt of notice of an indemnity claim if it intends to defend against such indemnity claim. If the indemnitor elects to defend, the indemnitee shall have the right to participate, at the indemnitee's expense, in the defense of any such indemnity claim; provided, however, such participation by the indemnitee shall not interfere with the indemnitor's full and sole discretion and opportunity to defend and settle such indemnity claim so long as such settlement does not adversely affect the indemnitee.

18. During the term of this Conduit Lease Agreement, Lessor shall use commercially reasonable efforts to ensure that Lessee has quiet enjoyment of its rights under this Conduit Lease Agreement, provided Lessee remains in material compliance with its obligations under this Conduit Lease Agreement.
19. Lessee shall procure and maintain, during the entire term of this Conduit Lease Agreement, the following insurance coverages on an occurrence basis:
 - (a) Workers' Compensation in the amount required by all applicable laws;
 - (b) Employer's Liability with a limit of not less than \$1,000,000;
 - (c) Comprehensive General Liability, including contractual liability, with a limit of not less than \$1,000,000 per occurrence; and
 - (d) Automobile Liability with a limit of not less than \$1,000,000 per occurrence.

Upon the request of Lessor at any time, Lessee shall provide Lessor with certificates showing the above insurance coverages to be in effect. All insurance policies shall be issued by

insurance companies licensed to do business in the State of Ohio and shall contain a provision that requires 30-day written notice to Lessor prior to any cancellation, expiration, or material change of such policy. The obligation of Lessee to carry insurance under this Paragraph 19 shall in no way limit or modify any other obligation of Lessee under this Conduit Lease Agreement.

20. Lessee recognizes that, from time to time, Lessor may elect or be required, based upon law, contract, a third party requirement, an obsolete vault, or the closing, opening, or reconstruction of a building, to relocate all or a portion of the Conduit. Lessor agrees to keep Lessee fully informed with respect to any planned relocation of the Conduit and Lessor shall use commercially reasonable efforts to effect any such relocation in a manner that will minimize the disruptions in service over the FOC Network to the customers of Lessee. Lessor shall use its commercially reasonable efforts (i) to provide Lessee with at least three (3) months' prior written notice of any pending relocation and (ii) to provide Lessee with written notice of any governmental proceedings that may result in a relocation, as soon as Lessor becomes aware of such proceedings. Lessee shall have the right, at its expense, to participate in such governmental proceedings. ~~If Lessor decides to relocate all or any portion of the Conduit solely for its own convenience or the convenience of a third party, Lessor shall be solely responsible for all costs incurred in relocating the FOC Network in connection with such relocation of the~~ Conduit. Notwithstanding the foregoing, if relocation of the Conduit is for Lessee's benefit or convenience and in all mandated cases, Lessee shall provide to Lessor such additional fiber optic cable, as may be necessary to install, and Lessee shall be responsible for the costs of installing the FOC Network in the portion of the Conduit that has been ~~relocated~~.
21. The performance of Lessor and Lessee under this Conduit Lease Agreement shall be excused by conditions or circumstances beyond their respective reasonable control, including but not

limited to acts or omissions of the other Party or third parties rendering the Party unable to perform, acts of God, strikes or lockouts, governmental orders, civil commotions, and the unavailability of materials and supplies, provided the Party whose performance is excused by such condition or circumstance uses commercially reasonable efforts to eliminate such condition or circumstance and then performs after such condition or circumstance has been eliminated. If such force majeure event continues in effect for more than six months, this Conduit Lease Agreement may be terminated by the Party whose performance was not excused with regard thereto.

22. This Conduit Lease Agreement shall be governed by and interpreted in accordance with the laws of the State of Ohio. Any claim or dispute relating to or arising out of this Conduit Lease Agreement shall be brought in a court of competent jurisdiction located in Hamilton County, Ohio. The Parties hereby consent to such choice of law and venue.
23. If it is determined by a court, regulatory agency, or other entity exercising its proper jurisdiction that any provision of this Conduit Lease Agreement is invalid, illegal, or incapable of being enforced, then such provision shall be deleted from this Conduit Lease Agreement and thereafter all other conditions and provisions of this Conduit Lease Agreement shall continue to remain in full force and effect, provided the economic or legal substance of this Conduit Lease Agreement is not affected in any manner materially adverse to either Party. In the event such deletion does materially and adversely affect either Party, the Parties shall negotiate in good faith to amend this Conduit Lease Agreement so as to effect the original intent of the Parties and the original purpose of this Conduit Lease Agreement as closely as possible and to the greatest extent possible in a manner acceptable to both Parties. In the event the Parties cannot agree upon such an amendment within a reasonable period of time, this Conduit Lease Agreement may be terminated by either Party upon written notice to the other Party.

24. This Conduit Lease Agreement, including the documents referred to in this Conduit Lease Agreement, contains the entire agreement and understanding of the Parties relating to the subject matter of this Conduit Lease Agreement. This Conduit Lease Agreement and any provision of this Conduit Lease Agreement may not be amended or waived, unless in a writing that is signed, in the case of an amendment, by both Parties and, in the case of a waiver, by the Party waiving the specific enforcement or breach. No waiver shall be valid until such written waiver is made and such waiver shall not constitute a waiver of or consent to any subsequent or different breach.

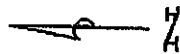
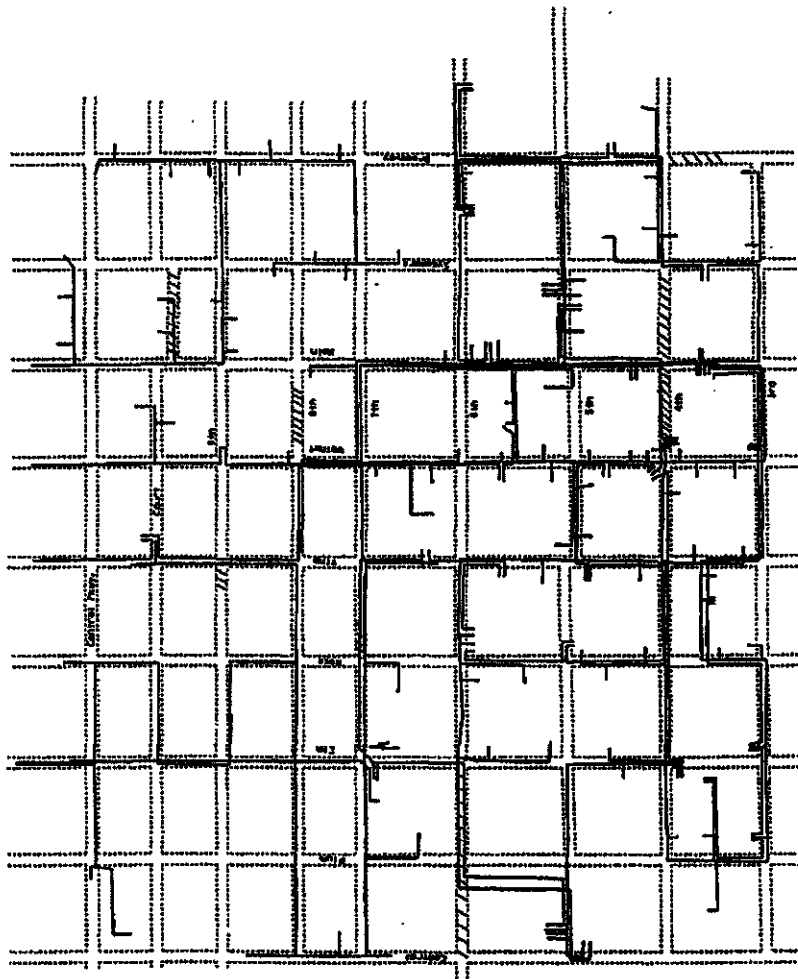
ENERTECH ASSOCIATES INTERNATIONAL,
INC., LESSEE

By: Allan P. Haskell
Allan P. Haskell
Executive Director

THE CINCINNATI GAS & ELECTRIC COMPANY,
LESSOR

By: Terry Bruck
Terry Bruck
Vice President, Electric Operations

C:\WPDOCS\C-LEASE3.



LEGEND

||||| INDICATES ONLY LOCATIONS WHERE NO DUCTS ARE AVAILABLE

DATE	DESIGNED BY	FOR WHOM
THE CINCINNATI GAS & ELECTRIC CO.		
RUMBLE BUILDING CONNECTION		
FIBER OPTIC CABLE		
PERMIT APPLICATION		
DRAWN	CHECKED	INITIAL
DESIGNED BY	FOR WHOM	
CADD DRG.		
DRG. EXHIBIT A		

EXHIBIT "A"

Amendment

This Amendment is effective as of the 8th day of August, 1995 and modifies and becomes part of the Conduit Lease Agreement dated September 1, 1994, the Conduit Lease Assignment and Consent dated September 2, 1994, and the Installation and Operating Agreement dated September 2, 1994 by and among The Cincinnati Gas & Electric Company ("CG&E"), Power International, Inc., formerly known as Enertech Associates International, Inc., ("Enertech"), CINergy Technology, Inc. ("CINergy"), and Warner Cable Communications of Cincinnati, Inc. ("WCC").

1. The first two sentences of Paragraph 5 of the Conduit Lease Agreement is hereby amended to read as follows: " This Conduit Lease Agreement shall be effective as of September 1, 1994 and shall continue, subject to earlier termination as set forth in this Paragraph 5, for an initial term through June 30, 2000. Lessee may, at its option, extend the term of this Conduit Lease Agreement beyond the initial term for additional five-year periods up to three times, subject to all Parties having the required authorizations from the City of Cincinnati, so that the total duration of this Conduit Lease Agreement shall be approximately six (6), eleven (11), sixteen (16), or twenty-one (21) years, with such additional periods to be as follows: July 1, 2000 through June 30 2005; July 1, 2005 through June 30, 2010; and July 1, 2010 through June 30, 2015."

2. The Due Dates listed in Paragraph 5 of the Conduit Lease Assignment and Consent are hereby amended as follows:

<u>Year</u>	<u>Due Date</u>	<u>Annual Payment</u>
1*	see Paragraph 6 <i>July 1, 1995</i>	\$400,000.00
2	July 1, 1996	\$400,000.00
3	July 1, 1997	\$400,000.00
4	July 1, 1998	\$100,000.00
5	July 1, 1999	\$100,000.00
6**	July 1, 2000	\$200,000.00
7**	July 1, 2001	\$200,000.00

8**	July 1, 2002	\$200,000.00
9**	July 1, 2003	\$200,000.00
10**	July 1, 2004	\$200,000.00
11**	July 1, 2005	\$500,000.00
12**	July 1, 2006	\$550,000.00
13**	July 1, 2007	\$600,000.00
14**	July 1, 2008	\$650,000.00
15**	July 1, 2009	\$700,000.00
16**	July 1, 2010	\$750,000.00
17**	July 1, 2011	\$750,000.00
18**	July 1, 2012	\$750,000.00
19**	July 1, 2013	\$750,000.00
20**	July 1, 2014	\$750,000.00

* Year 1 shall commence with the completion of the initial installation of the FOC Network, as described in Paragraph 6 below, and shall continue through June 30, 1996.


** The Annual Payments for Years 6-10, 11-15, 16-20 listed above shall be due if WCC elects to extend the term of the Conduit Lease Agreement as described in Paragraph 5 of the Conduit Lease Agreement.

3. The Conduit Lease Agreement, the Conduit Lease Assignment and Consent, and the Installation and Operating Agreement shall be subject to the Agreement Relating to Fiber Optic Cable Network in Downtown Cincinnati by and among the City of Cincinnati, The Cincinnati Gas & Electric Company, and CINergy Technology, Inc. dated August 1995, a copy of which is attached to and made part of this Amendment.

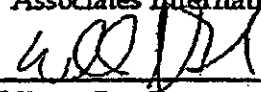
4. All rights and obligations of Enertech under the Conduit Lease Agreement, the Conduit Lease Assignment and Consent, and the Installation and Operating Agreement are hereby assigned by Enertech to CINergy. CINergy hereby accepts all such rights and obligations. All Parties to this Amendment hereby acknowledge and agree to such assignment.

5. Except as expressly amended by this Amendment, all other terms and conditions of the Conduit Lease Agreement, the Conduit Lease Assignment and Consent, and the Installation and Operating Agreement shall remain in full force and effect.

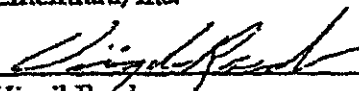
The Cincinnati Gas & Electric
Company

By: 
Terry E. Bruck
Group Vice-President,
CINergy Corp.

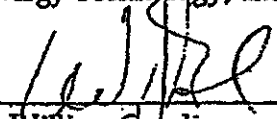
Power International, Inc.
(formerly known as Enertech
Associates International, Inc.)

By: 
William Grealis
President

Warner Cable Communications
of Cincinnati, Inc.

By: 
Virgil Reed
President

CINergy Technology, Inc.

By: 
William Grealis
President

CONDUIT LEASE ASSIGNMENT AND CONSENT

This Conduit Lease Assignment and Consent is effective as of the 2nd day of September, 1994 and is by and among Warner Cable Communications of Cincinnati, Inc. ("WCC"), an Ohio corporation with an office located at 11252 Cornell Park Drive, Cincinnati, Ohio 45242, The Cincinnati Gas & Electric Company ("CG&E"), an Ohio corporation with an office located at 139 East Fourth Street, Cincinnati, Ohio 45202, and Enertech Associates International, Inc. ("Enertech"), an Ohio corporation with an office located at 139 East Fourth Street, Cincinnati, Ohio 45202 (collectively, the "Parties", and each, a "Party").

Whereas, WCC, by itself and through affiliated companies, currently operates a cable television business in the Cincinnati area and WCC is planning to have fiber optic cable installed in the Cincinnati area for its cable television system and for other purposes; and

Whereas, Enertech has leased certain conduit space from CG&E in the Downtown Cincinnati Area (as defined in the Conduit Lease Agreement described below); and

Whereas, Enertech is willing to assign to WCC the right to lease the conduit space and CG&E is willing to consent to such assignment, subject to the terms and conditions in this Conduit Lease Assignment and Consent; and

Whereas, Enertech and CG&E represent that, based on the potential availability for future use of the fiber optic system, the relationship created among the Parties pursuant to this Conduit Lease Assignment and Consent, and pursuant to the Installation and Operating Agreement, as defined below, the Conduit Lease Agreement, and the Mutual Customer Letter of Intent referenced in this Conduit Lease Assignment and Consent (the "Project") is energy service related and is functionally related to

CG&E's utility business, but certain aspects of the Project are appropriate for a non-utility company for the following reasons: there is no duty of CG&E to provide the conduit space and the willingness to expend the time involved is predicated on the expectation of revenue on a non-regulated basis; the Parties may discuss ownership rights in fiber optic cable that are inappropriate for CG&E; and having an affiliated company may minimize the exposure of CG&E, and ultimately the ratepayers of CG&E, to risks and liabilities involved in the Project and to any expenses that may be incurred in the execution, administration, and enforcement of this Conduit Lease Assignment and Consent;

Now, Therefore, for and in consideration of the mutual promises and terms and conditions set forth in this Conduit Lease Assignment and Consent, the Parties agree as follows:

1. WCC, Enertech, and CG&E hereby acknowledge and agree to the Recitals set forth above in this Conduit Lease Assignment and Consent.
2. Enertech has entered into a Conduit Lease Agreement ("Conduit Lease Agreement") with CG&E for the lease of conduit space in the Downtown Cincinnati Area, dated as of September 1, 1994. Enertech hereby assigns all of its rights and delegates all of its duties as Lessee under the Conduit Lease Agreement to WCC. WCC hereby accepts such rights and duties of Lessee under the Conduit Lease Agreement as of the date of this Conduit Lease Assignment and Consent. Capitalized terms used in this Conduit Lease Assignment and Consent and not otherwise defined are used as defined in the Conduit Lease Agreement.
3. CG&E hereby consents to the assignment of the rights and delegation of duties of Lessee under the Conduit Lease Agreement to WCC subject to the following: WCC hereby assumes all obligations of Lessee under the Conduit Lease Agreement as of the date of this Conduit Lease Assignment and Consent; WCC hereby agrees to abide by all terms and conditions of the

Conduit Lease Agreement and of this Conduit Lease Assignment and Consent; and WCC hereby agrees to enter into the Mutual Customer Letter of Intent ("Mutual Customer Letter of Intent").

4. WCC shall hereby be required to enter into a separate Installation and Operating Agreement ("Installation and Operating Agreement") with Enertech and CG&E prior to the installation of any portion of the FOC Network in the Conduit. The FOC Network shall be installed in the Conduit by qualified employees, representatives, or subcontractors of Enertech or CG&E. WCC shall pay for all costs and expenses related to such installation work, in accordance with the Installation and Operating Agreement. Any and all maintenance of the FOC Network shall be performed in accordance with the terms and conditions of the Installation and Operating Agreement.
5. WCC acknowledges that the leased conduit space is essential to WCC's fiber optic cable system. Therefore, in addition to the lease payments payable under the Conduit Lease Agreement and in consideration of Enertech's involvement in the Project, WCC shall make the following Annual Payments to Enertech, which shall be paid in accordance with Paragraph 6 below and as follows; provided, however, that WCC shall be obligated to make such Annual Payments to Enertech only if the Conduit Lease Agreement assigned to WCC under this Conduit Lease Assignment and Consent is still in effect between CG&E and WCC as of the specific Due Dates listed below:

<u>Year</u>	<u>Due Date</u>	<u>Annual Payment</u>
1	see Paragraph 6.....	\$400,000.00
2	July 1, 1995.....	\$400,000.00
3	July 1, 1996.....	\$400,000.00

4	July 1, 1997.....	\$100,000.00
5	July 1, 1998.....	\$100,000.00 + <i>for 1998</i>
6 *	July 1, 1999.....	\$200,000.00
7 *	July 1, 2000.....	\$200,000.00
8 *	July 1, 2001.....	\$200,000.00
9 *	July 1, 2002.....	\$200,000.00
10 *	July 1, 2003.....	\$200,000.00
11 *	July 1, 2004.....	\$500,000.00
12 *	July 1, 2005.....	\$550,000.00
13 *	July 1, 2006.....	\$600,000.00
14 *	July 1, 2007.....	\$650,000.00
15 *	July 1, 2008.....	\$700,000.00
16 *	July 1, 2009.....	\$750,000.00
17 *	July 1, 2010.....	\$750,000.00
18 *	July 1, 2011.....	\$750,000.00
19 *	July 1, 2012.....	\$750,000.00
20 *	July 1, 2013.....	\$750,000.00

* The Annual Payments for the Years 6-10, 11-15, 16-20 listed above shall be due if WCC elects to extend the term of the Conduit Lease Agreement as described in Paragraph 13 below.

6. As long as the Conduit Lease Agreement and this Conduit Lease Assignment and Consent remain in effect, the Annual Payments listed in Paragraph 5 above, together with the lease payments under the Conduit Lease Agreement, shall be due and payable in full from WCC to Enertech on the later of (i) each July 1, upon receipt of an invoice on or prior to June 1 of that year, or (ii) thirty (30) days after receipt of such invoice; provided, however, that the first Annual Payment of \$400,000.00 shall be due on the date on which the initial installation of

the FOC Network is deemed completed under the Installation and Operating Agreement. WCC shall make one annual payment to Enertech that includes the Annual Payment amount listed in Paragraph 5 above and that also includes the lease payment payable to CG&E under the Conduit Lease Agreement. Enertech shall be responsible for forwarding the lease payments to CG&E. WCC's payment obligations under this Conduit Lease Assignment and Consent shall be unconditional and shall not be subject to any set-offs or credits; provided, however, that if, at the time any Annual Payment becomes due and payable, either CG&E or Enertech has an undisputed obligation to compensate WCC for the specific damages suffered by WCC as a result of a breach by CG&E or Enertech of their respective obligations to WCC under Paragraphs 2 or 12 of the Installation and Operating Agreement and the payment of such compensation is more than 30 days past due, WCC may suspend payment of such Annual Payment until CG&E or Enertech, as the case may be, completely satisfies such obligation to pay to WCC such undisputed amount.

7. In addition to the foregoing, and as part of the consideration provided to CG&E under this Conduit Lease Assignment and Consent, WCC shall provide to CG&E, at no cost to CG&E, up to 82,000 linear feet of 12-fiber loose tube buffer, vinyl-sheathed cable containing single mode fiber (the "12-Fiber Cable"), which CG&E may install in the Downtown Cincinnati Area; provided that any such installation does not decrease the areas accessible in the Conduit, indicated on Exhibit A to the Conduit Lease Agreement, or result in the removal or relocation of any portion of the FOC Network. CG&E may charge WCC, up to a maximum of \$200,000.00, for the incremental increase in the labor costs associated with installing the 12-Fiber Cable in the Downtown Cincinnati Area through these same portions of the Conduit in which the FOC Network is installed; provided that such installation of the 12-Fiber Cable occurs at the same time the FOC Network is installed pursuant to the terms of the Installation and Operating Agreement. Except as otherwise expressly provided herein, CG&E, at its own

cost and expense, shall be solely responsible for installing and using the 12-Fiber Cable in compliance with any and all applicable federal, state, and local laws, rules, and regulations; for all necessary maintenance, repairs, and replacements to the 12-Fiber Cable; and for all taxes, assessments, fees, charges, costs, personal injuries, and property damages in any way arising out of or related to its purchase, installation, and use of the 12-Fiber Cable. CG&E, at its own cost and expense, also shall indemnify and hold WCC harmless from and against any and all liability, damages, losses, claims, costs, attorney fees, and expenses relating to its purchase, installation, or use of the 12-Fiber Cable. WCC MAKES NO WARRANTY, GUARANTEE, OR REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE 12-FIBER CABLE, INCLUDING BUT NOT LIMITED TO MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, QUALITY, OR USE OF THE 12-FIBER CABLE AND IN NO EVENT SHALL WCC BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES WITH RESPECT TO THE 12-FIBER CABLE.

8. Enertech and CG&E each represent and warrant that:

- (a) it is duly organized, validly existing, and in good standing under the laws of the State of Ohio;
- (b) this Conduit Lease Assignment and Consent has been duly authorized by all necessary corporate action, and it has full power and authority to execute and deliver this Conduit Lease Assignment and Consent and perform its obligations herein; and
- (c) there is nothing to prevent the leasing by CG&E of the space within the Conduit as provided under the Conduit Lease Agreement to Enertech, or the assignment and delegation by Enertech to WCC hereunder of Enertech's lease rights and obligations.

WCC represents and warrants that:

- (a) it is duly organized, validly existing, and in good standing under the laws of the State of Delaware; and
 - (b) this Conduit Lease Assignment and Consent has been duly authorized by all necessary internal action of WCC, and it has full power and authority to execute and deliver this Conduit Lease Assignment and Consent and perform its obligations herein.
- 9. CG&E and Enertech (i) acknowledge and agree that WCC has agreed to structure the Project in the manner requested by CG&E and Enertech, and (ii) jointly and severally agree to indemnify and hold WCC harmless from and against any and all claims, damages, losses, judgments, and expenses, including, without limitation, reasonable attorneys' fees, that arise out of any claim, administrative or regulatory proceeding or investigation, litigation or threat of litigation resulting from the inclusion of Enertech in the Conduit Lease Agreement, the Installation and Operating Agreement, and this Conduit Lease Assignment and Consent, including without limitation any failure of Enertech to deliver payments or other performance received by it from WCC to CG&E.
- 10. (a) In the event any third party offers to lease conduit space in the Downtown Cincinnati Area from CG&E, directly or through an affiliate of CG&E, such specific space and routes shall not be made available to any such unaffiliated third party under terms and conditions or at prices that are more favorable to such unaffiliated third party than the terms and conditions and the prices for WCC pursuant to this Conduit Lease Assignment and Consent and the Conduit Lease Agreement unless similar terms and conditions and prices are also offered to WCC, so that WCC shall maintain a most favored customer status under this Conduit Lease Assignment and Consent and under the Conduit Lease Agreement for as long as this Conduit Lease Assignment and Consent and the Conduit Lease Agreement remain in effect and WCC remains in

material compliance with this Conduit Lease Assignment and Consent and with the Conduit Lease Agreement. However, if CG&E or its affiliate has an existing contractual obligation as of the effective date of this Conduit Lease Agreement, not including modifications or extensions thereof after such effective date, to lease such specific conduit space to such unaffiliated third party, the provisions of this Paragraph 10 shall not apply thereto. Notwithstanding the foregoing or anything stated elsewhere, (i) the terms of this Paragraph 10 shall not apply with respect to the terms and conditions of contractual obligations of CG&E to lease specific conduit space to third parties existing as of the effective date of this Conduit Lease Assignment and Consent, to the extent such obligations remain unmodified and unextended during the term hereof, and (ii) the City of Cincinnati may have terms and conditions and prices that are more favorable than any other party, including WCC.

- (b) Except as otherwise provided in this Conduit Lease Assignment and Consent, in the Conduit Lease Agreement, in the Installation and Operating Agreement, or in the Mutual Customer Letter of Intent, nothing in any such documents shall be interpreted as prohibiting (i) CG&E or its affiliates from installing its own fiber optic cable for any reason or purpose, including but not limited to use of fiber optic cable for its internal operations or (ii) WCC or its affiliates from providing or receiving any services, including without limitation the types of services described in the Mutual Customer Letter of Intent, to or from other customers or providers without any right of first offer, negotiation, or refusal in favor of CG&E.

- 11. (a) WCC may assign its rights and delegate its duties under this Conduit Lease Assignment and Consent at any time by providing prior written notice to Enertech, provided: (i) such assignee agrees in writing to accept such rights and duties of WCC under this Conduit Lease Assignment and Consent and the related Conduit Lease Agreement and

Installation and Operating Agreement (the "Related Agreements"), to assume all obligations of WCC under the Related Agreements, to otherwise abide by the terms and conditions of the Related Agreements; (ii) such assignee agrees not to make any further assignment, except as otherwise provided below in Paragraph 11(b) or except to a company that is controlling, controlled by, or under common control with WCC, in which event Paragraph 11(b) shall not apply; and (iii) any assignment does not materially and adversely affect the interests of Enertech or CG&E (and it is acknowledged that assignment to a company controlling, controlled by, or under common control with WCC or a permitted assignee under Paragraph 11(b) below shall have no such effect).

- (b) In the event WCC desires to sell or transfer the FOC Network to an unaffiliated third party, either alone or in connection with a sale or transfer of all or part of WCC's business in the Greater Cincinnati area, to the extent WCC may do so without violating any applicable federal, state, or local law, rule, or regulation and without being in breach of any of its obligations to any third party, WCC shall notify Enertech and CG&E of such desire in a timely manner and WCC shall provide to Enertech and CG&E a reasonable opportunity to discuss with WCC the possible purchase by them of the FOC Network or such business from WCC. After providing Enertech and CG&E with such reasonable opportunity, WCC nonetheless may sell or transfer the FOC Network, either alone or in connection with a sale or transfer of all or part of WCC's business in the Greater Cincinnati area, to a third party. WCC may also sell or transfer the FOC Network to a third party together with any portion of the business of WCC and its affiliates beyond the Greater Cincinnati area without providing CG&E and Enertech the notice or opportunity described in the first sentence of this Paragraph 11(b). In any such event, WCC may assign its rights and delegate its duties under this Conduit Lease

Assignment and Consent to such third party upon prior written notice to Enertech, provided that:

- (i) such purchaser or transferee is capable of immediately assuming and performing all of WCC's duties under this Conduit Lease Assignment and Consent; and
 - (ii) either (A) the positive difference between the assets and liabilities of such purchaser or transferee exceeds \$10,000,000 as of the end of the last two fiscal years of such purchaser or transferee immediately prior to such sale or transfer, (B) the net sales of such purchaser or transferee during the last two fiscal years ending immediately prior to such sale or transfer exceed \$50,000,000, or (C) WCC agrees to guarantee performance by such purchaser or transferee of all of its obligations under this Conduit Lease Assignment and Consent; and
 - (iii) such purchaser or transferee is not, and no entity controlling, controlled by, or under common control with such purchaser or transferee is, a competitor of CG&E or Enertech that is engaged in the business of generating or distributing power (other than generating or distributing power in connection with the transmission of voice, data, or video signals) to commercial, industrial, or residential users in Ohio, Indiana or Kentucky.
- (c) Any prohibited assignment shall be void. The terms and conditions of this Conduit Lease Assignment and Consent shall be binding upon any permitted assignees and upon any successors.

(d) Except for assignments to affiliates, which are expressly permitted, CG&E and Enertech shall not assign their respective rights under this Conduit Lease Assignment and Consent without the consent of WCC, which shall not be unreasonably withheld. Any assignment shall be made only together with the Conduit Lease Agreement and the Installation and Operating Agreement.

12. The Parties shall keep the terms and conditions of this Conduit Lease Assignment and Consent and of the Conduit Lease Agreement, the Installation and Operating Agreement, and the Mutual Customer Letter of Intent confidential and shall not disclose to any third party other than the affiliated companies of the Parties (a) such terms and conditions including, without limitation, the exhibits and attachments to such Agreements and Letter of Intent, or (b) any other confidential information presented in documents marked with a restrictive notice or otherwise tangibly designated as confidential or presented during oral discussions, at which time the disclosing Party specifies that the information is confidential; provided, however, that nothing in this Paragraph 12 shall be construed to restrict:

- (a) WCC in its ability to present such information regarding the FOC Network to its customers or potential customers as it deems necessary or appropriate to market or provide its services or to potential lessees or purchasers of its FOC Network, provided such potential lessees or purchasers agree in writing to maintain the confidentiality of such information in accordance herewith; or
- (b) CG&E from providing such information as it deems necessary or appropriate for purposes of its participation in the "Call Before You Dig" program.

The foregoing notwithstanding, no Party shall have any obligation with respect to, or be

restricted in its use of, any information that is in the public domain through any means other than a breach of this Conduit Lease Assignment and Consent, of the Conduit Lease Agreement, of the Installation and Operating Agreement or of the Mutual Customer Letter of Intent is already in the possession of the non-disclosing Party, is rightfully received from a third party with no obligation to keep such information confidential, or is required to be disclosed by CG&E for the purpose of ensuring that WCC retains its most favored customer status under this Conduit Lease Assignment and Consent. If the Parties becomes legally compelled to disclose any of the confidential information, the compelled Party shall undertake reasonable efforts to provide the other Party with prompt notice of such requirement prior to disclosure so that the other Party may seek a protective order or any other appropriate remedy. If such protective order or other remedy is not obtained, the compelled Party agrees to furnish only that portion of the confidential information that it is legally required to so furnish and, at the request of the other Party, to use reasonable efforts, at the other Party's expense, to obtain assurance that confidential treatment will be accorded such information.

13. This Conduit Lease Assignment and Consent shall be effective as of the date first written above and, unless terminated earlier pursuant to this Paragraph 13, shall terminate upon any termination or expiration of the Conduit Lease Agreement. Either Enertech or WCC may terminate this Conduit Lease Assignment and Consent upon the failure of WCC, on the one hand, or Enertech or CG&E, on the other hand, to perform or observe any material provision of this Conduit Lease Assignment and Consent and such failure remains unremedied for a period of sixty (60) days after written notice is given to the defaulting Party. In the event WCC is the defaulting Party and this Conduit Lease Assignment and Consent is terminated, CG&E shall have the right to terminate the Conduit Lease Agreement. Notwithstanding anything to the contrary in this Conduit Lease Assignment and Consent, in the Conduit Lease

Agreement, in the Mutual Customer Letter of Intent, or in the Installation and Operating Agreement, but not in limitation of Section 5 of the Conduit Lease Agreement, in the event any rights of CG&E or WCC or their respective affiliates under any of the foregoing named Agreements are significantly and adversely affected or in the event any economic or other hardship on CG&E or WCC or their respective affiliates results from or arises out of any of the foregoing named Agreements due to any federal, state, or local law, rule, or regulation, or any governmental interpretation or action, the Party so affected shall have the right to terminate any or all of the foregoing named Agreements and the Parties shall have no further liability under such Agreement(s), except that WCC, at the request of CG&E and to the extent WCC has not transferred title to the FOC Network to Enertech, or its affiliate, or abandoned the FOC Network in place pursuant to the terms of the Conduit Lease Agreement, shall properly and promptly remove its fiber optic cable from the Conduit, at the sole cost and expense of WCC and with such removal to be in accordance with the Installation and Operating Agreement.

14. WCC, CG&E, and Enertech shall not make any public announcement regarding the Project without the prior written consent of the other Parties. Further, the specific content of any proposed public announcement shall be subject to the prior review and reasonable approval of all of the Parties.
15. Any notice required under this Conduit Lease Assignment and Consent, under the Conduit Lease Agreement, or under the Mutual Customer Letter of Intent shall be made in writing and sent to the following:

Warner Cable Communications
11252 Cornell Park Drive
Cincinnati, Ohio 45242
Attention: Virgil M. Reed

The Cincinnati Gas & Electric Company
Enertech Associates International, Inc.
139 East Fourth Street
Cincinnati, Ohio 45202
Attention: Michael R. Voorhees
Legal Department

with a copy to:

Time Warner Cable
300 First Stamford Place
Stamford, CT 06902
Attn: General Counsel


The above addresses and individuals may be amended from time to time by providing notice of such in accordance with this Paragraph 15. All notices shall be deemed given when received.

16. This Conduit Lease Assignment and Consent shall be governed by and interpreted in accordance with the laws of the State of Ohio. Any claim or dispute relating to or arising out of this Conduit Lease Assignment and Consent shall be brought in a court of competent jurisdiction located in Hamilton County, Ohio. The Parties hereby consent to such choice of law and venue.
17. If it is determined by a court, regulatory agency, or other entity exercising its proper jurisdiction that any provision of this Conduit Lease Assignment and Consent is invalid, illegal, or incapable of being enforced, then such provision shall be deleted from this Conduit Lease Assignment and Consent and thereafter all other conditions and provisions of this Conduit Lease

Assignment and Consent shall continue to remain in full force and effect, provided the economic or legal substance of this Conduit Lease Assignment and Consent is not affected in any manner materially adverse to any Party. In the event such deletion does materially and adversely affect any Party, the Parties shall negotiate in good faith to amend this Conduit Lease Assignment and Consent so as to effect the original intent of the Parties and the original purpose of this Conduit Lease Assignment and Consent as closely as possible and to the greatest extent possible in a manner acceptable to all of the Parties. In the event the Parties cannot agree upon such an amendment within a reasonable period of time, this Conduit Lease Assignment and Consent may be terminated by any of the Parties upon written notice to the other Parties.

18. This Conduit Lease Assignment and Consent, including the documents referred to in this Conduit Lease Assignment and Consent, contains the entire agreement and understanding of the Parties relating to the subject matter of this Conduit Lease Assignment and Consent. This Conduit Lease Assignment and Consent and any provision of this Conduit Lease Assignment and Consent may not be amended or waived, unless in a writing that is signed, in the case of an amendment, by all of the Parties and, in the case of a waiver, by the Party waiving the specific enforcement or breach. No waiver shall be valid until such written waiver is made and such waiver shall not constitute a waiver of or consent to any subsequent or different breach.

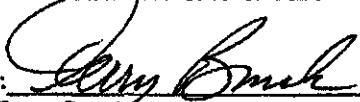
WARNER CABLE COMMUNICATIONS OF
CINCINNATI, INC.

By: 
Virgil M. Reed
President

ENERTECH ASSOCIATES INTERNATIONAL, INC.

By: 
Allan P. Haskell
Executive Director

THE CINCINNATI GAS & ELECTRIC COMPANY

By: 
Terry Bruck
Vice President, Electric Operations

C:\WPDOCS\C-ASSIGN.

INSTALLATION AND OPERATING AGREEMENT

This Installation and Operating Agreement is effective as of the 2nd day of September, 1994 and is by and among The Cincinnati Gas & Electric Company ("CG&E"), an Ohio corporation with an office located at 139 East Fourth Street, Cincinnati, Ohio 45202, Enertech Associates International, Inc. ("Enertech"), an Ohio corporation with an office located at 139 East Fourth Street, Cincinnati, Ohio 45202, and Warner Cable Communications of Cincinnati, Inc. ("WCC"), an Ohio corporation with an office located at 11252 Cornell Park Drive, Cincinnati, Ohio 45242 d/b/a Warner Cable Communications (collectively, the "Parties", and each, a "Party").

Whereas, pursuant to the Conduit Lease Assignment and Consent, Enertech has assigned to WCC the right to lease space in conduit owned by CG&E ("Conduit") in the Downtown Cincinnati Area under the Conduit Lease Agreement dated September 1, 1994 ("Conduit Lease Agreement"); and

Whereas, WCC desires to have its fiber optic cable and related equipment ("FOC Network") installed in the Conduit; and

Whereas, the Conduit Lease Agreement specifies that CG&E, by its employees, representatives, or subcontractors, shall perform all installation work relating to the Conduit; and

Whereas, CG&E is willing to install the FOC Network in the Conduit ("Installation") through Enertech, subject to the terms and conditions of this Installation and Operating Agreement;

Now, Therefore, in and for consideration of the mutual promises as set forth in this Installation and Operating Agreement and other good and valuable consideration, the Parties agree as follows:

1. The FOC Network shall be installed in the Conduit in accordance with this Installation and Operating Agreement at the prices or rates generally and reasonably charged by Enertech or its affiliates for such services. The price of the initial installation shall be as agreed by the Parties within the ranges previously disclosed to WCC. The services provided under this Installation and Operating Agreement shall be performed by or on behalf of Enertech and all amounts due and payable by WCC under this Installation and Operating Agreement shall be made to Enertech. Enertech hereby secures the services of the appropriate employees of CG&E or of its subsidiary or affiliated companies, for which Enertech and CG&E shall be solely liable, to perform or secure performance of all services required under this Installation and Operating Agreement, performance of which WCC shall have the right to monitor at WCC's cost and expense; provided, however, that in no event shall the agents or representatives of WCC be allowed to enter into any vault, man-hole, or other confined space comprising part of the Conduit. CG&E, for itself and for its subsidiary and affiliated companies, hereby agrees to provide or procure, on behalf of Enertech, all services to be performed under this Installation and Operating Agreement. To the extent WCC has obtained all required prior approvals and authorizations, the Installation shall be for the pulling of the fiber optic cable through the Conduit into the vaults of the Conduit, running laterals into the vaults of the Conduit, coring from the vaults to building interiors, and any related services as agreed to by the Parties. Enertech shall complete each Installation under this Installation and Operating Agreement within the time frame(s) in the schedules established and mutually agreed to by the Parties in writing from time to time during the term of this Installation and Operating Agreement, subject to the force majeure provision set forth in Paragraph 8 below, and subject further to the availability and condition of the Conduit. If during Installation Enertech or CG&E discovers that repairs to the Conduit are required before the fiber optic cable may be installed, the Installation schedule shall be extended, upon written notice to WCC, as may be necessary to provide time for such repairs to be made.

2. Subject to the force majeure provision set forth in Paragraph 8 below and to any adjustments to the Installation schedule, including any extension for repairs to the Conduit as described in Paragraph 1 above, to the extent Enertech fails to complete the Installation work in accordance with any applicable schedule agreed upon in writing by Enertech and WCC:
- (a) WCC may withhold the payment of any amount due and payable to Enertech under this Installation and Operating Agreement until such Installation is properly completed by Enertech; and
 - (b) if, as a direct result of such failure, WCC suffers actual and provable damages in the form of lost revenues, Enertech shall pay to WCC an amount equal to such lost revenues; provided, however, that in no event shall Enertech be obligated to make any payment to WCC pursuant to this Paragraph 2(b) in an amount exceeding the next Annual Payment that WCC or its assignee shall be obligated to pay to Enertech pursuant to the Conduit Lease Assignment and Consent entered into among the Parties. WCC shall use its best efforts to mitigate any such damages.
3. Prior to Installation, WCC and Enertech shall agree upon a detailed listing of designated stages for segments of the Installation. Upon completion of designated segments pages of the Installation, WCC shall be notified of the date of such completion, which shall serve as a request for confirmation of such completion by WCC in accordance with Paragraph 10. Enertech shall send an invoice to WCC in the amount relating to any such completion during the preceding period. Upon receipt of the notice of completion, WCC shall promptly either (i) confirm to Enertech in writing that such segment of the FOC Network as is referred to in the notice has been completed on the date indicated in the notice or (ii) provide Enertech with a detailed written list of the aspects in which WCC believes the segment of the FOC Network

has not been completed or does not meet agreed-upon performance criteria. Any portion of the Installation included in the notice to WCC and not listed by WCC as incomplete or rejected in the detailed written list delivered to Enertech within 30 days of WCC's receipt of such notice shall be deemed complete and accepted. With respect to the FOC network segment listed by WCC as incomplete, and if Enertech agrees such portion of the Installation is incomplete or does not meet acceptance criteria, such FOC Network segment shall be completed and the above acceptance procedure shall be repeated.

4. WCC shall pay the full amount invoiced within 30 days of receipt of any invoice due and payable with respect to any services performed under this Installation and Operating Agreement, to the extent that such services are complete and have been accepted.
5. In the event any portion of the FOC Network is to be removed from the Conduit, such removal shall be performed by Enertech. Such removal work shall be performed in the same manner and under the same procedures as the Installation, and at the prices or rates generally and reasonably charged by Enertech or CG&E for such similar services.
6. The Installation and other services provided hereunder shall be performed with the degree of skill and judgment normally exercised by experienced entities performing construction services of a similar nature. The installed FOC Network, and such portions thereof, as the Parties shall agree under Paragraphs 3 and 10, shall perform upon completion of Installation in accordance with agreed-upon specifications and performance criteria. In the event the Installation of any FOC Network segment does not conform to this standard, Enertech shall have such Installation re-performed at its own expense or, if such re-performance is not reasonably feasible, Enertech shall provide a refund or otherwise waive the charge for the segment of the FOC Network failing to meet such specifications. EXCEPT AS EXPRESSLY PROVIDED IN PARAGRAPH 2 OF

THIS INSTALLATION AND OPERATING AGREEMENT, SUCH RE-PERFORMANCE, REFUND, OR WAIVER OF CHARGES SHALL BE WCC'S SOLE AND EXCLUSIVE REMEDY AND ENERTECH'S AND CG&E'S SOLE LIABILITY RELATING TO PERFORMANCE AND RE-PERFORMANCE OF THE INSTALLATION. Any such non-conformance must be reported by WCC to Enertech in writing and within 90 days of the completion of such Installation.

7. Except as expressly provided in this Installation and Operating Agreement, the Conduit Lease Agreement, and the Conduit Lease Assignment and Consent, Enertech and CG&E provide NO WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. EXCEPT AS EXPRESSLY PROVIDED IN PARAGRAPHS 2 AND 12 OF THIS INSTALLATION AND OPERATING AGREEMENT, IN NO EVENT SHALL ENERTECH OR CG&E OR WCC BE LIABLE FOR ANY INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF USE, REGULATORY FINES AND PENALTIES, OR LOST PROFITS OR REVENUES. ENERTECH AND CG&E SHALL HAVE NO LIABILITY FOR OR ARISING OUT OF SERVICES, MATERIALS, OR EQUIPMENT FURNISHED BY ANY PARTY OTHER THAN ENERTECH, CG&E, OR THEIR SUBCONTRACTORS. IN NO EVENT SHALL ENERTECH'S AND CG&E'S COLLECTIVE TOTAL LIABILITY TO WCC UNDER THIS INSTALLATION AND OPERATING AGREEMENT FOR ANY 12-MONTH PERIOD ENDING JUNE 30, WHETHER IN CONTRACT, TORT, OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LIABILITY UNDER PARAGRAPHS 2 AND 12 OF THIS INSTALLATION AND OPERATING AGREEMENT, IN THE AGGREGATE EXCEED THE AMOUNT OF THE NEXT ANNUAL PAYMENT THAT WCC OR ITS ASSIGNEE SHALL BE OBLIGATED TO PAY TO ENERTECH PURSUANT TO THE CONDUIT LEASE ASSIGNMENT AND CONSENT.

8. The performance of each of the Parties under this Installation and Operating Agreement shall be excused by conditions or circumstances beyond its reasonable control, including but not limited to acts or omissions of the other Parties or third parties rendering the Party unable to perform, acts of God, strikes or lockouts, governmental orders, civil commotions, and the unavailability of materials and supplies, provided the Party whose performance is excused by such condition or circumstance uses commercially reasonable efforts to eliminate such condition or circumstance and then performs after such condition or circumstance has been eliminated.
9. CG&E shall provide to WCC, upon completion of FOC Network segments and from time to time as needed, information and engineering documentation relating to the Conduit and the Installation, which may be of use to WCC in the design and operation of the FOC Network. WCC shall be solely responsible for the design, operation, and maintenance of the FOC Network. CG&E shall be obligated to maintain the Conduit, as provided under the Conduit Lease Agreement, but Enertech and CG&E shall in no way be responsible for the design or operation of the FOC Network.
10. WCC shall, at its own cost and expense, provide to CG&E the fiber optic cable and related equipment to be installed in the Conduit and any and all materials and supplies related to the repair or maintenance of the FOC Network. The Installation shall be handled solely by CG&E or its subcontractors. Except as otherwise provided in the Conduit Lease Agreement, WCC at all times shall maintain sole and exclusive ownership of the FOC Network. WCC shall have the right to be present during the Installation. Prior to the Installation, the Parties shall agree upon mutually acceptable test criteria relating to the functionality of the fiber optic cable to be used in the FOC Network and of the FOC Network. WCC, using such test criteria and agreed methodology, shall test the fiber optic cable and inspect the related equipment used in the FOC

Network and certify as to the satisfactory performance of the FOC Network prior to providing such cable and equipment to Enertech for Installation. The test results and certification shall be provided to Enertech in writing prior to Installation. WCC, using the same FOC Network test criteria and agreed methodology, shall test the FOC Network upon completion of the Installation in accordance with Paragraph 3.

11. During the term of this Installation and Operating Agreement, the services described in this Paragraph 11 shall be provided in accordance with the following procedures:

(a) With respect to "major outages" (i.e., occurrences that cause one or more customers to lose services provided by WCC through the FOC Network or as otherwise reasonably determined by WCC) and with respect to "performance-affecting problems" (i.e., occurrences that cause one or more customers serviced through the FOC Network to receive a substandard level of service, but which do not completely cut off customers' access to the FOC Network) that WCC determines to have been caused by a problem in the FOC Network, the procedures set forth below will be followed:

(i) Enertech will provide to WCC a Contact List that sets forth the relevant information and the persons to be contacted in the event a major outage or a performance-affecting problem has occurred and that specifies the order in which such persons are to be contacted, depending upon the nature of the major outage or the performance-affecting problem.

(ii) WCC will attempt to isolate the location within the FOC Network where the problem causing the major outage or affecting the performance of the FOC

Network has occurred and report to the appropriate person on the Contact List the nature and, to the extent possible, the location of the problem.

- (iii) Within the response times set forth below, Enertech and WCC each will have a crew at the location designated by WCC. Such crews shall work together to remedy the problem causing such major outage or performance-affecting problem as promptly as possible. Enertech shall access the Conduit as needed and, in no event, shall WCC personnel be permitted access to the Conduit. The relevant response times shall be as follows:

- (A) Monday through Friday, between the hours of 8:00 a.m. and midnight, the response time shall be within two (2) hours after WCC contacts the appropriate CG&E personnel to report a major outage or a performance-affecting problem; and

- (B) Monday through Friday, from the hours of midnight to 8:00 a.m., and at any time on Saturday and Sunday, the response time shall be within four (4) hours after WCC contacts the appropriate CG&E personnel to report a major outage or a performance-affecting problem.

- (iv) Notwithstanding anything set forth above or elsewhere, the response times provided above shall at all times be subject to the priority of emergency situations relating to CG&E's system. In the event all crews are dedicated to a CG&E system emergency, the response provided under this Paragraph 11 shall be on an "as soon as available" basis. Enertech shall attempt to allocate

additional resources, both internally and externally, to respond as soon as possible.

(b) - With respect to maintenance or service of the FOC Network:

(i) Enertech will provide to WCC a Maintenance Contact List, which sets forth the relevant information and the persons to be contacted in the event WCC would like to request maintenance or other service for the FOC Network and that specifies the order in which persons are to be contacted, depending upon the nature of the maintenance or service.

(ii) WCC will contact the appropriate person on the Maintenance Contact List and describe to such person the nature of the maintenance or service. WCC and CG&E will schedule a mutually convenient time for such maintenance or service work. CG&E shall access the Conduit as needed and, in no event, shall WCC personnel be permitted access to the Conduit.

Payment for the services provided above shall be made by WCC to Enertech at the prices or rates generally and reasonably charged by Enertech or CG&E for such similar services. Such payment by WCC shall be in accordance with the payment provisions in Paragraph 4 above.

12. Subject to the force majeure provision set forth in Paragraph 8 above and to the exception noted in Paragraph 11(a)(iv) above, if, as a direct result of a failure by Enertech to perform its obligations as described in Paragraph 11 above (a "Failure"), WCC suffers actual and provable damages in the form of lost revenues, Enertech shall pay to WCC an amount equal to such lost revenues; provided, however, that in no event shall Enertech be obligated to pay more than

\$20,000 for such lost revenues as WCC may suffer as a direct result of any single Failure, subject to the Annual Payment limitation of liability set forth in Paragraph 7. WCC shall use its best efforts to mitigate any such damages.

13. In furnishing the Installation for WCC or any other service under this Installation and Operating Agreement, Enertech and CG&E shall be and shall remain at all times an independent contractor and not an employee, agent, or representative of WCC.
14. In addition to the agreed-upon price, WCC or its affiliates shall also pay any applicable taxes, assessments, fees, charges, costs, expenses, or other payments, other than applicable income taxes payable by Enertech and CG&E, directly relating to the activities of the Parties pursuant to this Installation and Operating Agreement. Further, WCC shall pay for any and all fees, charges, or other payments required by any municipality, regulatory agency, or other governmental entity created solely and directly as a result of the activities of the Parties pursuant to this Installation and Operating Agreement.
15. This Installation and Operating Agreement shall be effective as of the date first written above and, unless terminated earlier pursuant to this Paragraph 15, shall terminate upon any termination or expiration of the Conduit Lease Agreement. Either Enertech or WCC may terminate this Installation and Operating Agreement upon the failure of WCC, on the one hand, or Enertech or CG&E, on the other hand, to perform or observe any material provision of this Installation and Operating Agreement and such failure remains unremedied for a period of sixty (60) days after written notice is given to the defaulting Party. Following any such termination that occurs prior to termination of the Conduit Lease Agreement, maintenance and repair for FOC Network previously installed shall continue to be performed by Enertech or CG&E on the terms set forth herein, in accordance with the standards set forth herein. WCC may also

terminate this Installation and Operating Agreement if it determines that any amount payable by it or its affiliates pursuant to Paragraph 14 above or any federal, state, or local law, rule, or regulation, or any governmental interpretation or action of or pursuant to any federal, state, or local law, rule, or regulation, whether enacted or promulgated prior to or after the effective date of this Installation and Operating Agreement materially and adversely affects the economic or legal substance of the transactions contemplated by this Installation and Operating Agreement. However, such termination by WCC shall not relieve WCC of any obligation to make any payment hereunder or comply with any law, rule, or regulation if such payment or compliance obligation accrued prior to such termination.

16. Any notice required under this Installation and Operating Agreement shall be made in writing and sent to the following:

To WCC: Warner Cable Communications
11252 Cornell Park Drive
Cincinnati, Ohio 45242
Attention: Virgil M. Reed

with a copy to:

Time Warner Cable
300 First Stamford Place
Stamford, CT 06902
Attn: General Counsel

To Enertech or CG&E: The Cincinnati Gas & Electric Company

139 E. 4th Street

Cincinnati, Ohio 45202

Attention: Randall L. Antrobus

The above addresses and individuals may be amended from time to time by providing notice of such change in accordance with the notice procedure set forth in this Paragraph 16. All notices shall be deemed given when received.

17. This Installation and Operating Agreement shall be interpreted and construed under the laws of the State of Ohio, except to the extent that any federal, state and local laws, rules, and regulations, including but not limited to any OSHA standards and rules of the City of Cincinnati, are determined to otherwise apply. Any claim or dispute relating to or arising out of this Installation and Operating Agreement shall be brought in a court of competent jurisdiction located in Hamilton County, Ohio. The Parties hereby consent to such choice of law and venue.
18. If it is determined by a court, regulatory agency, or other entity exercising its proper jurisdiction that any provision of this Installation and Operating Agreement is invalid, illegal, or incapable of being enforced, then such provision shall be deleted from this Installation and Operating Agreement and thereafter all other conditions and provisions of this Installation and Operating Agreement shall continue to remain in full force and effect, provided the economic or legal substance of this Installation and Operating Agreement is not affected in any manner materially adverse to any Party. In the event such deletion does materially and adversely affect any Party, the Parties shall negotiate in good faith to amend this Installation and Operating

Agreement so as to effect the original intent of the Parties and the original purpose of this Installation and Operating Agreement as closely as possible and to the greatest extent possible in a manner acceptable to the Parties. In the event the Parties cannot agree upon such an amendment within a reasonable period of time, this Installation and Operating Agreement may be terminated by any Party upon written notice to the other Parties.

19. This Installation and Operating Agreement, including the documents referred to in this Installation and Operating Agreement, contains the entire agreement and understanding of the Parties relating to the subject matter of this Installation and Operating Agreement. This Installation and Operating Agreement and any provision of this Installation and Operating Agreement may not be amended or waived, unless in a writing that is signed, in the case of an amendment, by the Parties and, in the case of a waiver, by the Party waiving the specific enforcement or breach. No waiver shall be valid until such written waiver is made and such waiver shall not constitute a waiver of or consent to any subsequent or different breach.

WARNER CABLE COMMUNICATIONS
OF CINCINNATI, INC.

By: _____

Virgil M. Reed
President

THE CINCINNATI GAS & ELECTRIC COMPANY

By: _____

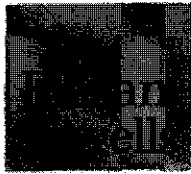
Terry Bruck
Vice President, Electric Operations

ENERTECH ASSOCIATES INTERNATIONAL, INC.

By: _____

Allan P. Haskell
Executive Manager

C:\WPDOCS\INSTALL-3



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Gardner F. Gillespie
Partner
D +1 202 637 8796
gardner.gillespie@hoganlovells.com

December 22, 2010

By E-mail and First Class Mail

James E. McLean, Jr.
Assistant General Counsel
Duke Energy – Office of the General Counsel
139 East Fourth Street, 1212 Main
Columbus, OH 45202

Re. Conduit and Pole Attachments

Dear James:

We discussed on the telephone last week Time Warner Cable's position that it is not liable for the \$750,000 charge (or the associated 3% franchise fee) included in the Duke Energy invoice related to use of Duke's conduit for the period July 1, 2009 through June 30, 2010. The \$750,000 portion of the invoice is labeled as "lease charge current year increase per contract." The other charges in the invoice are based on the tariff charge of \$1.26 per linear foot.

TWC is in the process of preparing a check in the amount of \$188,441.85 (the \$1.26 per-foot tariff charge, plus the 3% franchise fee). That check should be delivered to you before the end of the year. We understand that Duke does not necessarily agree with TWC's position regarding the \$750,000 charge, and Duke may cash the \$188,441.85 check without waiving any arguments that it may have regarding the portion of the invoice that TWC is not paying.

This letter will provide the basis of our position in writing, as I offered on our call. We base our position on the following:

First, as you know, last year TWC and Duke entered into an agreement under which "[t]he Parties agree that the conduit occupancy rate shall be \$1.26 per

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linear foot." No exceptions were provided in the agreement, and no additional payment for conduit occupancy was specified.

Second, under the familiar "filed rate doctrine," Duke may only charge rates approved by the Public Utility Commission of Ohio ("PUCO"). See Ohio Rev. Code Ann. 4905.33; *Gary Phillips & Assoc. v. Ameritech Corp.*, 144 Ohio App.3d 149, 153 (Ohio App. Ct. 2001) ("The filed rate doctrine, embodied in R.C. 4905.33, mandates that a public utility must charge the tariff rates approved by the PUCO."). As you are aware, the PUCO approved a tariff charge limited to \$1.26 per linear foot for use of Duke's conduit effective July 13, 2009. Since that date, then, the additional "lease charge" contained in the parties' earlier conduit agreement, which was never approved by the Commission, was superseded by the PUCO-approved tariff rate and is therefore no longer effective. See, e.g., *In re Orwell Natural Gas Co.*, 2007 WL 2042577 (PUC 2007) (holding previous contracts overridden by PUCO-approved tariff).

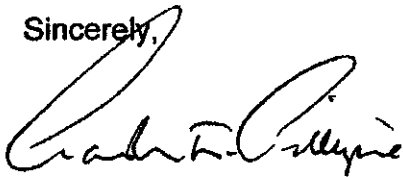
Third, the PUCO has certified to the FCC that it regulates pole and conduit rates under 47 U.S.C. § 224(c), and that assertion necessarily covers pole and conduit usage by both cable operators and telecommunications service providers. See *id.*, § 224(a)(4). And as you know, the PUCO relies on the FCC's methodology for conduit rates – the basis for the \$1.26 rate calculation. On the other hand, if the PUCO did not regulate the rates for conduit used by TWC here, then the FCC would retain jurisdiction to impose its rate methodology – again, deriving the \$1.26 rate. Under the FCC's rules and policies, any contract that specifies a rate higher than a "just and reasonable" rate is preempted and void. See *Selkirk Comm., Inc. v. Florida Power & Light*, 5 F.C.C.R. 387, 389 (1993).

Whichever way the issues here are analyzed, therefore, the result is the same. I hope that on careful consideration you will agree that the conduit rate applicable for 2009-10 is limited to \$1.26 per linear foot.

We discussed in our telephone call a possible meeting in early January, along with our clients, to try to hammer out the wording of a conduit and a pole attachment agreement. We have already exchanged red-lines of the conduit agreement, and we expect to have a red-line of the pole attachment agreement available for you before we meet.

Please let me know when you might be available for such a meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Gardner F. Gillespie". The signature is fluid and cursive, with a large initial "G" and "F".

Gardner F. Gillespie
Partner
gardner.gillespie@hoganlovells.com
D +1 202 637 8796

GFG/gs

cc. Jeanne W. Kingery
Ed Kozelek
Trish McCausland



139 East Fourth Street, 1212-Main
Cincinnati, OH 45202
Telephone: (513) 287-4341
Facsimile: (513) 287-4386

James E. McLean
Associate General Counsel
E-mail: James.McLean@duke-energy.com

February 14, 2011

Gardner F. Gillespie
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Re: Past Due Payment – Invoice 30311723, dated July 1, 2010; September 2, 1994
Conduit Lease Assignment And Consent (“Conduit Lease Assignment”)

Dear Mr. Gillespie:

I am writing in response to your letter of December 22, 2010 regarding the July 1, 2010 Duke Energy (“Duke”) invoice that your client, Time Warner Cable LLC (“TWC”), has refused to pay in full. The \$750,000 “Annual Payment” charge at issue was properly billed to TWC pursuant to the above-referenced contract between Duke’s unregulated affiliate Duke Technologies, Inc. (as successor to Enertech Associates International, Inc.) and TWC (as successor to Warner Cable Communications of Cincinnati, Inc.). Duke therefore demands immediate and full payment of the July 1, 2010 invoice (including the franchise fees associated with the Annual Payment). As of February 2, the late fees total \$96,000. If payment is not received by March 2, the late fees will total \$106,000.

We have carefully considered the three reasons you provided for TWC’s refusal to pay, and we have determined that none has merit.

1. Your letter asserts that “last year TWC and Duke entered into an agreement under which the parties agree[d] that the conduit occupancy rate shall be \$1.26 per linear foot,” with “no exceptions” and “[n]o additional payment for conduit occupancy.” Even if the \$750,000 Annual Payment charge at issue here was a charge for “conduit occupancy” or “conduit capacity” – and, as explained below, it is not – the language you quote is from a *draft* agreement. Although TWC and Duke Energy Ohio, Inc. (a regulated utility that is a subsidiary of Duke Energy) exchanged drafts of a conduit occupancy agreement last year, no final agreement was reached. Language from an unexecuted draft obviously could not excuse TWC from its obligations under the valid, executed Conduit Lease Assignment.

2. You also contend that the conduit occupancy rate and other provisions of Duke Energy Ohio's Pole Attachment/Conduit Occupancy tariff and the "filed rate doctrine" somehow excuse TWC from complying with its obligations under the Conduit Lease Assignment to make the Annual Payments to Duke Technologies, Inc. (an unregulated subsidiary of Duke Energy). In fact, neither the Duke Energy Ohio tariff nor the filed tariff doctrine has any application here.

First, as the Conduit Lease Assignment and the parties' related 1994 contracts make clear, the \$750,000 Annual Payment due as of July 1, 2010 is not a charge for conduit capacity or occupancy or any other service governed by any Duke company tariff. Rather, the Annual Payment charges under the Conduit Lease Assignment owed to Duke Technologies (as successor to Enertech) are the consideration that TWC's predecessor committed itself (and its successors) to pay for separate deal formation and structuring, construction oversight and management and other services.

As you may be aware, the parties' predecessors, Cincinnati Gas and Electric Company ("CG&E") and Warner Cable Communications of Cincinnati, Inc. ("Warner Cable") desired to enter into a transaction that would permit Warner Cable to deploy a high-capacity network in Cincinnati using conduit owned by CG&E. At the time, this was a complicated and novel transaction that required resolution of numerous issues, including ownership of the resulting network, how the network would be constructed and maintained, the parties' rights to access the conduit space, and many other issues. CG&E and Warner Cable turned to a third party, Enertech, to facilitate this project. Enertech provided that service and facilitated the implementation and performance of a long-term arrangement under which CG&E agreed, among other things, to lease certain conduit capacity in return for a per linear foot charge.¹

Enertech's role was substantial. In addition to facilitating and structuring the deal, Enertech undertook responsibilities for (1) securing the services of the appropriate employees of CG&E to perform or secure performance of all required services; (2) completing each installation contemplated under the agreements in the agreed-upon time frames; (3) participating in pre-installation meetings with Warner Cable to agree upon the designated stages for segments of installation; (4) notifying Warner Cable of the completion of each designated segment state and invoicing for same; (5) addressing any incomplete or improper installations; (6) accomplishing any necessary removal of any portion of the fiber optic cable network from the conduit; (7) providing Warner cable with a contractor list to be used in connection with major outages and arrangement to have crews available to respond to major outages; (8) providing Warner Cable with a contact list to be used in connection with maintenance or service; and (9) receiving payment from Warner Cable for services provided in connection with major outages and/or maintenance. In addition, Enertech accepted liability for all services so performed on its

¹ CG&E was a subsidiary of Cinergy Corp. when the 1994 contracts were executed. In 1995, Enertech assigned its rights and obligations under the contracts at issue here to a non-regulated affiliate of Cinergy Corp., called Cinergy Technologies, Inc. In 2006, Duke Energy Corporation and Cinergy Corp. merged. As a result of the merger, CG&E was renamed Duke Energy Ohio, Inc., and continues to be a regulated subsidiary of the merged entity. Cinergy Technologies, Inc. was renamed Duke Technologies, Inc., and continues to be a non-regulated subsidiary of the merged entity. Thus, Duke Energy Ohio owns the rights to the conduit lease payments originally owed by Warner Cable to CG&E, and Duke Technologies owns the rights to the Annual Payments originally owed by Warner Cable to Enertech.

behalf. See Installation and Operating Agreement (effective Sep. 2, 1994); Conduit Lease Assignment And Consent (effective Sep. 2, 1994); Conduit Lease Agreement (effective Sep. 1, 1994). “[I]n consideration of Enertech’s involvement in the Project,” Warner Cable agreed to make specified Annual Payments to Enertech in each year that Warner Cable enjoyed the benefits of the project facilitated and implemented by Enertech. Conduit Lease Assignment § 5. As the Conduit Lease Assignment makes clear, these Annual Payments due to Enertech were separate from and “in addition to the lease payments payable under the Conduit Lease Agreement” that were ultimately payable to CG&E for Warner Cable’s occupancy and use of the conduit. *Id.*

Because the Annual Payments are not regulated electric company rates or charges for conduit occupancy, they need not be tariffed or approved by the Public Utilities Commission of Ohio (“PUCO”), and the filed rate doctrine cases you cite are simply inapposite. See *Gary Phillips & Assoc. v. Ameritech Corp.*, 144 Ohio App. 3d 149, 153 (Ohio App. Ct. 2001) (filed rate doctrine applies only to “tariff rates approved by PUCO”). Accordingly, neither Duke Energy Ohio’s tariff nor the filed rate doctrine can excuse TWC’s Annual Payment obligations to Duke Technologies. And, contrary to the suggestion in your letter, neither our longstanding practice of providing TWC the convenience of a single invoice that consolidates the lease payments due to Duke Energy Ohio and the Annual Payments due to Duke Technologies nor the (perhaps inartful) “lease charge current year increase per contract” label used in our invoices can change the fact that the Annual Payments are not and never have been conduit occupancy charges subject to any tariffing regime. In this regard, I note that your current position is inconsistent with TWC’s own practice in paying in full our past single bill invoices that used the same labels notwithstanding Duke Energy Ohio’s conduit occupancy tariff (which has been on file for years).

Second, even if the \$750,000 Annual Payment charges by Duke Technologies could be considered rates for TWC’s occupancy of Duke Energy Ohio’s conduits, the filed tariff doctrine is still inapplicable. The existence of a tariff regime would not, as you claim, supersede the earlier agreement authorizing the \$750,000 charge. None of the case law cited in your December 22, 2010 letter stands for the proposition that previous contracts are automatically “overridden by [a] PUCO-approved tariff.” In the case you cite, *In re Orwell Natural Gas Co.*, 2007 WL 2042577 (PUC 2007), a gas company that previously relied on individually negotiated contracts elected to instead set all of its rates by tariff, and the PUCO language you cite merely describes that decision; nothing in that PUCO Order indicates that the gas company was required to rely solely on tariffs. In fact, the Ohio regulatory regime expressly contemplates “reasonable arrangement[s]” between a “public utility” and its “customers” in addition to an approved tariff. See Ohio Rev. Code 4905.31; see also, e.g., *AT&T Ohio v. Dayton Power and Light Company*, 2007 Ohio PUC LEXIS 243 (PUCO, Mar. 28, 2007) (addressing pole attachment claims governed by contract between telephone company and electric utility); *N. Ohio Sugar Co. v. Columbia Gas of Ohio, Inc.*, 1981 WL 5610 (Ohio App. 981) (explaining that “[g]as service was available under appellant’s regular tariff rates or by negotiated contract”).

Third, the filed tariff doctrine is inapplicable for the additional reason that the Duke Energy Ohio tariff expressly states that it applies only to persons or entities “other than a public

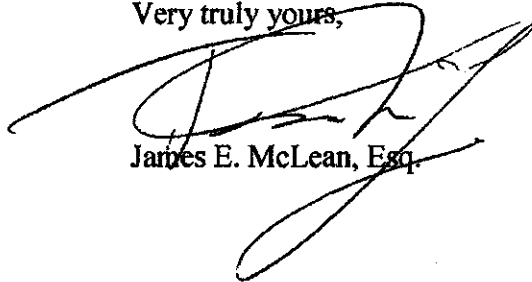
utility,” CG&E P.U.C.O. No. 1, Pole Attachment Tariff, as permitted by the Ohio law (Ohio Rev. Code 4905.31). *See also* 4905.71 (expressly excluding from the conduit tariffing requirements arrangements between public utilities). At the time the contract was executed and at the time that the \$750,000 charge at issue became due (July 1, 2010), TWC was an Ohio public utility by virtue of the telephone services it provides over the fiber in Duke’s conduit. In this regard, the statutory regime in place during the period during which the contract was executed and the \$750,000 charge accrued “left to the Commission’s discretion the regulatory framework for telecommunications services.” *In re the Adoption of Rules to Implement Substitute Senate Bill 162*, 2010 WL 4342039 (PUCO 2010). And, prior to September 2010, PUCO exercised “public utility” jurisdiction over telecommunications services providers, *see, e.g., In re the Application of New Commc’ns Online and Long Distance, Inc. to Provide Competitive Telecomm. Servs. In Ohio*, 2010 WL 751645 (PUCO 2010) (stating that a telephone company is a public utility subject to PUCO’s jurisdiction); *In re Intrado Commc’ns*, 2008 WL 320191 (PUCO 2008). As a provider of telecommunications services, TWC qualified as a “public utility” and thus was not eligible to purchase conduit occupancy under the Duke Energy Ohio tariff.

The revised statutory definition of “public utility” that took effect in September 2010 that limited PUCO’s jurisdiction over voice over Internet protocol (“VOIP”) is not relevant here, because that statute was enacted *after* the contract at issue here was executed and after the \$750,000 charge at issue accrued under that contract. *See* Ohio Const., Sec. 28, Art. II (“The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts”); *Phillips v. State Auto. Ins. Co.*, 711 N.E. 2d 1080, 1086 (1998) (confirming that statutes cannot retroactively impair contracts and stating that “a statute is presumed to be prospective in its operation unless expressly made retrospective”); *Randolph v. Grange Mut. Cas. Co.*, 925 N.E.2d 149, 160 (Ohio App. 2009) (“Administrative regulations, whether interpretive or legislative, are presumed to be prospective, not retroactive.”).

3. Your letter notes that PUCO had certified to the FCC that it regulates pole and conduit rates under 47 U.S.C. § 224(c), that PUCO has adopted the rate-making methodology used by the FCC to develop rates for conduit leases, and that this methodology produces a conduit lease rate of \$1.26 per linear foot. While that all may be true, your conclusion that the \$750,000 Annual Payment charge is therefore unlawful is wrong for at least two reasons. First, it is premised on the incorrect assertion that the Annual Payment charge is a charge for conduit occupancy. As demonstrated above, it is not, and thus the federal and state conduit regulations governing such charges are irrelevant. Second, your argument incorrectly characterizes the FCC and PUCO regulatory regime. Section 224 provides the FCC authority to regulate, among other things, a regulated utility’s provision of conduit, unless the state has certified that it has adopted a regime to regulate conduit, 47 U.S.C. § 224(c). As you point out, PUCO has certified to the FCC that it has adopted a regulatory regime to regulate conduit. The PUCO regulatory regime, permits rates to be set by tariffs approved by PUCO or by negotiated agreement. And while PUCO has chosen to use the FCC methodology to establish tariff rates, it has not concluded that rates produced by the FCC formula are the *only* rates that can be just and reasonable.

TWC's decision to withhold payment of the \$750,000 violates the valid executed contract between Duke Energy and TWC. Duke Energy therefore demands immediate payment of this past-due amount. If payment is made immediately, then Duke Energy will waive the accrued late fees. I would appreciate your response within 5 business days of receipt of this letter.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'J. McLean', is written over the typed name.

James E. McLean, Esq.

JEM/sjr

cc: Greg Fields
Jean Kingery, Esq.
David Lawson, Esq.
Michael Pahutski, Esq.
Michael Schneider, Esq.



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March 2, 2011

By E-Mail and First Class Mail

James E. McLean, Jr.
Assistant General Counsel
Duke Energy – Office of the General Counsel
139 East Fourth Street, 1212 Main
Cincinnati, OH 45202

Re: Annual Payments Under Conduit Lease Assignment and Consent Agreement

Dear Mr. McLean:

I am writing in response to your letter dated February 14, 2011, which responded to my earlier letter to you dated December 22, 2010, concerning the \$750,000 "Annual Payment" that Duke Energy Ohio ("Duke") has charged Time Warner Cable ("TWC") above and beyond its tariff rate for conduit occupancy. We appreciate your effort to set forth your own views on the matter, and we have given serious consideration to your responses to our position. However, we remain convinced that, to the extent that the Annual Payments were ever lawful, Duke lost the ability to impose them once the parties entered into their joint Stipulation and Recommendation and it became effective in 2009. At that same time, furthermore, the tariff for conduit occupancy took effect and superseded any prior contracts. We address each of your arguments in turn below.

1. In your letter, you appear to suggest that Duke is under no obligation to charge only \$1.26 per linear foot for conduit occupancy. But as you are surely aware, the parties to the proceeding before the Ohio Public Utilities Commission ("PUCO") styled *Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates* (Case Nos. 08-709-EL-AIR; 08-710-EL-ATA; 08-710-EL-AAM; 08-710-EL-ATA) agreed to a Stipulation and Recommendation that, among other things, provided that "DE-Ohio's Conduit

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Occupancy rate shall be \$1.26 per linear foot as defined in the PA Tariff appended to Stipulation Attachment 3." In turn – and as quoted in my earlier letter to you – Stipulation Attachment 3 provides: "The Parties agree to a conduit occupancy rate of \$1.26 per linear foot." Duke's Pole Attachment/ Occupancy Tariff provides for the same conduit charge as well.¹

The PUCO adopted the parties' Stipulation in its entirety on July 8, 2009. See *Application of Duke Energy Ohio, Inc., for an Increase in Elec. Distrib. Rates*, Case Nos. 08-709-EL-AIR; 08-710-EL-ATA; 08-710-EL-AAM; 08-710-EL-ATA, Opinion & Order, at 19 (July 8, 2009). In its opinion, the PUCO specifically stated that "Duke's conduit occupancy rate shall be \$1.26 per linear foot as defined in the PA tariff appended to Stipulation Attachment 3." Opinion & Order at 9. The PUCO would be quite surprised, we think, to learn that Duke considers the Stipulation an "unexecuted draft," rather than a binding agreement.

Nor can Duke escape this clear obligation by arguing that the Annual Payments are pursuant to a contract with its subsidiary. As we explain in greater detail below, Duke cannot rely on a subsidiary to circumvent its obligation to tariff its conduit charges or, now that it has finally tarified its conduit rate, to charge TWC only the tarified rate. The bottom line is that because of the parties' agreement, approved by the Commission, regarding Duke's \$1.26 conduit rate, Duke cannot as a contractual matter impose additional charges on TWC for conduit occupancy. That is really the end of the matter. In the interests of completeness, however, we will address your other points below.

2.a. In responding to our position that the filed-rate doctrine bars Duke from collecting the Annual Payment this year, your principal argument is that the filed-rate doctrine does not apply because Annual Payments are not for conduit occupancy and are owed to a non-regulated Duke subsidiary. Ltr. at 2-3. We disagree.

¹ Duke is obligated under Ohio law to include conduit occupancy rates in its pole attachment tariff. See Ohio Rev. Code Ann. § 4905.71; *Ohio Cable Telecomms. Ass'n v. Columbus S. Power Co.*, Case No. 96-1309-EL-CSS, Opinion & Order, Aug. 27, 1997, pp. 18-19 (holding Section 4905.71 requires utility pole attachment tariffs to "incorporate all terms and conditions governing pole attachments"). Despite this clear obligation, however, Duke has not, as you suggest, had a tariff rate for conduit occupancy "on file for years." Ltr. at 3. Duke's pre-existing pole attachment tariff did not include any rate for conduit occupancy. Duke first tarified conduit occupancy as part of resolving its 2009 rate case, only after the Ohio Cable and Telecommunications Association complained that Duke previously had failed to comply with its obligation to tariff its conduit charges.

First, your contention that Annual Payments are not charges for conduit capacity, but instead are for "deal formation and structuring, construction oversight and management and other services," is based on a mistaken view of the parties' Conduit Lease Assignment and Consent Agreement, dated September 4, 1994 ("Assignment Agreement"). Ltr. 2. Under the Assignment Agreement, Enertech Associates International, Inc., a subsidiary of Duke's predecessor, Cincinnati Gas & Electric ("CG&E"), assigned to TWC's predecessor, Warner Cable Communications of Cincinnati, Inc. ("WCC"), its rights to lease conduit capacity from CG&E. See Assignment Agreement ¶ 2 ("Enertech hereby assigns all of its rights and delegates all of its duties as Lessee under the Conduit Lease Agreement to WCC."). In return, WCC agreed to make Annual Payments "in addition to the lease payments payable under the Conduit Lease Agreement." *Id.* ¶ 5 ("WCC acknowledges that the leased conduit space is essential to WCC's fiber optic cable system. Therefore . . . WCC shall make the following annual payments.").² If these payments are not for conduit occupancy, it is hard to understand what they are for, given the Assignment Agreement only governed the assignment of rights to occupy Duke's conduit.

Nor does the Assignment Agreement impose any obligations on Enertech related "deal formation and structuring, construction oversight and management and other services" for which you assert that the Annual Payments are consideration. Ltr. 2. While Paragraph 5 states that the Annual Payments are "in consideration of Enertech's involvement in the Project," consideration for Enertech's involvement in the Project is dealt with under the "separate Installation and Operating Agreement" that WCC was required to enter into with CG&E and Enertech as part of the Assignment Agreement. *Id.* ¶ 4. Indeed, while you state that "Enertech's role [in the transaction] was substantial," Ltr. at 2, all of the obligations that you list were imposed under the parties' separate Installation and Operating Agreement, dated September 2, 1994. See Installation and Operating Agreement ¶¶ 1-6 & 11. Enertech was compensated for carrying out those obligations under that agreement. *Id.* ¶ 1 (requiring payment "at the prices or rates generally and reasonably charged by Enertech or its affiliates for such services"); see also *id.* ¶ 11 ("Payment for the services provided above shall be made by WCC to Enertech at the prices or rates generally applicable and reasonably charged by Enertech or CG&E for such similar services.").

² WCC was also obligated to provide CG&E "at no cost to CG&E, up to 82,000 linear feet of 12-fiber loose tube buffer, vinyl-sheathed cable containing single mode fiber . . . which CG&E may install in the Downtown Cincinnati Area." Assignment Agreement ¶ 7.

Second, we disagree that the Annual Payments need not be tarified because they "are not regulated electric company rates or charges." Ltr. at 3. Every public utility is required to tariff its pole attachment charges, including rates for conduit occupancy. See Ohio Rev. Code Ann. § 4905.71 ("Every telephone or electric light company that is a public utility as defined by section 4905.02 of the Revised Code shall permit, upon reasonable terms and conditions and the payment of reasonable charges, the attachment of any wire, cable, facility, or apparatus to its poles, pedestals, or placement of same in conduit duct space Every such telephone or electric light company shall file tariffs with the public utilities commission containing the charges, terms, and conditions established for such use."); *Ohio Cable Telecomms. Ass'n v. Columbus S. Power Co.*, Case No. 96-1309-EL-CSS, Opinion & Order, Aug. 27, 1997, pp. 18-19. Here, the Assignment Agreement simply assigned to WCC rights to lease conduit space that CG&G had conveyed to its subsidiary, Enertech (now, Duke Technologies).³ CG&E, now Duke, cannot use a subsidiary to circumvent its obligation to tariff rates for conduit occupancy. Indeed, as you recognize, Duke – not its subsidiary – actually collects the Annual Payments directly. It would make a mockery of Duke's obligation to tariff its charges for conduit occupancy if it could avoid that obligation simply by leasing conduit space through a non-regulated subsidiary. See Ohio Rev. Code § 4905.71(A); see generally *AT&T Corp. v. FCC*, 317 F.3d 227, 233 (D.C. Cir. 2003) ("Clearly, the entire arrangement was devised solely in order to circumvent regulation of Atlas as a dominant carrier, deserves to be treated as a sham, and cannot benefit from precedents set with respect to legitimate affiliates.").

Effective July 13, 2009, Duke's tarified rate for conduit occupancy is \$1.26 per linear foot. Under the filed rate doctrine, that is the only rate that it can charge for conduit occupancy. See Ohio Rev. Code Ann. § 4905.33. Duke cannot evade that limitation by re-characterizing an earlier agreement for conduit occupancy as something else, or relying on a subsidiary to circumvent its obligations to tariff its conduit charges. See *id.* Accordingly, Duke cannot impose an additional \$750,000 Annual Payment on TWC for 2010 above and beyond the rates in its published tariff.

2.b. Your additional argument that the filed rate doctrine is inapplicable because the "Ohio regulatory regime expressly contemplates reasonable arrangements between a public utility and its customers in addition to an approved tariff" is also mistaken. Ltr. at 3 (internal alteration & quotation marks omitted). A public utility is obligated to tariff its

³ As you acknowledges, Enertech subsequently assigned its rights and obligations under the parties' contracts to an affiliate of Cinergy Corporation, Cinergy Technologies. See Ltr. n.1. Following Cinergy's merger with Duke Energy Corporation, Cinergy Technologies was renamed Duke Technologies. See *id.*

pole attachment charges. See Ohio Rev. Code 4905.71(A). Under such circumstances, it is well settled that a tariff supersedes a pre-existing contract. See, e.g., *Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Chesapeake & Oh. Ry. Co.*, 441 F.2d 483, 488 (4th Cir. 1971) ("legal tariffs must be strictly observed regardless of any preexisting contract"); *American Broad. Co. v. FCC*, 643 F.2d 818, 823 (D.C. Cir. 1980) (because the Communications Act "does not provide for filing of contracts . . . it must follow that they are not a permissible means of establishing terms and conditions").

Furthermore, even if you were correct that Duke could impose additional conduit charges through side agreements with customers apart from those in its tariff – which it cannot – your argument still misses the mark. While a utility is permitted under some circumstances to enter into a reasonable agreement with a customer, such an agreement is only valid if it is filed and approved by the PUCO. See, e.g., *In re Aqua Ohio, Inc.*, 2007 WL 1805043, *2, ¶11 (Oh. P.U.C. 2007) ("Section 4905.31 authorizes public utilities to enter into reasonable arrangements with another public utility or its customers *and to file the arrangements with the Commission for approval.*") (emphasis added). But the Assignment Agreement was never filed with – let alone approved by – the PUCO.⁴

Nor do any of the cases that you cite support the remarkable proposition that a public utility may impose a tariff charge for a service and also collect additional charges for the same service under a side agreement with a customer that has not been approved by the PUCO. That cuts against the very purpose of the filed rate doctrine. See *Gary Phillips & Assoc. v. Ameritech Corp.*, 144 Ohio App.3d 149, 153, 759 N.E.2d 833, 836 (Ohio App. 10th Dist. 2001) ("The filed rate doctrine, embodied in R.C. 4905.33, mandates that a public utility must charge the tariff rates approved by the PUCO."); *Cleveland Elec. Illuminating Co. v. City of Cleveland*, 50 Ohio App.2d 275, 280, 363 N.E.2d 759, 763 (Ohio App. 1976) ("The filed rate doctrine basically states that a public utility may charge only the rate on file with the Commission unless changed in a manner sanctioned by the regulatory statute.").

2.c. Your further contention that TWC was not eligible to purchase conduit occupancy under Duke's tariff during the relevant period because TWC was a "public utility by virtue of the telephone services it provides over the fiber in Duke's conduit" is incorrect and irrelevant. Ltr. at 4. To the extent the argument is premised on the mistaken

⁴ In fact, even if Duke were permitted to rely on a pre-existing agreement in the face of its tariff (it is not), the justness and reasonableness of the terms of that contract would remain subject to review by the PUCO. See Ohio Rev. Code Ann. § 4905.31; *id.* § 4905.71(B).

assumption that Voice-over-Internet-Protocol ("VoIP") service constituted a telecommunications service at any time, it is clearly incorrect. See *Commission Investigation into Voice Servs. Using Internet Protocol*, PUCO Case No. 03-950-TP-COI (April 17, 2003); Ohio Rev. Code Ann. § 4927.042 ("Regarding advanced services or internet protocol-enabled service as defined by federal law, including federal regulations, the public utilities commission shall not exercise any jurisdiction over those services that is prohibited by, or is inconsistent with its jurisdiction under, federal law, including federal regulations."); *IP-Enabled Servs.*, Notice of Proposed Rulemaking, 19 F.C.C.R. 8863 (2004).

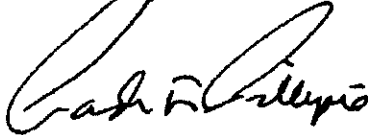
In any case, there is another problem with your position, as we have previously pointed out. The PUCO has certified to the FCC that it regulates pole and conduit rates used by both cable operators and telecommunications providers. See 47 U.S.C. § 224(a)(4). If the PUCO were unable to regulate conduit rates for TWC, however, then the FCC would retain jurisdiction to regulate them. Either way, the end result is the same: Duke's conduit rate would be no more than \$1.26 because that is the maximum rate produced under the formulas used by both the PUCO and the FCC, and both agencies have authority to set aside any higher contract rate.

3. Finally, we disagree that Duke's Annual Payments are permissible under the PUCO's regulatory regime. As explained above, Duke is obligated to tariff its conduit charges, and now that it has done so, it cannot collect Annual Payments in addition to its tariff rate. Furthermore, the PUCO follows the methodology established by the FCC to set rates for conduit occupancy. That methodology establishes the *maximum* just and reasonable rate for conduit occupancy. Thus, while you are technically correct that the PUCO "has not concluded that rates produced by the FCC formula are the only rates that can be just and reasonable," by adopting the FCC methodology it has concluded that rates that exceed that formula are *unjust and unreasonable*. A \$750,000 surcharge on top of the maximum rate generated under the FCC formula is therefore plainly unlawful under the PUCO's regulatory regime.

For all of the foregoing reasons, we disagree that TWC is obligated to make Annual Payments to Duke in addition to the conduit charges in its filed tariff. We are, however, returning a revised conduit agreement to Jeanne Kingery at Duke today, and we hope

to have a meeting with Duke regarding both the \$750,000 invoice and the new agreement as soon as the necessary people on both sides can be available. I hope we will be able to discuss both issues at that meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Gardner F. Gillespie". The signature is fluid and cursive, with the first name "Gardner" being more prominent.

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GFG/gs

cc. Jeanne Kingery
Ed Kozelek