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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Time Warner Cable, LLC )  
 )  
Complainant, )  
 )  
v. )  
 )  
Duke Energy Ohio, Inc., )  
 )  
Respondent. )

PUCO

Case No. 11-3797-EL-CSS

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MOTION TO DISMISS OF RESPONDENT,  
DUKE ENERGY OHIO, INC.

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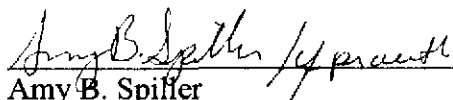
Respondent Duke Energy Ohio, Inc. respectfully moves that the Public Utilities Commission of Ohio (Commission) dismiss the Complaint filed by Time Warner Cable, LLC (Complaint), for the following reasons:

1. The Commission lacks jurisdiction over the issue that is the foundation of the Complaint.
2. The Complaint fails to state a cause of action upon which relief can be granted.
3. Time Warner Cable (TWC) failed to set forth reasonable grounds for its Complaint under R.C. 4905.26 and O.A.C. 4901-9-01(C)(3).
4. TWC has failed to state a prayer for relief in its Complaint that can properly be granted by the Commission.

Each of these factors is discussed in the Memorandum in Support of Duke Energy Ohio's Motion to Dismiss, which is attached hereto.

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Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Amy B. Spiller / s/representl.", is written over a horizontal line.

Amy B. Spiller

Deputy General Counsel

Elizabeth H. Watts

Associate General Counsel

139 E. Fourth Street, 1303-Main

P.O. Box 961

Cincinnati, Ohio 45201-0960

Telephone: (513) 287-4359

Fax: (513) 287-4385

Amy.Spiller@duke-energy.com

Elizabeth.Watts@duke-energy.com

Carolyn S. Flahive

Thompson Hine LLP

41 S. High Street, Suite 1700

Columbus, Ohio 43215

Telephone: (614) 469-3200

Fax: (614) 469-3361

Carolyn.Flahive@thompsonhine.com

*Attorneys for Duke Energy Ohio, Inc.*

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>Time Warner Cable, LLC</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
v.	)	<b>Case No. 11-3797-EL-CSS</b>
	)	
<b>Duke Energy Ohio, Inc.,</b>	)	
	)	
<b>Respondent.</b>	)	

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**MEMORANDUM IN SUPPORT OF  
DUKE ENERGY OHIO, INC.'S  
MOTION TO DISMISS**

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**INTRODUCTION**

Duke Energy Ohio, Inc., (Duke Energy Ohio) files this Motion to Dismiss in response to a Complaint filed by Time Warner Cable LLC (TWC) concerning a dispute about an unpaid charge pursuant to a contract. In its Complaint, TWC contends, *inter alia*, that Duke Energy Ohio violated the Stipulation adopted by the Public Utilities Commission of Ohio (Commission) in *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 08-709-EL-AIR *et al.*, by charging TWC an amount that exceeds the tariff rate for conduit occupancy.

Although TWC advances a number of claims and allegations in its Complaint against Duke Energy Ohio, one very important point cannot be avoided: Duke Energy Ohio is not the entity charging TWC for services rendered in 1994 under a contract signed at that time, nor is Duke Energy Ohio the party to whom the payment is due. In fact, the party to whom the payment is due, while an affiliate of Duke Energy Ohio, is not regulated by the Commission.

Therefore, the Commission lacks jurisdiction over the issue that is the foundation of the Complaint. Duke Energy Ohio accordingly requests that the Commission dismiss TWC's Complaint.

Throughout its Complaint, TWC tries to obfuscate the issues, attempting to convince the Commission that Duke Energy Ohio is the party to whom the \$750,000 annual payment, which TWC is contesting, is owed. In reality, the annual payment is due to an affiliate of Duke Energy Ohio: Cinergy Technology, Inc. (CTI). CTI is not regulated by the Commission. Further, to the extent that the annual payment from TWC to CTI arises from the assignment of a contract right from a non-regulated entity to another non-regulated entity, the Commission has no jurisdiction over the matter.

#### **FACTUAL BACKGROUND**

The annual payment arose in connection with the commencement of a conduit lease arrangement that would allow the cables of TWC's predecessor to be placed within conduits under the city of Cincinnati. Initially, the Cincinnati Gas and Electric (CG&E) agreed to lease conduit space to one of its affiliates, Enertech Associates International, Inc. (Enertech), an unregulated entity. On September 2, 1994, Enertech assigned its rights and responsibilities under that lease to Warner Cable Communications of Cincinnati, Inc. (WCC), the predecessor in interest of TWC. The Conduit Lease Assignment and Consent (Assignment) stated the following: "*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[:]:...July 1, 2010...\$750,000" (Emphasis added). It is clear from this language that the annual payment was in addition to any lease payments, and was payable as a result of Enertech's involvement in, and the responsibilities it had assumed, as part of the

project. As the annual Enertech payments were “in addition to the lease payments,” those annual payments could not themselves be lease payments. It is also critical to note that the actual lease payments were calculated on the basis linear footage occupied. In contrast, the annual payment to compensate Enertech for its involvement was agreed to as a flat amount each year, regardless of the amount of conduit space occupied. Enertech’s services had the same value to the parties whether WCC occupied one foot of conduit space or 1,000 feet. The annual Enertech payments that form the basis of TWC’s Complaint were never viewed by the parties as a charge for conduit occupancy. The payments to Enertech for its services and the payments to CG&E for its conduit space were based on discreet benefits to WCC and therefore gave rise to discreet payments by WCC.

On August 8, 1995, Enertech assigned its remaining rights and obligations, including its right to receive the annual payments from WCC, to CTI. In 2006, Duke Energy Corporation merged with Cinergy Corp. As a result of the merger, Duke Energy Ohio became the successor in interest of CG&E. Thus, Duke Energy Ohio succeeded to the right to receive the conduit occupancy payments. Additionally, TWC ultimately became the successor in interest of WCC, thereby becoming obligated, under the Assignment, to make conduit occupancy payments to Duke Energy Ohio and to make the annual Enertech payments to CTI.

As a result of these transactions, CTI, which, again, is a non-regulated indirect subsidiary of Duke Energy Corporation and an affiliate of Duke Energy Ohio, is the only party with a present interest in the annual Enertech payments. The annual Enertech payments are payable to CTI by TWC.

## **BASIS OF COMMISSION JURISDICTION**

Under Ohio law, this venerable Commission has jurisdiction over public utilities and railroads.<sup>1</sup> With regard to complaint cases, such as TWC's Complaint in this proceeding, the Commission has jurisdiction to hear and decide complaints by any person with regard to rates, fares, charges, tolls, rental, schedules, classifications, or services relating to any service furnished by a public utility.<sup>2</sup>

On the basis of its general jurisdiction over public utilities' operations and specific statutory authorization,<sup>3</sup> the Commission has taken jurisdiction over rates charged by public utilities for the lease of space in utility-owned conduits.<sup>4</sup>

On July 13, 2009, Duke Energy Ohio filed, for the first time, a tariff setting conduit occupancy rates (PA Tariff).<sup>5</sup> The PA Tariff governs, among other things, the rates that Duke Energy Ohio may charge for conduit occupancy. TWC claims that Duke Energy Ohio is violating the terms of its PA Tariff by imposing a conduit lease charge that exceeds the allowable rate, as set forth in that tariff. However, TWC conveniently fails to understand that the annual Enertech payment is not invoiced by Duke Energy Ohio – or any other public utility under the jurisdiction of the Commission – and is, thus, not due and payable to Duke Energy Ohio or any other public utility. The amount of the annual Enertech payment is not governed by Duke Energy Ohio's PA Tariff in any way. As such, there is no violation of the PA Tariff and the Commission has no jurisdiction over the Complaint.

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<sup>1</sup> R.C. 4905.04.

<sup>2</sup> R.C. 4905.26.

<sup>3</sup> R.C. 4905.71.

<sup>4</sup> See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates*, Case No. 08-709-EL-AIR, *et al.*, Opinion and Order (July 8, 2009) (2009 Rate Case).

<sup>5</sup> P.U.C.O. No. 1, Sheet No. 1.6, authorized and approved in *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates*, Case No. 08-709-EL-AIR, *et al.*, Opinion and Order (July 8, 2009).

The Commission's lack of jurisdiction over the matter at the heart of TWC's Complaint leads to several other points that demand dismissal of the Complaint. The Commission's lack of jurisdiction over the matter necessarily means that TWC failed to state a cause of action upon which relief can be granted, or to state a prayer for relief in its Complaint that can properly be granted by the Commission. The Commission's lack of jurisdiction also evidences TWC's failure to set forth reasonable grounds for its Complaint.

### **TWC's SPECIFIC CLAIMS FOR RELIEF**

A review of each of TWC's claims for relief, as set forth in the Complaint, shows that dismissal is appropriate. The first claim for relief suggests that Duke Energy Ohio has violated the Stipulation in the 2009 Rate Case by charging a conduit occupancy fee in excess of the \$1.26 per foot that was agreed to. As described above, the annual Enertech payment is not a conduit occupancy fee. It is neither charged by Duke Energy Ohio nor calculated on the basis of footage occupied. It was specifically described in the underlying documents as compensating Enertech for its involvement. As the annual Enertech payment is not a conduit occupancy fee, it is not in violation of the Stipulation.

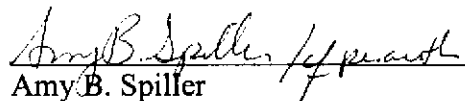
For its second claim for relief, TWC asks the Commission to find that Duke Energy Ohio has violated the Stipulation in the 2009 Rate Case by failing to negotiate a new conduit occupancy agreement. However, even TWC does not say that negotiations have ceased. The parties have traded a number of drafts, disagreeing about certain issues. Each party has taken time to respond. There can be no violation of the Stipulation when negotiations continue. Thus, this claim is clearly premature.

The third claim for relief proposes that the annual Enertech payment is an unreasonable conduit occupancy fee. As that annual charge is not a conduit occupancy fee at all, it is certainly not an unreasonable one. Accordingly, the claim should be dismissed.

The fourth claim for relief is not actually a legal claim at all but, rather a simple recitation by counsel for TWC of his view of the issues. As this is not a request for relief, it sets forth no basis on which to maintain the action.

Based upon these deficiencies in TWC's Complaint, Duke Energy Ohio respectfully requests that the Commission dismiss TWC's complaint with prejudice.

Respectfully submitted,



Amy B. Spiller  
Deputy General Counsel  
Elizabeth H. Watts  
Associate General Counsel  
139 E. Fourth Street, 1303-Main  
P.O. Box 960  
Cincinnati, Ohio 45201-0960  
Telephone: (513) 287-4359  
Fax: (513) 287-4385  
Amy.Spiller@duke-energy.com  
Elizabeth.Watts@duke-energy.com

Carolyn S. Flahive  
Thompson Hine LLP  
41 S. High Street, Suite 1700  
Columbus, Ohio 43215  
Telephone: (614) 469-3200  
Fax: (614) 469-3361  
Carolyn.Flahive@thompsonhine.com

*Attorneys for Duke Energy Ohio*

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Answer of Duke Energy Ohio, Inc., was provided to the persons listed below via U.S. mail, postage prepaid, on July 12, 2011:

Benita Kahn  
Stephen Howard  
Vorys, Sater, Seymour & Pease, LLP  
52 East Gay Street  
Columbus, Ohio 43215

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

*Attorneys for Time Warner Cable LLC*

  
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Carolyn S. Flahive