

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMPLAINT OF
THE EAST OHIO GAS COMPANY D/B/A
DOMINION ENERGY OHIO,**

COMPLAINANT,

CASE NO. 18-290-GA-PWC

V.

CITY OF MARIETTA, OHIO,

RESPONDENT.

ENTRY

Entered in the Journal on June 6, 2018

I. SUMMARY

{¶ 1} The Commission determines that reasonable grounds for complaint have been stated and that this matter should proceed to hearing. Accordingly, the public way ordinance that is the subject of this complaint should be suspended as to The East Ohio Gas Company d/b/a Dominion Energy Ohio until otherwise ordered by the Commission.

II. DISCUSSION

{¶ 2} The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO) is a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of the Commission.

{¶ 3} R.C. 4939.06(A) provides that, if a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation, the public utility may appeal the public way fee to the Commission. An appeal is made by filing a complaint that the amount of a public way fee, any related classification of public way occupants or users, or the assignment or allocation of costs to the public way fee is unreasonable, unjust, unjustly discriminatory, or unlawful. The complaint is subject to the

same procedures as a complaint filed pursuant to R.C. 4905.26 and must be filed not later than 30 days after the date the public utility first becomes subject to the ordinance. The Commission must issue an order resolving the complaint within 120 days of the filing of the complaint.

{¶ 4} On March 30, 2018, DEO filed a complaint against the city of Marietta, Ohio (Marietta or the City) pursuant to R.C. 4939.06, 4909.34, and 4905.26. In the complaint, DEO challenges the public way fees and conditions appearing in Chapter 910 of the City's Codified Ordinances.

{¶ 5} DEO alleges that, on December 12, 2017, the City filed a public way notification with the Commission in Case No. 17-2489-AU-PWN.

{¶ 6} DEO states in its complaint that, on December 21, 2017, the City passed Ordinance 316 (16-17) (Ordinance), which enacted Chapter 910, which is entitled "Comprehensive Right-of-Way Policy of the Codified Ordinances of the City of Marietta, Ohio." The Ordinance requires that a service provider wishing to use or occupy the City's public way must 1) obtain the City's consent; 2) pay annual application registration, amendment, or renewal fees; 3) pay permit fees; and 4) comply with its various provisions and future regulations governing the use and occupancy of the public way.

{¶ 7} DEO alleges that it uses the City's public ways to provide natural gas service to customers within Marietta. Thus, DEO concludes that it is a "provider" within the purview of the Ordinance.

{¶ 8} DEO alleges that, on February 21, 2018, Marietta notified DEO by electronic mail that Marietta would not begin to enforce the Ordinance until March 1, 2018.

{¶ 9} Prior to and after the enactment of the Ordinance, DEO states that it attempted, without success, to obtain information from the City regarding the basis for the fees.

{¶ 10} In Count I of its complaint, DEO alleges that it is not clear how certain registration and application fees should be applied, nor does DEO find it clear how the fees were determined. DEO concludes that the City's fees are not based on actual costs and are unreasonable.

{¶ 11} In Count II of the complaint, DEO challenges permit and inspection fees. DEO highlights a General Right-of-Way Permit fee of \$250, a Special Right-of-Way Permit Non-Residential fee of \$250, a Special Right-of-Way Permit Residential fee of \$100, and an Inspection Fee that is prorated at \$48 per hour. DEO identifies these as public way fees and challenges their validity because they are not based on costs actually incurred by the City.

{¶ 12} In Count III of the complaint, DEO challenges the requirement of performance bonds and financial guaranties. The Ordinance requires that certain permit holders provide a bond to pay the cost of restoration work or to cover the cost for the removal or relocation of any facilities if the permit holder fails to perform any required removal or relocation. DEO alleges that the City has not provided information that substantiates that the performance bonds and financial guaranties are based on actual costs incurred by the City. DEO, therefore, concludes that the fees are unreasonable and unlawful and that they violate R.C. Chapter 4939.

{¶ 13} In Count IV of the complaint, DEO challenges informational obligations imposed by the Ordinance. For example, DEO alleges that certain drawings, maps, and other certification requirements for right-of-way applications are costly, burdensome, and arbitrary. DEO construes some requirements, such as graffiti removal, as obligating DEO to provide nonmonetary compensation or free service to the City, in violation of R.C. 4939.05(A).

{¶ 14} In Count V of the complaint, DEO challenges the Ordinance requirement that applicants for right-of-way permits provide performance bonds for restoration of the right-of-way and the removal or relocation of facilities. DEO points out that the Ordinance allows

the City to revoke a right-of-way permit if the permittee fails to obtain and maintain the required bond. DEO believes that this provision of the Ordinance is unreasonable and contrary to law.

{¶ 15} In Count VI of the complaint, DEO alleges that the Ordinance gives the City the authority to demand the removal or relocation of facilities at DEO's expense. DEO regards this as an obligation to provide nonmonetary compensation or a free service to the City, in violation of R.C. 4939.05(A).

{¶ 16} Count VII of the complaint concerns removal of facilities. The Ordinance provides that a permit holder notify the City of abandoned or unused facilities within the right-of-way. The City may require the permit holder to remove the facilities at the permittee's expense. DEO warns that this obligation will affect the cost and provision of service by DEO. DEO also declares the obligation to be unreasonable and contrary to law.

{¶ 17} In Count VIII of the complaint, DEO points to the City's broad discretion in enforcing provisions of the Ordinance concerning matters such as ordering relocation, ordering removal of facilities, and requiring financial guaranties. DEO highlights that the Ordinance has no means of assuring that such discretionary provisions are enforced in a nondiscriminatory and competitively neutral manner. DEO argues that the Ordinance, therefore, violates R.C. 4939.04(A), which requires a municipal corporation to provide open, comparable, nondiscriminatory, and competitively neutral access to its public ways.

{¶ 18} For relief, DEO seeks from the Commission a finding of reasonable grounds, a suspension of the public way fee provisions in the Ordinance, and findings that various provisions in the Ordinance are unjust, unreasonable, unjustly discriminatory, unduly burdensome, and unlawful.

{¶ 19} On April 27, 2018, Marietta filed an unopposed motion to extend until May 14, 2018, the time for filing an answer to the complaint.

{¶ 20} On May 14, 2018, the City filed an answer to the complaint in which it asserts that DEO's claims lack merit and should be dismissed. Marietta also states that, on March 26, 2018, a letter regarding the City's fee methodology was sent to DEO.

{¶ 21} By Entry dated May 16, 2018, the attorney examiner granted the City's motion for an extension and accepted its answer as if it were timely filed.

{¶ 22} The Commission will examine the standard under R.C. 4939.06(B) to determine whether reasonable grounds are stated for a complaint under R.C. 4939.06(A). DEO brought this action based on the amount of public way fees, the related classification of public way occupants or users, and the assignment or allocation of costs to the public way fees imposed by the Ordinance, which are issues covered by R.C. 4939.06(A). DEO has raised substantial arguments with regard to these issues. Our review of the allegations in the complaint leads us to conclude that reasonable grounds for complaint have been stated and that this matter should proceed to hearing.

{¶ 23} Based on this finding, R.C. 4939.06(B) requires that the Commission suspend the public way fee provisions established by the Ordinance for the duration of the Commission's consideration of the complaint. If a complaint is filed not later than 30 days after the date that the ordinance first took effect, the suspension shall apply to the public way fee for every occupancy or use of the public way to which the fee would apply. For any other complaint, the suspension applies to only the public utility filing the complaint. DEO alleges that the City passed the Ordinance on December 21, 2017. Because DEO filed its complaint on March 30, 2018, more than 30 days after the passage of the Ordinance, the Ordinance shall be suspended only as to DEO.

III. ORDER

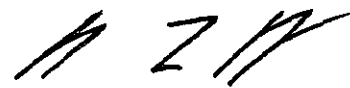
{¶ 24} It is, therefore,

{¶ 25} ORDERED, That reasonable grounds for complaint have been established in accordance with Paragraph 22. It is, further,

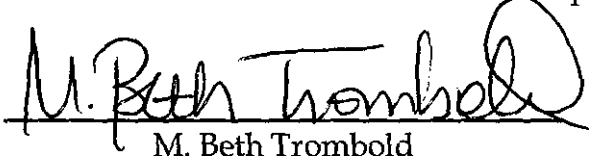
{¶ 26} ORDERED, That the public way fee provisions in the Ordinance be suspended as to DEO in accordance with Paragraph 23 until otherwise ordered by the Commission. It is, further,

{¶ 27} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

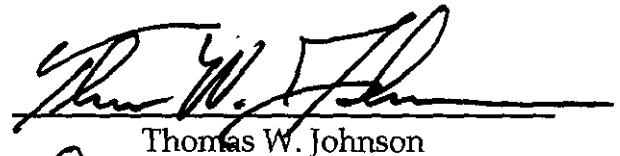
THE PUBLIC UTILITIES COMMISSION OF OHIO



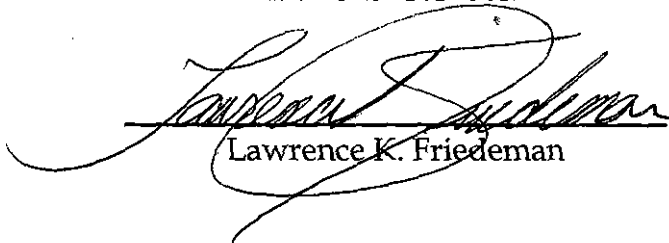
Asim Z. Haque, Chairman



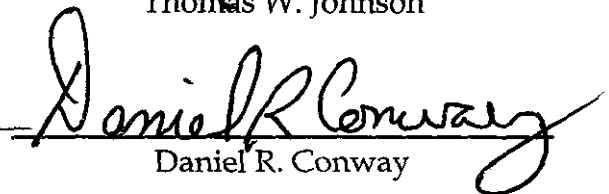
M. Beth Trombold



Thomas W. Johnson



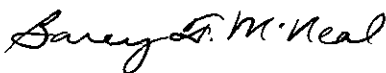
Lawrence K. Friedeman



Daniel R. Conway

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Barcy F. McNeal
Secretary