

July 12, 2011

By: *Messenger Delivery*

Ms. Betty McCauley
Secretary of the Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

RECEIVED-DOCKETING DIV
2011 JUL 12 PM 5:01
PUCO

RE: *Time Warner Cable, LLC v. Duke Energy Ohio, Inc.*
Public Utilities Commission of Ohio, Case No. 11-3797-EL-CSS


Dear Ms. Jenkins:

Enclosed for filing are an original and ten (10) copies of the following documents to be filed in the above-referenced matter:

1. Answer of Respondent Duke Energy Ohio, Inc.; and
2. Motion to Dismiss of Respondent, Duke Energy Ohio, Inc.

Please contact me if you have any questions. Thank you.

Respectfully yours,


Carolyn S. Flahive

cc: Benita Kahn, Esq.
Stephen Howard, Esq.
Gardner Gillespie, Esq.
James A. George, Esq.

Enclosures

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV

2011 JUL 12 PM 5:01

Time Warner Cable, LLC

Complainant

v.

Duke Energy Ohio, Inc.,

Respondent.

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Case No. 11-3797-EL-CSS

PUCO

**ANSWER OF RESPONDENT,
DUKE ENERGY OHIO, INC.**

For its Answer to the Complaint of Time Warner Cable, LLC (TWC) in this proceeding, Duke Energy Ohio, Inc., (Duke Energy Ohio) respectfully states as follows:

1. Duke Energy Ohio is without sufficient knowledge as to the truth of the allegations contained in Paragraph 1 of the Complaint and thus denies the same.

2. Duke Energy Ohio admits the allegations contained in Paragraph 2 of the Complaint.

3. Duke Energy Ohio admits that it is a public utility and electric light company as those terms are defined in the Ohio Revised Code. Duke Energy Ohio additionally states that the Commission's authority and jurisdiction are set forth in the Ohio Revised Code. Duke Energy Ohio denies the remaining allegations set forth in Paragraph 3 of the Complaint.

4. Duke Energy Ohio admits the allegations contained in Paragraph 4 of the Complaint.

5. With respect to the allegations contained in Paragraph 5 of the Complaint, Duke Energy Ohio admits only that R.C. 4905.71 applies to charges for attachments to poles or conduit

use of equipment. Answering further, Duke Energy Ohio states that R.C. 4905.71 sets forth the criteria applicable to said attachments and thus denies the allegations of Paragraph 5 of the Complaint to the extent they misstate or misinterpret R.C. 4905.71. Duke Energy Ohio denies the remaining allegations contained in Paragraph 5 of the Complaint.

6. With respect to the allegations set forth in Paragraph 6, Duke Energy Ohio is without knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

7. With regard to the allegations contained in Paragraph 7 of the Complaint, Duke Energy Ohio denies that it has charged TWC \$750,000, plus an associated three percent franchise fee, for conduit access from July 1, 2009, until June 30, 2010. With respect to the remaining allegations set forth in Paragraph 7, Duke Energy Ohio is without knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

8. With regard to the allegations contained in Paragraph 8 of the Complaint, Duke Energy Ohio states that the statutes to which TWC refers speak for themselves and no response is thus required. To the extent a response is required, Duke Energy Ohio denies the allegations in Paragraph 8 of the Complaint to the extent they misstate or misinterpret R.C. 4905.71 and 4905.26. Duke Energy Ohio denies all other allegations set forth in Paragraph 8 of the Complaint.

9. With regard to the allegations contained in Paragraph 9 of the Complaint, Duke Energy Ohio admits that the Commission has exclusive jurisdiction over various matters pursuant to the two-part test for exclusive jurisdiction set forth in *Corrigan v. Illum. Co.* (2009), 122 Ohio St.3d 265, 267, 910 N.E.2d 1009. However, Duke Energy Ohio denies the remaining allegations of Paragraph 9. Answering further, Duke Energy Ohio expressly denies that the

allegations as referenced in TWC's Complaint are within the exclusive jurisdiction of the Commission.

10. With regard to the allegations contained in Paragraph 10 of the Complaint, Duke Energy Ohio admits that the United States Supreme Court observed, in part, in *FCC v. Florida Power Corp.*, 480 U.S. 245, 247, 107 S. Ct. 1107, that “[c]able operators...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.” With regard to the remaining allegations contained in Paragraph 10 of the Complaint, however, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

11. With regard to the allegations contained in Paragraph 11 of the Complaint, Duke Energy Ohio admits that Congress enacted the Federal Pole Attachment Act, codified at 47 U.S.C. 224, in 1978. With regard to the remaining allegations contained in Paragraph 11 of the Complaint, however, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

12. With regard to the allegations contained in Paragraph 12 of the Complaint, Duke Energy Ohio states that the statute to which TWC refers speaks for itself. Answering further, Duke Energy Ohio denies the allegations in Paragraph 12 of the Complaint to the extent they misstate or misinterpret 47 U.S.C. Section 224. Duke Energy Ohio denies all other allegations set forth in Paragraph 12 of the Complaint.

13. With regard to the allegations contained in Paragraph 13 of the Complaint, Duke Energy Ohio states that the regulation to which TWC refers speaks for itself. Answering further,

Duke Energy Ohio denies the allegations in Paragraph 13 of the Complaint to the extent they misstate or misinterpret 47 U.S.C. Section 224. With regard to the remaining allegations contained in Paragraph 13 of the Complaint, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

14. With regard to the allegations contained in Paragraph 14 of the Complaint, Duke Energy Ohio admits that Ohio regulates utilities' rates, terms, and conditions of pole attachments, in connection with 47 U.S.C. 224(c). With regard to the remaining allegations contained in Paragraph 14 of the Complaint, however, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

15. With regard to the allegations contained in Paragraph 15 of the Complaint, Duke Energy Ohio states that the statute to which TWC refers speaks for itself. Answering further, Duke Energy Ohio denies the allegations in Paragraph 15 of the Complaint to the extent they misstate or misinterpret R.C. 4905.71. Duke Energy Ohio denies all other allegations set forth in Paragraph 15 of the Complaint.

16. With regard to the allegations contained in Paragraph 16 of the Complaint, Duke Energy Ohio states that the statute to which TWC refers speaks for itself. Answering further, Duke Energy Ohio denies the allegations in Paragraph 16 of the Complaint to the extent they misstate or misinterpret R.C. 4905.71. Duke Energy Ohio denies all other allegations set forth in Paragraph 16 of the Complaint.

17. With regard to the allegations contained in Paragraph 17 of the Complaint, Duke Energy Ohio states that the statute to which TWC refers speaks for itself. Answering further, Duke Energy Ohio denies the allegations in Paragraph 8 of the Complaint to the extent they

misstate or misinterpret R.C. 4905.30. Duke Energy Ohio denies all other allegations set forth in Paragraph 17 of the Complaint.

18. With regard to the allegations contained in Paragraph 18 of the Complaint, Duke Energy Ohio states that the statute to which TWC refers speaks for itself. Answering further, Duke Energy Ohio denies the allegations in Paragraph 8 of the Complaint to the extent they misstate or misinterpret R.C. 4905.71. Duke Energy Ohio denies all other allegations set forth in Paragraph 18 of the Complaint.

19. With regard to the allegations contained in Paragraph 19 of the Complaint, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same. Answering further, Duke Energy Ohio denies the allegations in Paragraph 19 of the Complaint to the extent they misstate or misinterpret R.C. 4905.71.

20. With regard to the allegations contained in Paragraph 20 of the Complaint, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

21. With regard to the allegations contained in Paragraph 21 of the Complaint, Duke Energy Ohio admits that it currently owns a conduit network that is used for the purpose of delivering electric service to its customers in the city of Cincinnati. Duke Energy Ohio also admits that it rents excess space in its conduit to other providers of communications services. Duke Energy Ohio denies the remaining allegations contained in Paragraph 21 of the Complaint.

22. With regard to the allegations contained in Paragraph 22 of the Complaint, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

23. With regard to the allegations contained in Paragraph 23 of the Complaint, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

24. With regard to the allegations contained in Paragraph 24 of the Complaint, Duke Energy Ohio specifically denies that Enertech Associates International, Inc. (Enertech) is its predecessor in interest. As to the remaining allegations in Paragraph 24 of the Complaint, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and thus denies the same.

25. With regard to the allegations contained in Paragraph 25 of the Complaint, Duke Energy Ohio states the content of the Conduit Lease Agreement and Installation and Operating Agreement speak for themselves and, as such, no response to this allegation is required. To the extent a response is required, Duke Energy Ohio denies the allegations of Paragraph 25 of the Complaint to the extent they misstate or misinterpret the content of the Conduit Lease Agreement and the Installation and Operating Agreement. Duke Energy Ohio denies the remaining allegations in Paragraph 25.

26. With regard to the allegations contained in Paragraph 26 of the Complaint, Duke Energy Ohio states the content of the Conduit Lease Agreement, Installation and Operating Agreement, and Assignment speak for themselves and, as such, no response to these allegations is required. To the extent a response is required, Duke Energy Ohio denies the allegations of Paragraph 26 of the Complaint to the extent they misstate or misinterpret the content of the Conduit Lease Agreement, Installation and Operating Agreement, and the Assignment. Duke Energy Ohio denies the remaining allegations contained in Paragraph 26 of the Complaint.

27. Duke Energy Ohio admits the allegations contained in Paragraph 27 of the Complaint.

28. Duke Energy Ohio denies that the initial term of the Lease Agreement expired on June 30, 1999. Duke Energy Ohio admits the remaining allegations contained in Paragraph 28 of the Complaint.

29. Duke Energy Ohio denies the allegations contained in Paragraph 29 of the Complaint.

30. With regard to the allegations contained in Paragraph 30 of the Complaint, Duke Energy Ohio admits that it first tariffed conduit occupancy rates in the context of *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Commission Case No. 08-709-EL-AIR *et al.* Duke Energy Ohio denies the remainder of the allegations contained in Paragraph 30 of the Complaint.

31. With regard to the allegations contained in Paragraph 31 of the Complaint, Duke Energy Ohio states that the Stipulation to which TWC refers speaks for itself and thus no response to this paragraph is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 31 of the Complaint to the extent they misstate or misinterpret the content of the Stipulation. Duke Energy Ohio denies all other allegations set forth in Paragraph 31 of the Complaint.

32. With regard to the allegations contained in Paragraph 32 of the Complaint, Duke Energy Ohio states that the Stipulation to which TWC refers speaks for itself and thus no response to this paragraph is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 32 of the Complaint to the extent they misstate or

misinterpret the content of the Stipulation.. Duke Energy Ohio denies all other allegations set forth in Paragraph 32 of the Complaint.

33. With regard to the allegations contained in Paragraph 33 of the Complaint, Duke Energy Ohio states that the Stipulation to which TWC refers speaks for itself and thus no response to this paragraph is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 33 of the Complaint to the extent they misstate or misinterpret the content of the Stipulation. Duke Energy Ohio denies all other allegations set forth in Paragraph 33 of the Complaint.

34. With regard to the allegations contained in Paragraph 34 of the Complaint, Duke Energy Ohio states that the tariff to which TWC refers speaks for itself and thus no response is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 34 of the Complaint to the extent they misstate or misinterpret the tariff.

35. Duke Energy Ohio admits that, on or about May 14, 2009, TWC notified Duke Energy Ohio that it would not renew the Lease Agreement beyond June 30, 2009. Duke Energy Ohio denies the remaining allegations in Paragraph 35 of the Complaint.

36. With regard to the allegations contained in Paragraph 36 of the Complaint, Duke Energy Ohio admits that it responded to TWC's May 14, 2009, letter on June 19, 2009. Duke Energy Ohio denies the remaining allegations in Paragraph 36 of the Complaint.

37. *With respect to the allegations contained in Paragraph 37 of the Complaint, Duke Energy Ohio is without sufficient knowledge as to the truth thereof and thus denies the same.*

38. Duke Energy Ohio denies the allegations contained in Paragraph 38 of the Complaint to the extent they misstate or misinterpret the communication from counsel for Duke

Energy Ohio. Duke Energy Ohio further denies all remaining allegations contained in Paragraph 38 of the Complaint.

39. With respect to the allegations contained in Paragraph 39 of the Complaint, Duke Energy Ohio is without sufficient knowledge as to the truth thereof and thus denies the same.

40. With regard to the allegations contained in Paragraph 40 of the Complaint, Duke Energy Ohio admits that it provided a draft of a new conduit agreement to TWC in mid-June 2010. Duke Energy Ohio denies the remaining allegations contained in Paragraph 40 of the Complaint and further expressly denies any suggestion that TWC has been diligent and prompt in respect of entering into a new conduit agreement.

41. Duke Energy Ohio admits that, on or about August 27, 2010, TWC sent Duke Energy Ohio a revised version of the agreement and that, on or about September 17, 2010, Duke Energy Ohio responded with another revised version. Duke Energy Ohio denies the remaining allegations contained in Paragraph 41 of the Complaint and further expressly denies any suggestion that TWC has been diligent and prompt in respect of entering into a new conduit agreement.

42. Duke Energy Ohio denies the allegations contained in Paragraph 42 of the Complaint.

43. With regard to the allegations contained in Paragraph 43 of the Complaint, Duke Energy Ohio admits that counsel for TWC sent Duke Energy Ohio a letter on December 22, 2010. Duke Energy Ohio denies the remaining allegations contained in Paragraph 43. Answering further, Duke Energy Ohio states that it has not violated any agreements to which it and TWC are parties.

44. Duke Energy Ohio denies each of the allegations contained in Paragraph 44 of the Complaint.

45. With regard to the allegations contained in Paragraph 45 of the Complaint, Duke Energy Ohio admits that TWC replied by letter on March 2, 2011 to the February 14, 2011 letter. Duke Energy Ohio denies the remaining allegations contained in Paragraph 45. Answering further, Duke Energy Ohio states that it has not violated any agreements to which it and TWC are parties.

46. With regard to the allegations contained in Paragraph 46 of the Complaint, Duke Energy Ohio denies that it communicated with TWC in March in an effort to set up a meeting with TWC. Duke Energy Ohio further denies that it sent an e-mail on June 10 or otherwise threatened to file a complaint against TWC. Duke Energy Ohio denies the remaining allegations contained in Paragraph 46.

47. With regard to the allegations contained in Paragraph 47, Duke Energy Ohio denies that it met with TWC on June 20, 2011 in Cincinnati. With regard to the remaining allegations contained in Paragraph 47 of the Complaint, Duke Energy Ohio lacks the knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same.

48. In response to the allegations contained in Paragraph 48, Duke Energy Ohio hereby re-states and incorporates its responses to Paragraphs 1-47 of the Complaint.

49. In response to the allegations contained in Paragraph 49, Duke Energy Ohio states that the Stipulation to which TWC refers speaks for itself and thus no response is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 49 of the Complaint to the extent they misstate or misinterpret the Stipulation. Duke Energy Ohio denies all other allegations set forth in Paragraph 49 of the Complaint.

50. In response to the allegations contained in Paragraph 50, Duke Energy Ohio states that the Opinion and Order to which TWC refers speaks for itself and thus no response is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 50 of the Complaint to the extent they misstate or misinterpret the Opinion and Order. Duke Energy Ohio denies all other allegations set forth in Paragraph 50 of the Complaint.

51. In response to the allegations contained in Paragraph 51, Duke Energy Ohio states that the Opinion and Order and Stipulation to which TWC refer speak for themselves and thus no response is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 51 of the Complaint to the extent they misstate or misinterpret the Opinion and Order. Duke Energy Ohio denies all other allegations set forth in Paragraph 51 of the Complaint.

52. Duke Energy Ohio denies the allegation contained in Paragraph 52 of the Complaint.

53. In response to the allegations contained in Paragraph 53, Duke Energy Ohio admits that the Commission possesses only that jurisdiction that is granted to it in the Ohio Revised Code. Duke Energy Ohio denies all other allegations set forth in Paragraph 53 of the Complaint.

54. In response to the allegations contained in Paragraph 54 of the Complaint, Duke Energy Ohio hereby re-states and incorporates its responses to Paragraphs 1-53 of the Complaint.

55. Duke Energy Ohio admits the allegations contained in Paragraph 55 of the Complaint.

56. In response to the allegations contained in Paragraph 56 of the Complaint, Duke Energy Ohio admits that it sent TWC a draft agreement in June 2010. Duke Energy Ohio denies the remaining allegations of Paragraph 56 of the Complaint.

57. Duke Energy Ohio admits that TWC sent a revised agreement on or about August 27, 2010, and that TWC requested meetings. Duke Energy Ohio denies the remaining allegations contained in Paragraph 57 of the Complaint.

58. Duke Energy Ohio denies the allegation contained in Paragraph 58 of the Complaint.

59. Duke Energy Ohio denies the allegation contained in Paragraph 59 of the Complaint.

60. In response to the allegations contained in Paragraph 60 of the Complaint, Duke Energy Ohio hereby re-states and incorporates its responses to Paragraphs 1-59 of the Complaint.

61. In response to the allegation contained in Paragraph 61 of the Complaint, Duke Energy Ohio states that the statute to which TWC refers speaks for itself and thus no response is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 61 of the Complaint to the extent they misstate or misinterpret R.C. 4905.71.

62. In response to the allegation contained in Paragraph 62 of the Complaint, Duke Energy Ohio states that the statute to which TWC refers speaks for itself and thus no response is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 62 of the Complaint to the extent they misstate or misinterpret R.C. 4905.30.

63. In response to the allegation contained in Paragraph 63 of the Complaint, Duke Energy Ohio states that the tariff to which TWC refers speaks for itself, and thus no response is required. To the extent a response is required, Duke Energy Ohio denies the allegations contained in Paragraph 63 of the Complaint to the extent they misstate or misinterpret the tariff.

64. Duke Energy Ohio denies the allegations contained in Paragraph 64 of the Complaint.

65. Duke Energy Ohio denies the allegations contained in Paragraph 65 of the Complaint.

66. In response to the allegations contained in Paragraph 66, Duke Energy Ohio admits that the Commission possesses only that jurisdiction which is granted to it in the Ohio Revised Code. Duke Energy Ohio denies all other allegations set forth in Paragraph 66 of the Complaint.

67. In response to the allegations contained in Paragraph 67 of the Complaint, Duke Energy Ohio hereby re-states and incorporates its responses to Paragraphs 1-66 of the Complaint.

68. Duke Energy Ohio denies the allegations contained Paragraph 68 of the Complaint.

69. Duke Energy Ohio admits that a charge by an unregulated entity is not regulated by the Commission and need not be tarified or approved by the Commission. Duke Energy Ohio denies the remaining allegations contained Paragraph 69 of the Complaint.

70. Duke Energy Ohio denies the allegations contained in Paragraph 70 of the Complaint.

71. Duke Energy Ohio admits the allegations contained in Paragraph 71 of the Complaint, only to the extent that the “conduit access charge” to which TWC refers is the annual

payment, which is not charged by or due to Duke Energy Ohio and is not a conduit occupancy charge.

72. Duke Energy Ohio denies the allegations contained in Paragraph 72 of the Complaint.

73. Duke Energy Ohio denies the allegations contained in Paragraph 73 of the Complaint.

74. Duke Energy Ohio denies the allegations contained in Paragraph 74 of the Complaint.

75. Duke Energy Ohio denies the allegation contained in Paragraph 75 of the Complaint, insofar as the \$750,000 annual payment is not due to Duke Energy Ohio and is not a conduit occupancy charge.

76. Duke Energy Ohio denies the allegations contained in Paragraph 76 of the Complaint, and contends that clarification by the Commission is unnecessary, given that Duke Energy Ohio is not the company to which the \$750,000 payment is owed and that such payment is not a conduit occupancy charge.

77. Duke Energy Ohio denies the allegations contained in Paragraph 77 of the Complaint.

78. Duke Energy Ohio denies any allegations contained in Paragraph 78 of the Complaint, and contends that the Commission's clarification is unnecessary, for the reasons set forth in Paragraph 76 above.

AFFIRMATIVE DEFENSES

1. Duke Energy Ohio denies each and every allegation of fact and conclusion of law not expressly admitted herein.

2. Duke Energy Ohio asserts as an affirmative defense that the Commission lacks jurisdiction over the issue that serves as the foundation of the Complaint;

3. Duke Energy Ohio asserts as an affirmative defense that the Complaint fails to state a cause of action upon which relief can be granted.

4. Duke Energy Ohio asserts as an affirmative defense that TWC has failed to set forth reasonable grounds for its complaint pursuant to R.C. 4905.26 and O.A.C. 4901-9-01(B)(3).

5. Duke Energy Ohio asserts as an affirmative defense that TWC has failed to state a prayer for relief that can properly be granted by the Commission.

6. Duke Energy Ohio asserts as an affirmative defense that the Stipulation delineated the rate Duke Energy Ohio may charge TWC for conduit occupancy, and that Duke Energy Ohio has not deviated from that rate.

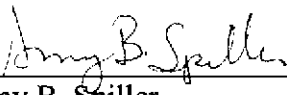
7. Duke Energy Ohio asserts as an affirmative defense the doctrines of estoppel and res judicata.

8. Duke Energy Ohio asserts as an affirmative defense that TWC's Complaint constitutes a breach of its agreement with Duke Energy Ohio.

8. Duke Energy Ohio reserves the right to raise additional affirmative defenses or to withdraw any of the foregoing affirmative defenses as may become necessary during the investigation and discovery of this matter.

WHEREFORE, having fully answered the allegations of the Complaint herein, Duke Energy Ohio respectfully requests that the Commission dismiss the Complaint filed against it by TWC with prejudice and provide Duke Energy Ohio with any other relief to which it may be entitled.

Respectfully submitted,

 / *cf. Watts*

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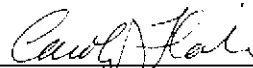
CERTIFICATE OF SERVICE

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:

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Vorys, Sater, Seymour & Pease, LLP
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Attorneys for Time Warner Cable LLC



Carolyn S. Flahive