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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of The Cincinnati Gas & Electric Company	:	
Complainant,	:	
v.	:	Case No. 05-75-EL-PWC
The City of Forest Park	:	
Respondent.	:	

REPLY BRIEF OF COMPLAINANT, DUKE ENERGY OHIO

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INTRODUCTION AND STATEMENT OF FACTS:

Throughout the above styled action, the City of Forest Park (Forest Park) has continuously and erroneously argued that Duke Energy Ohio (DE-Ohio) is trying to change the law. In maintaining the present action, DE-Ohio is not challenging a municipal corporation's power to administer its right of way, or recover its actual costs via an ordinance. DE-Ohio is advocating that any such ordinance should comply with the law. DE-Ohio is simply asking the Public Utilities Commission of Ohio (Commission) to uphold R.C. Chapter 4939 and its precedent and not allow Forest Park to enforce an unreasonable and unlawful Ordinance.

In the case at bar, the applicable law consists of the legislatively created restrictions on a municipality's authority to charge right of way fees under R.C. 4939.[1] Simply put, R.C. 4939.05(C) requires a municipality only charge public way fees that are based on actual costs incurred that the municipality can clearly demonstrate are properly allocated and assigned to the occupancy or use of the public way.[2] The evidence of record shows that the alleged actual costs included in Forest Park's New Ordinance are in fact not actual, suspect, unreasonable and not supportable. Further, Forest Park's unreasonable fees are allocated to public way occupants in a manner that is in direct conflict with statute and the Commission's established precedent.

Moreover, in the New Ordinance, Forest Park unreasonably includes undefined mapping fees and speculative street degradation costs, which the city reserves the right to determine and charge at any level, at any time in the future. Lastly, Forest Park unreasonably seeks to recover legal fees stemming from the defense of its previously held

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1 Ohio Revised Code Ann. § 4939.05 (Baldwin 2005).

2 *Id.*

unreasonable Ordinance. Neither DE-Ohio nor any other right of way occupant should be required to subsidize a municipality's promulgation and defense of an unreasonable and unlawful ordinance.

As fully explained in the Merit Brief of Complainant DE-Ohio (Merit Brief), filed in this matter, the evidence of record clearly shows the fees included in Forest Park's New Ordinance do not pass the Commission's ten-part test. As such, the New Ordinance is unreasonable and unlawful under R.C. 4939.

For purposes of this Reply Brief, DE-Ohio respectfully incorporates the discussion set forth in the initial Merit Brief and submits the present Reply Brief in Response to the incorrect claims submitted by Forest Park. The Commission should find Forest Park's New Ordinance to be unlawful and invalid, just as it did Forest Park's previous permutation of an unreasonable Ordinance.

LAW AND ARGUMENT

1. Fees Included in the New Ordinance Are Not Based Upon Actual Costs.

Forest Park continues to claim that it is merely following the "rules of the road" established by this Commission in its *Dayton* and *Toledo* Cases.[3] In its Initial Brief, the City now asserts that DE-Ohio's present action is merely a challenge to the rules themselves.[4] The City is wrong on both counts. DE-Ohio agrees that Commission precedent is clear and that *Dayton* and *Toledo* are dispositive to the case at bar. DE-Ohio is challenging the fact that Forest Park has consciously decided to ignore and re-write this precedent. Despite Forest Park' insistence to the contrary, the only "rules of the road" upon which Forest Park can legitimately rely, are the clear requirements of the

[3] Forest Park Initial Brief at 3.
[4] Forest Park Initial Brief at 3.

Commission's ten-part test set forth in both the *Toledo* and *Dayton* decisions and R.C. 4939.[5] Anything else steers the City down the wrong road.

In *Toledo,* the Commission established clear and basic principles for municipalities to follow in their assessment of public way fees.[6] First, the Commission held that costs must be supported and cannot be based upon guesses of the amount of time spent on particular activities.[7] Second, the methodology for determining the right-of-way costs must not be suspect or questionable.[8] In order for a Right of Way fee to be found reasonable pursuant to R.C. 4939.05(C), the fees must pass muster under the following ten-part test:[9]

> 1. The public way fees must be based on amounts paid by the municipal corporation.
>
> 2. The amounts paid, on which public way fees are based, must be real expenses to which the municipal corporation has already become subject.
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> 3. The amount paid, on which public way fees are based, must be incurred by a municipal corporation in its own right, not by a utility owned by that municipal corporation, and must be incurred as a result of activities of the municipal corporation which are associated with the public way.

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[5] See *In re Worldcom v. City of Toledo,* Case No. 02-3207-AU-PWC (Opinion and Order)(May 13, 2003); *In re Worldcom v. City of Dayton,* Case No. 03-324-AU-PWC (Opinion and Order)(June 26, 2003).

[6] See *In re Worldcom v. City of Toledo,* Case No. 02-3207-AU-PWC (Opinion and Order)(May 13, 2003); *In re Worldcom v. City of Dayton,* Case No. 03-324-AU-PWC (Opinion and Order)(June 26, 2003).

[7] *In re Worldcom v. City of* Dayton, Case No. 03-324-AU-PWC(Opinion and Order at 15) (June 26, 2003).

In *City of Dayton,* the Commission accepted Dayton's civil engineering costs and approved Dayton's process for tracking those costs. In Dayton, time sheets of employees were reviewed on a bi-weekly basis. Each time sheet included a specific job description and activity code which identifies what kind of function was performed by the employee. These time sheets were reviewed for several years prior to the enactment of Dayton's ordinance to arrive at a cost. Thus, the Commission is requiring municipalities to keep detailed cost records to support the fees.

[8] *In re Worldcom V. City of Toledo,* Case No. 02-3207-AU-PWC (Opinion and Order at 49)(May 14, 2003).

[9] *Id.* at 30-31.

4. The amounts paid, on which public way fees are based, must have been caused by the use or occupancy of the public way by one or more individual occupants or users, by one or more reasonable classifications of occupants or users, or by all of the occupants or users as a whole.

5. The amounts paid, on which public way fees are based, must be fairly allocated among the users or occupants.

6. The amounts paid, on which the public way fees are based, must be allocated among the users or occupants in a manner that has no effect on competition among those users or occupants.

7. The public way fees can not result in the municipal corporation profiting financially from its public way fees.

8. Any classification of users or occupants of the public way must be based on actual similarity of the members of the classes and must logically relate to a just purpose of the municipal corporation.

9. If there is a reasonable classification of users or occupants of the public way, the amount of the public way fee charged to any class of users or occupants of the public way may not exceed the amounts paid by the municipal corporation as a result of the use or occupancy of the public way by that class.

10. If there is no reasonable classification of users or occupants of the public way, the amount of the public way fee charged to any individual user or occupant of the public way may not exceed the amounts paid by the municipal corporation as a result of the use or occupancy of the public way by that individual user or occupant. [10]

The evidence presented at the hearing and fully explained in DE-Ohio's Merit Brief shows that Forest Park's newly assessed fees conflict with the standards set by the Commission in the *City of Dayton* and *City of Toledo* cases and fail the ten-part test

[10] *Id.*

resulting in unlawful fees.[11] There is no credible evidence that Forest Park's public way fees are either" based on amounts paid by the municipal corporation," or are "based [on] real expenses to which the municipal corporation has already become subject."[12]

The City supports its newly calculated fees based upon employee notes and summaries that the City dubiously calls time sheets.[13] These time sheets are the sole evidence Forest Park has submitted to justify its right of way costs. These "time sheets" merely support the fact that the City has failed to account accurately for its costs. Forest Park admits that the City failed to provide a uniform standard or guidance for its employees to follow in accurately tracking their time spent in right of way administration.[14] Consequently, the resulting "time sheets" are nothing more than fee schedules consisting of rounded minimum or maximum charges for various administrative activities, rather than actual time spent administering the City's right of way.

For instance, the City is billing every e-mail sent by Mr. Berquist at a fifteen minute interval. Common sense alone calls into question whether each and every e-mail sent by Mr. Berquist in 2005 required exactly fifteen minutes of his time. Rather, the logical conclusion is that Mr. Berquist has arbitrarily tabulated a flat/ minimum billing of time spent per e-mail. The fact that Mr. Berquist included the exact date and time of his e-mails supports this conclusion.

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11 See *In re Worldcom v. Dayton*, Case No. 03-324-AU-PWC (Opinion and Order)(June 26, 2003); *In re Worldcom v. Toledo,* Case No. 02-3207 (Opinion and Order)(May 13, 2003).

12 *In re Worldcom v. Toledo,* Case No. 02-3207-AU-PWC(Opinion and Order at 30-31)(May 13, 2003).

13 Forest Park Exhibit 1 at 9.

14 TR at 45-46.

As fully discussed in DE-Ohio's Merit Brief, there are numerous instances in which Mr. Berquist sent multiple e-mails within the same fifteen-minute increment, but bills fifteen-minutes for each instance of e-mail.[15] In its Initial Brief, Forest Park now identifies Mr. Berquist's time entries as including a start time and duration and alleges that "Mr. Berquist started one task, was interrupted, completed the second task, and then returned to the first."[16] In essence, the City would have the Commission believe that in each instance in which Mr. Berquist sent two or more e-mails within a fifteen-minute increment, the later e-mail always took priority, interrupting his work on the first e-mail.

This explanation is unsupported by any evidence of record and does not account for Mr. Berquist's multitasking on March 31, 2005, at 1:30 pm in which he starts an hour-long conference call and twenty-eight minutes later, at 1:58 pm begins e-mailing.[17] In calculating his total time, Mr. Berquist charged sixty minutes of his time for the conference call as well as fifteen minutes for the e-mail that occurred within the period of the conference call.[18] It is highly doubtful that Mr. Berquist suspended his hour-long conference call for fifteen minutes to send an e-mail. Even if he did just that, Mr. Berquist's time sheet is inaccurate because there should be two consecutive conference calls. The time sheet should state there was a twenty-eight minute conference call lasting from 1:30 through 1:58, followed by an e-mail entry at 1:58, and then a second conference call lasting approximately thirty-two minutes beginning around 2:13 pm.

15 DE-Ohio Merit Brief at 11-14.
16 *Id.*
17 Forest Park Exhibit 1, Attachment B at FP0131.
18 *Id.*

Clearly, Mr. Berquist has charged seventy-five minutes of time in a sixty-minute period. Such double counting cannot represent actual costs incurred by the City.[19]

Forest Park attempts to blame DE-Ohio for failing to call Mr. Berquist as a witness to explain the suspect time entries.[20] DE-Ohio did not call Mr. Berquist, or any other Forest Park employee submitting cost data, because the data attached to Forest Park's witness Mr. Buesking's testimony was, and remains, suspect on its face. Further, Mr. Buesking added to the mendacity of the evidence by testifying that he did not require Forest Park employees to use the form developed to account for their time, did not set any consistent standards for employees to follow to keep their time, and did not verify the time recorded.[21]

Forest Park's futile attempt at explaining Mr. Berquist's double billing as merely interrupting one e-mail to send another, enhances suspicion surrounding the City's time keeping methods and lacks evidentiary support.[22] The cost evidence attached to Mr. Buesking's testimony is simply not credible. The City has no excuse for failing to account accurately for its costs. This is especially true given that the City actually developed a form for its employees to use to account for time, but according to the City, one employee used the form only once.[23] Forest Park fails to comprehend that its own failure to provide its employees with any direction or a consistent methodology to account for their time, and failure to review the time recorded, has resulted in fees that are not based upon the City's actual costs. Mr. Berquist is but one example. As

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19 DE-Ohio is not alleging that Mr. Berquist has engaged in any nefarious conduct, nor is the Company questioning Mr. Berquist's ability to multitask. DE-Ohio merely points out the discrepancy to prove that Forest Park has not accurately accounted for its actual costs.

20 Forest Park Initial Brief at 8.

21 TR at 46-48.

22 Forest Park Initial Brief at 8.

23 TR at 47.

discussed in DE-Ohio's Merit Brief, the City also charges each fax at a fifteen-minute increment.[24] Likewise, each inspection is charged in either a fifteen or a thirty-minute increment.[25] Clearly, the City is assessing a flat fee by the activity, rather than the actual time spent performing the activity.

Forest Park is quick to point out that in the New Ordinance, it has chosen not to track and seek recovery of certain administrative costs such as gasoline, mileage, photocopying, "supplies, and the like."[26] Such a decision does not excuse the City's blatant failure to account accurately for the administrative expenses it is seeking to recover. Moreover, it does not justify the assessment of something other than actual costs. The record clearly shows that there is no protocol for recording time spent or to review for accuracy time submitted by its employees.[27] Clearly, Forest Park cannot accurately quantify the alleged costs incurred for maintenance of its right-of-way, and is over-billing for its employees' time in violation of parts one and two of the ten-part test.

2. Forest Park's sole justification for its unreasonable cost allocation methodology is that Dayton allegedly allocates costs in the same unreasonable manner.

Forest Park continues to proclaim that it is merely following the example of the City of Dayton in setting its per mile allocation and assessment of costs. Forest Park goes so far as to claim its New Ordinance follows the "Dayton model."[28] What Forest Park fails to mention is that the "Dayton model," which it is relying upon, was never

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[24] Forest Park Exhibit 1, Attachment B at FP0133.

[25] Forest Park Exhibit 1, Attachment B at FP0138-FP0176.

[26] Forest Park Initial Brief at 8.

[27] TR at 48. (At hearing, Forest Park's witness Mr. Buesking testified that the time represented on the time sheet labeled "Debbie- Street Lights- Outages" includes time spent for an administrative assistant to fax. According to Mr. Buesking, the incremental time of .15 per faxing event is actually a percentage of an hour or approximately 9 minutes.) However, upon adding the total time for inclusion in its fees, the City has charged this as increments of fifteen minutes.

[28] Forest Park Initial Brief at 1.

brought before the Commission for review. The Commission never expressly approved the ordinance model that Forest Park claims to have parroted. In fact, the only "Dayton Ordinance" reviewed by the Commission was found to be unreasonable and unlawful.[29] Further, although the Commission did, at Dayton's request, suggest in dicta that a per mile allocation methodology may be acceptable if it met the Commission's ten-part test, the Commission was careful to state that its suggestion should not be used as precedent in any future preceding.[30] Despite the Commission's admonition Forest Park improperly continues to rely upon *Dayton* dicta, rather than the Commission's unambiguous guidance contained in its ten-part test. The Commission should reject Forest Park's misplaced reliance upon the "Dayton model."

Forest Park continues to lobby for the reasonableness of its fees based upon the position that its costs are significantly less than the costs found justified in the Dayton case.[31] The dollars supported and collected by the City of Dayton is not the test established by the Commission in *Toledo* and affirmed in *Dayton*. A $10.00 fee is no less in violation of R.C. 4939, than a $10,000 fee if neither fee is based upon actual costs.

3. A Per Mile Allocation of Costs is Unreasonable

Forest Park's claim that the Commission has expressly approved the per mile allocation methodology is incorrect. The Commission has never ruled that a per mile allocation of costs is per se reasonable. Rather, in its *Entry On Rehearing* in *Dayton,* the Commission responded to a request for clarification by the City stating that "[a] fee that is based on the amount of pubic ways occupied or used would be acceptable if it also

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29 *In re Worldcom v. Dayton*, Case No. 03-324-AU-PWC (Opinion and Order) (June 26, 2003).

30 *In re Worldcom v. City of Dayton,* Case No. 03-324-AU-PWC (Entry on Rehearing at 2) (August 19, 2003).

31 Forest Park Initial Brief at 1.

reasonably and competitively neutrally allocates costs among the users or occupants, and meets all other parts of Section 4939.05."[32]

In other words, the Commission merely opined that a per mile allocation is not per se unreasonable providing it is competitively neutral and complies with R.C. 4939.[33] The propriety of a strict per mile allocation methodology was never brought before the Commission for review. The Commission recognized this fact and stated unequivocally that its clarification is limited solely to the facts presented in the *Dayton* record.[34] The Commission expressly stated, "any clarification that the Commission provides *may not be binding in a future proceeding.*"[35] Therefore, there can be no confusion as to the weight of the clarification provided by the Commission's Entry on Rehearing in *Dayton.*

Forest Park points out that DE-Ohio Witness Mr. Wathen testified at the hearing that *Dayton* was wrongly decided.[36] At the hearing of this matter, Mr. Wathen stated that the per mile allocation method is not a fair way to allocate costs.[37] Mr. Wathen is correct in his assessment. In fact, in this proceeding there is no evidentiary support for the position that a per mile allocation is a fair way to allocate right-of-way administrative costs. Forest Park has not conducted a single study to determine whether an occupant's proportion of right of way occupancy in any way correlates to administrative costs caused by occupants.[38] Further, at the hearing, Forest Park conceded that it is an occupant's level of activity in the right-of-way, rather than the number of miles of facilities, which

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32 *In re Worldcom v. Dayton*, Case No. 03-324-AU-PWC (Entry on Rehearing) (August 17, 2003) at 6.
33 *Id.*
34 *Id at 5.*
35 *Id. at 2.*
36 Forest Park Initial Brief at 4.
37 TR at 19.
38 TR at 53-54.

directly affects the city's administrative costs.[39] Therefore, the level of ongoing administrative costs should be allocated in proportion to the extent of right of way activity by the occupant, rather than through a strict per mile assessment.

In *Dayton,* the Commission stated that the city's goal "should be to determine an allocation method that will distribute costs to users of the public way in reasonable proportion to the costs caused by those users."[40] That is all DE-Ohio requests. If, as Forest Park concedes, its administrative costs would increase in relation to the extent of occupant activity in the right-of-way, then the city should be able to determine the level of activity of the right-of-way occupants and allocate costs accordingly.

4. Forest Park's Inclusion of Legal Fees is Unreasonable.

As discussed in DE-Ohio's Initial Brief, Forest Park's Registration Maintenance Fee includes approximately $100,000 in legal fees.[41] Forest Park concedes the assessment includes legal costs resulting from the defense of its invalid ordinance in 2005.[42] As support for its inclusion of these unreasonable expenses, Forest Park maintains that it has merely designed its ordinance and included the legal fees to reflect the Commission's interpretation of R.C. 4939.[43] Forest Park is once again misconstruing the Commission's decisions and the facts present in the *Dayton* and *Toledo* cases.

The Commission has never expressly approved an ordinance that included legal fees incurred through the defense of an unreasonable ordinance. Moreover, the Commission's opinion in *Dayton* did not approve recovery through right-of-way fees of

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39 TR at 55, lines 6-12. *See* Duke Energy Merit Brief at 16-17.

40 *In re Worldcom v. City of* Dayton, Case No. 03-324-AU-PWC(Entry on Rehearing at 4) (August 19, 2003).

41 Forest Park Exhibit 1at 9

42 *Id.*.

43 *The City of Forest Park's Initial Post-Hearing Brief* at 6.

all legal costs a municipality incurs relative to its defense of an ordinance, let alone the defense of an unreasonable ordinance such as Forest Park's. In *Dayton,* the Commission stated, "*qualifying legal* fees to defend occasional appeals should be recovered over a period of years."[44] Clearly, the Commission recognized a distinction between legal fees that should qualify and those fees that should not qualify for inclusion. Fees incurred defending an ordinance determined to be in violation of Ohio law, should not *qualify* as recoverable expenses incurred by a municipality.

The Complainants in *Dayton* did not contest the legal fees included in the assessment in that case.[45] In its *Entry on Rehearing,* the Commission qualified its opinion regarding the inclusion and amortization of legal fees in Dayton's ordinance because the Complainants agreed that there was some level of general legal expense associated with right of way administration. In fact, the Commission acknowledged that the parties in *Dayton* reserved "the right to argue against the inclusion of legal fees paid to defend a public way ordinance that, on its face, is unlawful and unreasonable."[46]

However, in the present action, the legal fees Forest Park is seeking to pass through to Right-of-Way occupants are unreasonable because those costs are associated with the defense of its initial Ordinance, which the Commission ultimately found unlawful.[47] Therefore, Forest Park is requesting right of way occupants to subsidize the City's prior promulgation of an unlawful Ordinance. The Commission should not approve such an assessment, as it would serve to encourage municipalities to present

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44 *In re Worldcom v. Dayton,* Case No. 03-324-AU-PWC (Application for Rehearing) (July 28, 2003) at 4.

45 *In re Worldcom v. City of Dayton,* Case No. 03-324-AU-PWC (Entry on Rehearing at 3-4) (August 19, 2003).

46 *Id.* at 4.

47 *In re Forest Park,* Case No. 05-75-EL-PWC (Opinion and Order at 8-9) (March 7, 2006).

unlawful ordinances and punish vigilant utilities for raising a challenge. There would be no deterrence for a municipality's attempt to assess unreasonable and unlawful fee structures because they would be guaranteed legal defense cost recovery. The Commission should discourage such a practice and not permit Forest Park to recover legal fees related to the enactment and defense of an unlawful Ordinance.

5. Street Degradation is not an Actual Cost Incurred by the City.

According to Forest Park, the issue of street degradation is not ripe for ruling because, "none of the fees at issue contain any component of street degradation."[48] Forest Park's position ignores the fact that its Ordinance expressly includes street degradation as a component of its Right of Way Permit Fee Schedule calculation.[49] Either Forest Park is calculating its annual fees in a way that is inconsistent with its own ordinance, or the City, by its own calculation, is including street degradation in its current fee assessment. It just so happens the assessment is $0.00 for 2006. This issue is ripe for consideration by this Commission because the City has billed DE-Ohio for the fees contained in the New Ordinance, which by definition include street degradation. Moreover, the City has stated on the record that it has the ability to impose street degradation costs without further process before the Commission or amendment to the Ordinance.[50]

As fully discussed in DE-Ohio's Merit Brief, street degradation in and of itself is speculative and in violation of the Commission's ten-part test because it is not an actual cost incurred by the City.[51] By the terms of the New Ordinance, any risk of street

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48 Forest Park Initial Brief at 9.
49 Forest Park Chapter 52.17(D)(2).
50 TR at 61.
51 DE-Ohio Merit Brief at 22-27.

degradation is eliminated because a utility engaged in construction along the City's streets, is also required to return the street to "a condition at least as good as its condition immediately prior to Construction."[52] Further, with respect to DE-Ohio, the company's engineering standards and maintenance practices ensure that its repairs do not cause any accelerated depreciation or any reduction in the life expectancy of the City's streets.[53] Forest Park has not made a showing otherwise. The City should not include street degradation in its calculation of public way fees.

In its Initial Brief, Forest Park makes the erroneous allegation that the Commission lacks jurisdiction to order the removal of the word "degradation" from its Ordinance.[54] Clearly, the General Assembly has charged the Commission with the duty to ensure a municipal Ordinance assessing Right-of-Way fees comply with R.C. Chapter 4939.[55] Revised Code Section 4939.05 requires that a municipality's public way fees are "based on costs that the municipal corporation has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way."[56] A speculative component included in a right of way fee calculation, that neither constitutes an actual cost incurred by a municipal corporation, nor is properly allocated to occupants, is per se unlawful. The Commission has the authority to exclude such an unlawful component from the fee calculation. In fact, the Commission has done so.[57]

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52 Ordinance Section 52.18(I).
53 DE-Ohio Merit Brief at 25.
54 Forest Park Initial Brief at 10.
55 Ohio Revised Code Ann. §4939.06 (Baldwin 2005).
56 Ohio Revised Code Ann. §4939.05 (Baldwin 2005).
57 *See e.g. In re Worldcom v. City of Toledo,* Case No. 02-3207-AU-PWC (Opinion and Order at 40-41 and 26)(May 13, 2003); (The Commission held that Toledo could not recover the value of trees removed because the City paid nothing with regard to the loss of the trees. Further, the Commission disallowed Toledo's attempt to include charges for safety forces in its fees reasoning that the actual costs could not be

Forest Park has not performed any study nor has it determined any engineering standard that would support the existence of street degradation.[58] The evidence is undisputed that even if degradation does exist, it is not an actual expense incurred by the City.[59] Further, as a condition for receiving a construction permit the City requires that its street is restored to the condition prior to construction. Moreover, the City requires a bond as a condition for issuing a construction permit and reserves a right of confiscation if its streets are not restored to the condition prior to construction. Lastly, even if the Commission determines that street degradation is an actual expense, Forest Park has not submitted any evidence that DE-Ohio, or any other right-of-way occupant, has caused degradation.

Clearly, street degradation is not an actual cost incurred by the City, and should be excluded under R.C. 4939.05(C). Moreover, permitting its inclusion would result in the City profiting from its fees, also in violation of R.C. 4939. Forest Park already requires a bond for construction and retains the right to confiscate the bond if the Company fails to restore the City's streets to the condition prior to construction. Allowing street degradation to remain a component of the City's fee structure will result in a double recovery of costs.

6. Mapping Fees Are Speculative and Are Not Actual Costs.

Forest Park also maintains that the issue of mapping costs is not ripe for decision because at present, the City has not included mapping related charges in its fees. This

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determined, that they were unrelated to the utilities occupation, and would result in an unreasonable allocation in excess of costs reasonably allocated to those utilities). *Id.*

[58] TR at 55.

[59] DE-Ohio Merit Brief at 22- 27.

claim is fully addressed in DE-Ohio's Merit Brief.[60] In its Opinion and Order, dated March 7, 2006, this Commission held that mapping charges would constitute a public way fee under the terms of Section 4939.06(A), Revised Code.[61] As such, the Commission clearly has jurisdiction to rule upon the propriety of the inclusion of such costs within public way fees.

Forest Park's witness Mr. Buesking testified that the City could change the mapping requirements at its discretion and assess costs upon Occupants without amendment to the Ordinance.[62] Forest Park's inclusion and reservation of the right to assess these costs through its public way ordinance constitutes a clear violation of parts one and two of the ten-part test because they do not represent "amounts paid" and "real expenses."[63]

The New Ordinance requires utilities to pay "any and all actual, direct, *incidental and indirect costs* incurred by the City during the process of reviewing, inputting and/or converting a Provider's mapping information to comport with the City's then current standard format (whether electronic or otherwise)..."[64] The inclusion of "incidental and indirect costs" is problematic because there is no way to determine if they are actual costs already incurred and real expenses.

If the Commission permits Forest Park to include mapping fees in its New Ordinance, the Commission should also permit DE-Ohio to institute a tracking mechanism to recover those costs directly from the consumers located in Forest Park's

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60 *See* Merit Brief at 28-30.
61 *In re CG&E v. Forest Park, 05-75-EL-PWC.,* (March 7, 2006) *(Opinion and Order).*
62 TR.at 61, lines 11-17.
63 *Id.*
64 *Id. Emphasis added.*

City limits. DE-Ohio's other consumers should not be forced to subsidize an administrative decision made by the City of Forest Park.

CONCLUSION:

DE-Ohio has clearly met its burden of proof in the above styled action. The fees included in Forest Park's New Ordinance do not reflect actual costs incurred and in some instances, are clearly in excess of actual costs. The Commission should not reward Forest Park's promulgation of an unlawful Ordinance by permitting the City to include legal fees incurred during the defense of its unlawful Ordinance. Street degradation and mapping fees are not real expenses incurred by the City and have no place in its Ordinance. As such, DE-Ohio respectfully requests that the Commission determine Forest Park's New Ordinance to be unlawful under R.C. 4939.05 and deny the City the ability to collect its unreasonable fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Complainant was served via ordinary mail on the following parties this 5th day of September, 2006.

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