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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Duke )  
Energy Ohio, Inc. to Establish and Adjust )  
the Initial Level of its Distribution Rate )  
Rider DR. )

Case No. 09-1946-EL-ATA

PUCO

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INITIAL BRIEF  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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**I. INTRODUCTION**

On December 11, 2009, Duke Energy Ohio, Inc. ("Duke" or "Company" or "Duke Ohio") filed an application ("Application") to request approval to establish and adjust the initial level of Rider DR to collect from customers its claimed storm damage costs associated with a September 14, 2008 Hurricane Ike-related windstorm ("2008 Windstorm").<sup>1</sup> In the alternative, the Company asked the Commission to include the costs in its test year expenses. On January 14, 2009, the Commission approved Duke's request to modify accounting procedures to defer incremental operation and maintenance ("O&M") costs related to the 2008 Windstorm service restoration expenses.<sup>2</sup> Duke filed this Application pursuant to a provision in the Stipulation and Recommendation filed on March 31, 2009, in Duke's most recent distribution rate case, 08-709-EL-AIR.<sup>3</sup>

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<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. For an Increase In Electric Rates, et al*, Case No. 08-709-EL-AIR, et al., Motion For Approval To Change Accounting Methods to Defer and Create a Regulatory Asset for Storm Restoration Costs (December 22, 2009).

<sup>2</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. For an Increase in Electric Rates, et al.*, Case No. 08-709-EL-AIR, Finding and Order (January 14, 2009).

<sup>3</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Rate Rider DR*, Case No. 09-1946-EL-ATA, Stipulation and Recommendation at 7.

## **II. APPLICABLE LAW AND STANDARDS**

### **A. The Stipulation Requires Duke to Demonstrate that the Storm Rider Costs are Prudently Incurred and Reasonable**

The Stipulation states that Duke will bear the burden of proof<sup>4</sup> to show that the costs it intends to collect are reasonable and prudently incurred:

The Parties agree that Rider DR shall be approved as a mechanism to recover reasonable and prudently incurred storm restoration costs relative to the September 2008 wind storm associated with Hurricane Ike only. Recovery is limited to the Operating Costs identified in paragraph 16 of the Company's December 22, 2008, Motion for Approval of a Change to Accounting Methods which was approved by the Public Utilities Commission on January 14, 2009 in this docket.

Paragraph 16 of the Motion for Approval states:

If the Commission approves DE-Ohio's requested regulatory asset treatment of its September 14, 2008, wind storm-related costs and carrying charges under any of the options listed in paragraph 14, DE-Ohio will make the following journal entries for Hurricane Ike-related costs:

Debit 182.3 Other Regulatory Assets

|            |                                  |
|------------|----------------------------------|
| Credit 58X | Distribution Operation Expense   |
| 59X        | Distribution maintenance Expense |
| 9XX        | Administrative & General Expense |
| 408        | Payroll Taxes. <sup>5</sup>      |

### **B. R.C. 4909.15 Provides Standards for the Fixation of Reasonable Rates**

The Stipulation provides that Duke can collect only those costs that are reasonable and prudently incurred. The General Assembly has provided standards for the determination of reasonable costs under R.C. 4909.15.

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<sup>4</sup> Stipulation at 7.

<sup>5</sup> Motion for Approval at 8.

Under R.C. 4909.15(A)(3) the cost of rendering service should be credited by interest earned. Under R.C. 4909.15(D) charges cannot be unjust, discriminatory or in violation of the law. Under R.C. 4909.15(D)(2) the Commission is to determine the reasonableness of charges based upon “all such other matters as are proper, according to the facts in each case.”

Under R.C. 4909.152 the Commission should consider the efficiency, sufficiency and adequacy of facilities provided and the service rendered by the public utility. R.C. 4909.154 directs the Commission to consider management policies, practices and organization of the utility and states:

In any event, the public utilities commission shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers imprudent.

**C. Limitations on Single Issue Ratemaking For Costs Incurred Before 2009**

R.C. 4928.143(B)(2)(h) is the only provision in the law that allows for single issue rate making for electric distribution service. As part of S.B. 221, that provision does not apply to costs incurred before 2009 and applies to infrastructure modernization, maintenance and updating of the distribution system—not storm restoration. Finally, it allows distribution companies to apply for such single issue mechanisms through an electric security plan, which the Company did not do in this case. Accordingly, relying on this provision to justify Duke’s recovery of storm restoration costs is not lawful and consequently, not reasonable.

### **III. ARGUMENT**

#### **A. The Costs That Duke Seeks To Recover From Ohio Customers Are Not Reasonable**

##### **1. The 2008 Windstorm Restoration Costs That Duke Seeks To Recover From Ohio Customers Are Not Reasonable Based Upon The Fact That Ohio Customers Suffered Even Higher Losses From The 2008 Windstorm**

In its Application, Duke correctly characterizes the severity of the electric outages caused by the 2008 Windstorm in its service territory:

Wind gusts in excess of 74 miles per hour were recorded within Duke Energy Ohio's service territory during the storm and Duke Energy Ohio documented approximately 822,000 outages greater than five minutes in duration. These outages affected approximately 83% of the Duke Energy Ohio's customers.<sup>6</sup>

But Duke's Application ignores the suffering and losses by its customers and mischaracterizes the state of emergency that existed at the time as one that relates only to the \$30,682,461 it alleges to have spent to repair the damage to its distribution facilities caused by the 2008 Windstorm.

While Duke correctly points out that Governor Strickland declared a state of emergency and noted that 1.92 million customers were without power across the state, Duke failed to recognize the huge losses to its residential, commercial and industrial customers. As OCC Witness Anthony J. Yankel testified, "This massive outage resulted in untold economic loss to Duke's customers, including residential customers."<sup>7</sup> He cited a study that estimated the cost for residential customers to be \$3 per hour and for small to

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<sup>6</sup> Application at 2.

<sup>7</sup> Direct Testimony of Anthony J. Yankel, OCC Exh. 1A at 3.

medium commercial customers to be \$1,200 per hour.<sup>8</sup> Considering the number of outages and the length of outages, Witness Yankel concluded that “it is clear that the economic loss/damage to the customers far exceeded the \$28.5 million that Duke Ohio is trying to get Ohio customers to pay.”<sup>9</sup> Workers lost wages and businesses lost income. Customers lost the food in their refrigerators and freezers, lighting in order to see in the dark, use of clocks, electric cooking appliances, electric water heaters, sump pumps, televisions, radios, air conditioners, and other basic electrical appliances. For these reasons, Witness Yankel stated “It is somewhat presumptuous for Duke Ohio to attempt to fully recover all of the costs it claims it incurred from the same customers that have little or no recourse to recover losses related to being without electrical service for up to nine days.”<sup>10</sup>

Duke Witness Mehring, who testified as to the damages of the storm seemed oddly unaware of the actual suffering of the public due to the outages.<sup>11</sup> He was unaware if any businesses were closed and if any employees lost wages,<sup>12</sup> he was unaware if any government offices were closed,<sup>13</sup> he was unaware if people were having trouble finding groceries during this outage,<sup>14</sup> and he was unaware as to whether people were moving

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<sup>8</sup> Id.

<sup>9</sup> Id. at 4.

<sup>10</sup> Id.

<sup>11</sup> Direct and Supplemental Testimony of Merhing, Duke Exhs. 2 and 3.

<sup>12</sup> Transcript Vol. I (Cross Examination of Merhing) at 46.

<sup>13</sup> Id.

<sup>14</sup> Id. at 47.



into hotels due to the outages at their homes, causing them to incur significant nonreimbursable costs<sup>15</sup> he did know that some cell towers were out, he knew that some schools were closed and that some water companies could not deliver water.

At the same time, Duke is asking the Commission to allow them to sidestep the effects of this “Act of God.” The Company is asking its customers to pay for all of its 2008 Windstorm related costs.<sup>16</sup> As the Company apparently sees it, customers should take two hits, and the Company should take none. In effect, Duke is seeking Commission authorization to force customers to act as an insurance company for Duke’s shareholders. This position of the Company is inherently unreasonable.

Duke presumes that only utilities should be made whole for force majeure events such as this Hurricane. However, nothing in the revised code or in the Commission rules requires that force majeure forgiveness can only apply to utilities. In fact, the Commission has approved force majeure provisions in utility tariffs that apply to both the utility and the customer.<sup>17</sup>

In any PUCO case, the Commission has authority to disallow recovery of all costs in consideration of “all such other matters as are proper, according to the facts in each case” under R.C. 4909.15(D)(2). Based on that authority, the Commission should consider the losses already suffered by all residences and businesses in the Duke service territory from the 2008 Windstorm and not permit collection of any of the storm restoration costs.

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<sup>15</sup> Id.

<sup>16</sup> Transcript Vol. I (Cross Examination of Wathen) at 162.

<sup>17</sup> *In the Matter of the Application of Ohio Power Company*, Case No. 83-98-EL-AIR, Opinion and Order (November 23, 1983) at 19.

**2. Is Inherently Unreasonable For Duke To Ask Its Customers To Pay The Company's 2008 Windstorm Related Costs When Duke Energy Indiana, Inc. Is Not Requiring Its Customers To Pay *Any Portion Of* Duke Energy Indiana, Inc.'s Costs**

In this proceeding, Duke is asking its customers to pay for all of its 2008 Windstorm related storm costs.<sup>18</sup> However, Duke's sister company, Duke Energy Indiana, Inc. ("Duke—Indiana") is not seeking to recover any of its approximately \$17 million in costs related to the same storm.<sup>19</sup> The actions of Duke—Indiana reveal that Duke's collection of storm restoration costs from Ohio customers is unreasonable. As Mr. Yankel testified:

I believe that Duke Energy Ohio has demonstrated no reason why Ohio should be treated differently than Indiana \* \* \* There's absolutely no reason here given why the two are being treated differently.<sup>20</sup>

Further, in two of the years during the period of 2005 - 2009, Duke in Ohio experienced storm response costs as high as \$5 million and \$7 million, yet did not seek the recovery of those costs.<sup>21</sup> Now, all of the sudden, and immediately following increases in its standard service offer generation rates<sup>22</sup> and its distribution rate,<sup>23</sup> Duke in Ohio wants to recover storm restoration costs from its Ohio customers, even as Duke—Indiana foregoes collecting costs for the same storm restoration from Indiana customers.

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<sup>18</sup> Transcript Vol. I (Cross Examination of Wathen) at 162.

<sup>19</sup> Transcript Vol. III (Cross Examination of Freeman) at \*\*\*.

<sup>20</sup> Transcript Vol. II (Cross Examination of Yankel) at 237.

<sup>21</sup> Transcript Vol. I (Cross Examination of Wathen) at 164-166.

<sup>22</sup> Case No. 08-920-EL-SSO.

<sup>23</sup> Case No. 08-807-EL-AIR.

In fact, Duke Witness Wathan, himself, seemed to believe that Duke's collection of costs from Ohio customers may be considered to be unreasonable. In response to the Question:

To those specific to distribution then, what incentive would the individual have [to save costs]?

Mr. Wathan replied:

There's no certainty we're going to get recovery, so I think it is in our interest to keep costs down. Particularly at the time that the storm happened, nobody knew it was going to be \$31 million. So the idea is to keep the costs down. It's all shareholder money until we know better. No differently, no.<sup>24</sup>

The fact that Duke would seek to burden Ohio ratepayers with costs it is not seeking to recover in Indiana raises questions regarding the legitimacy of these costs and the demand to recover then. There is nothing in the record to distinguish the facts in Indiana from those in Ohio or that contributes to an understanding of Duke's efforts to burden Ohio consumers. Does Duke believe that Ohio is acceptable to burdening customers while Indiana is not?

**3. The 2008 Windstorm Restoration Costs That Duke Seeks To Recover From Ohio Customers Are Not Reasonable Based Upon The Nonrecurring and Extraordinary Character of These Costs**

In its application, Duke also emphasizes the extraordinary character of the 2008 Windstorm:<sup>25</sup>

The Hurricane Ike Windstorm caused the largest electric outage in the history of Duke Energy Ohio (and its predecessor entities.) Wind gusts in excess of 74 miles per hour were recorded within Duke Energy Ohio's service territory during the storm and Duke Energy Ohio documented approximately 822,000 outages greater

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<sup>24</sup> Transcript, Vol. II, (Redirect of Yankel) at 297-298.

<sup>25</sup> Application at 2.

than five minutes in duration. These outages affected approximately 83% of Duke Energy Ohio's customers and, despite the Company's best efforts, service could not be restored for days.<sup>26</sup>

Mr. Mehring reported:

Just say I've been with the company 33 years, I've been responsible for a lot of storm restoration efforts, some extensive. In 33 years, for me, I have never seen anything like this in terms of how widespread it was, the amount of damage that we had, in terms of our facilities just being on the ground."<sup>27</sup>

And, in fact, the 2008 Windstorm was unprecedented and so extraordinary that it must be considered to be a nonrecurring event. Typically, the Commission will allow recovery of extraordinary and recurring expenses, amortized over a period of years, but the Commission does not allow recovery of nonrecurring expenses and the Ohio Supreme Court has upheld this practice.<sup>28</sup>

OCC Witness Yankel addresses the reasoning behind the Commission's practice of denying recovery of nonrecurring expenses:

The utility has built into its rates a certain allowance for storm related expense. When the storm expenses are less than what is in rates, the utility does not request a rate decrease, thus there should be no automatic expectations of full recovery, or even any recovery, during times when the expenses exceed that built into rates. There must be an understanding that there is a variation in storm related expenses from year to year and that that variation must be taken into account before any additional recovery is authorized.<sup>29</sup>

And although in more recent years Duke's actual storm restoration costs may have exceeded its test year amount, Duke may have had many, many other years, among those

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<sup>26</sup> Application at 2.

<sup>27</sup> Transcript, Vol. 1 (Cross-examination of Mehring) at 66.

<sup>28</sup> *Cincinnati Bell Telephone Company v. Public Utilities Commission of Ohio*, (2001) Case No. 92 Ohio St. 3d 177, 181.

<sup>29</sup> Yankel, OCC Exh. 1(A) at 4.

33 years that Mr. Mehring worked, in which Duke benefited by having a test year amount that greatly exceeded its actual storm restoration costs. In order for Duke to meet its burden of proof on this issue, Duke would have had to provide comparisons of test year amounts to actual costs for more than just recent years.

Additionally, Duke may be over-collecting revenues in other categories of expenses, established in its recent rate case under the rate case formulary of R.C. 4909.15, R.C. 4909.18 and 4909.19. In any case, Duke always has the opportunity to increase its storm restoration test year expenses by filing a new rate case under R.C. 4909.18. Duke might consider that if the combined annual actual expense amounts exceeded the combined test year expense amounts or if for another reason the rates that it is currently collecting exceed its actual annual expenses and rate base requirements.

#### **4. The Collection of Carrying Charges For The Period of Time Duke Requests is not Reasonable**

Under Duke's Application, Duke proposes to collect carrying charges for the storm costs from the date that the Commission approved the deferral until the date all the costs have been collected. As OCC witness Yankel points out Duke waited over a year after the Windstorm occurred to file this application.<sup>30</sup> The timing was in Duke's discretion and therefore Duke should be held responsible for the delay in receiving payment of the storm costs. The Commission should allow Duke to collect carrying charges for only the three years the costs are deferred, beginning when the Commission issues its order in this case.

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<sup>30</sup> OCC Exh. 1(A) at 43.

**B. Evidence Indicates That Some of Duke's Costs Were Not Prudently Incurred**

**1. Some Of The Costs That Duke Seeks To Collect From Customers Were Not Necessary For Storm Restoration And Are Excessive Costs**

**a. Unnecessary Costs**

As OCC Witness Yankel points out in his testimony, in its original application Duke included \$7,349 worth of massage costs for its call center personnel.<sup>31</sup> After OCC inquired about these massages, Duke agreed to remove it from the application along with \$42,058.60 of gravel costs OCC had inquired about also.<sup>32</sup> If these were removed should we ask: Are there further, non-decreased unnecessary costs?

**b. Supplemental Pay For Salaried Employees, Associated Loaders And Supervisory Costs**

OCC Witness Yankel also recommended that the Commission not allow Duke to collect from customers the supplemental pay Duke gave 461 salaried employees who apparently worked on storm restoration efforts in Ohio.<sup>33</sup> As Mr. Yankel pointed out, salaried employees are not paid based upon the number of hours they work.<sup>34</sup> The meaning of the word salary is "a fixed payment at regular intervals for services."<sup>35</sup> Duke shareholders should incur the costs of this supplemental pay because it was not required to be paid.

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<sup>31</sup> Id at 9.

<sup>32</sup> Id.

<sup>33</sup> Id at 10.

<sup>34</sup> Id.

<sup>35</sup> *New World Dictionary*, Second College Edition (1976) at 1255.

Mr. Yankel expresses the customer perspective well:

As pointed out above, the economic loss to customers far outweighed the \$28.5 million presently being requested by Duke Ohio. It is adding insult to injury to have customers out of service for nine days and then ask those customers to supplement the pay of salaried employees that were doing what they are being paid to do all along.<sup>36</sup>

Mr. Yankel recommends that the \$855,796 of supplemental pay that was paid to salaried employees should be removed from the amount that Duke can recover from customers. In addition, he recommends that \$371,196 hourly pay included in the collection amounts for the work of salaried employees should be removed. Duke is already recovering the salaries in the annual revenue requirements. Accordingly, a total of \$1,226,992 should be removed from the costs that Duke can collect.<sup>37</sup>

In addition, the Commission should remove, labor-loaders and supervision costs that Duke added to the supplemental payment recovery amounts through its Peoplesoft program.<sup>38</sup> Adding labor-loaders and supervision costs to the supplemental payment amounts is inappropriate and the Commission should subtract 20.86% of the total \$4,504,551 in labor loaders Duke requests for storm restoration costs.<sup>39</sup> Alternatively, \$939,863 worth of labor loaders along with \$1,112,591 of the supervision adder<sup>40</sup> and the direct labor amount of \$1,226,992 should be removed. Those amounts total \$3,279,446 that customers should not be required to pay.<sup>41</sup>

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<sup>36</sup> Yankel, OCC Exh. 1(A) at 12.

<sup>37</sup> Id at 15.

<sup>38</sup> Id at 16.

<sup>39</sup> \$1,226,992 of the total direct payroll costs of \$5,880,694 equals 20.86%, Yankel, OCC Exh. 1(A) at 16.

<sup>40</sup> 43.32% of total loaded labor of \$8,218,390 equals \$1,112,591. Yankel, OCC Exh. 1(A) at 16.

<sup>41</sup> Id at 17.

**c. Credits For Use Of Ohio Employees By Duke's Affiliates**

OCC Witness Yankel also pointed out that about one half of the \$15,300,000 that Duke is attempting to collect from Ohio customers as “internal labor costs” is associated with the work of employees of not Duke Ohio but of Duke’s affiliates.<sup>42</sup> The costs of these employees are already being collected by the affiliates through base rates in their jurisdictions. Therefore, if Duke Indiana and Duke Kentucky used Duke Ohio employees, during the 2008 Windstorm restoration or for any other storm restoration work, Duke Ohio would be collecting the costs of the Ohio employees from its customers through base rates and also from its affiliates for use of their employees. To the extent this is occurring, it undermines the credibility of Duke with respect to the presentation of their case and this information should be weighed by the Commission against their favor.

In order to further ascertain the fairness of this double recovery, OCC asked Duke in discovery how many Duke Ohio employees were sent to assist Duke’s affiliates in other states. Initially, Duke objected but claimed that Duke Ohio sent none of its employees to other jurisdictions.<sup>43</sup> Then Mr. Yankel filed his testimony, citing a Kentucky Commission Staff data request that stated that \$307,872 of Duke Kentucky restoration costs related to Duke Ohio employee labor.<sup>44</sup>

As a result of Duke’s unwillingness to provide information regarding the use of Ohio employees in other jurisdictions, OCC Witness Yankel estimated an amount of money that Duke Ohio was likely reimbursed by other jurisdictions for use of its employees. From the \$307,872 of Ohio labor as a percentage of the total of \$4.92 million

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<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Id at 19.



of Kentucky storm restoration costs, Mr. Yankel calculated that approximately \$1,063,875 of the \$17 million in Indiana storm restoration costs was Ohio labor that Duke is already collecting from Ohio base rates. In total, OCC Witness Yankel recommended that the Commission required Duke to credit Ohio customers with an additional \$1,371,657 as the amount Duke is likely recovering from its affiliates for use of Ohio employees for storm restoration work.<sup>45</sup> The Commission should require that these payments be flowed through to customers.

**d. Fringe Benefits**

In OCC's objections, OCC pointed out that because so much of the labor associated with the storm restoration was overtime, Duke could not rely upon the same loading percentage for fringe benefits as it does for regular time labor.<sup>46</sup> Duke later agreed and reduced its fringe benefit amount by \$800,461.<sup>47</sup>

**C. Duke Is Attempting To Collect Costs From Customers That Are Not Permitted Under The Stipulation**

Under the Stipulation, Duke is permitted to collect only incremental operation and maintenance expenses and is not permitted to collect capital costs.<sup>48</sup> Nevertheless, Duke's application appears to be attempting to collect capital costs by improperly categorizing many of the costs as operation and maintenance expenses. In comparison to the percentage of Duke storm restoration costs requested in Kentucky,<sup>49</sup> far less of the

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<sup>45</sup>Yankel, OCC Exh. 1(A) at 20.

<sup>46</sup> OCC Objections (February 23, 2010) at 6-7.

<sup>47</sup> Wathen Supp., Duke Exh.6 at 8.

<sup>48</sup> Stipulation at 7.

<sup>49</sup> Transcript Vol. II (Re-direct Examination of Tony Yankel) at 295.

restoration costs in Ohio are categorized as capital costs.<sup>50</sup> Non-Duke utilities in Kentucky capitalized approximately 24% of its storm restoration costs.<sup>51</sup> In this application, Duke capitalized only 2%.<sup>52</sup>

**1. Improper Expensing of Labor Costs Associated With Pole Replacement**

Duke did not capitalize the labor loadings along with the labor amounts it capitalized with pole replacement.<sup>53</sup> Instead, Duke left the labor loadings associated with pole replacement in expense accounts. To properly include the labor loadings, Duke would have to remove an additional \$.7 million from the collection amounts and place it in capital accounts.<sup>54</sup>

OCC Witness Yankel testified that there is no evidence that Duke capitalized contractor labor associated with pole replacement.<sup>55</sup> Additionally, Duke admitted that it did not include the contract labor associated with pole replacement in the capital accounts:

The way we prepare the entry, for ease we have all cost charged to O and M because we have a lot of folks that are not familiar with our system, not familiar with our capitalization policies. We then come along and journal the dollars from expense to capital. We remove them from **Duke labor only** using these rates so that the appropriate loaders will add on to the appropriate amount of expense.<sup>56</sup>

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<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Yankel, OCC Exh. 1(A) at 26.

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Transcript Vol. I (Cross Examination of Clippinger) at 70 (Emphasis added).

Mr. Yankel concluded that because “the invoices from most of the contractors do not provide a clue as to where the crews worked, let alone if they were doing capital or O&M work” it would be impossible to actually get quality data as to how the costs could be split between capital and O&M accounts.<sup>57</sup> Because Duke has failed to sustain its burden of proof, the costs should not be allowed. In the alternative, Mr. Yankel’s calculation should be adopted. He recommends that the Commission rely upon the percentage of storm restoration costs that were capitalized by other Kentucky utilities for an estimate as to the amount of the Duke costs that should be included in capital versus expense accounts.<sup>58</sup>

**D. In Comparison To The Incurrence of Labor Costs In Indiana, Duke’s Incurrence of Labor Costs In Ohio Was Imprudent**

The most significant discrepancy between the incurrence of costs in Ohio compared to Indiana was the amount Duke Energy Carolinas, Inc. (“Duke—Carolina”) charged Duke—Indiana for labor and the amount Duke—Carolina charged Duke—Ohio for labor. In addition, Duke Witness Clippinger seemed to indicate that the service that Duke—Carolina provided Duke in Ohio was inferior to that provided Duke—Indiana.<sup>59</sup>

The document Duke provided to Staff and OCC had only two columns of pay amount for each employee, labeled as “Ike \$/Hour” and “Supplemental Pay.”<sup>60</sup> The document Duke provided to OCC that represented Duke Indiana charges for labor had three columns of pay amount for each employee, one column labeled as “Regular Time

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<sup>57</sup> Yankel, OCC Exh. 1(A) at 27.

<sup>58</sup> Id at 27-28.

<sup>59</sup> Transcript Vol. III (Cross Examination of Clippinger) at 368 and 374.

<sup>60</sup> OCC Exh. 13(A).

\$/Hour", one column labeled as "Overtime \$/Hour," and one column designated "Supplemental Pay".<sup>61</sup> Almost every employee listed on the labor costs charged to Duke-Indiana had regular hours listed and overtime hours listed.

Duke Witness Clippinger claimed that the "Ike \$/Hour" on the Ohio document was a blended rate of overtime and regular time.<sup>62</sup> A comparison of the "Overtime \$/Hour" per employee that Duke—Carolina charged Duke—Indiana to the "Ike\$/Hour" Duke—Carolina charged Duke in Ohio for exactly the same employee shows that the "blended rate" added to the supplemental pay charged to Duke in Ohio for Duke Carolina labor was higher per hour than the "overtime rate" plus the supplemental pay charged to Duke Indiana in almost every case.<sup>63</sup> In response Witness Clippinger stated repeatedly that the Duke Carolina employees were deployed in Indiana first and were then deployed to Ohio after the overtime charges started.<sup>64</sup> She did not explain why the Duke Carolina employees were deployed to Indiana first, even though the storm restoration needs were much higher in Ohio.<sup>65</sup>

For whatever reason that Duke—Carolina charged Duke in Ohio more for the labor of the same employees that Duke—Carolina charged Duke—Indiana, it is clear that it is not reasonable. Additionally, the greater per hour labor charges to Duke in Ohio is especially suspect because Duke—Indiana is not recovering the storm restoration costs

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<sup>61</sup> OCC Exh. 14(A).

<sup>62</sup> Transcript Vol. III (Cross Examination of Clippinger) at 357.

<sup>63</sup> Transcript Vol. III (Cross Examination of Clippinger) at 356-376.

<sup>64</sup> Transcript Vol. III (Cross Examination of Clippinger) at 368 and 374.

<sup>65</sup> Duke—Indiana storm restoration costs were estimated to be only \$17 million, while Duke in Ohio initially requested \$30 million from Ohio customers.

from the customers in Indiana.<sup>66</sup> Because Duke cannot explain the basis for charging Ohioans more, it has again failed to sustain its burden of proof and the cost should be disallowed.

**E. Duke's Documentation Of 2008 Windstorm Costs Is So Haphazard And Unreliable That Duke Cannot Rely Upon The Documentation To Meet Its Burden Of Proof That It Did Prudently Incur The Costs Included In Its Application**

The documentation provided by Duke to justify collection of the 2008 Windstorm restoration costs is not sufficient for the Commission to formulate finding of facts that under R.C. 4903.09 that Duke's storm restoration costs are reasonable or that they were reasonably incurred. Under R.C. 4903.09 the Commission must have sufficient evidence on record to allow cost collection from customers. Therefore the Commission should find that Duke did not meet its burden of proof to demonstrate that its costs were reasonable and prudently incurred.

**1. Problems with Labor Reporting**

One particular area of problematic accounting is the labor area, specifically demonstrated by the differences in labor accounting between Duke Ohio and Duke—Indiana as revealed through a comparison of OCC Exhs. 13(B) and 14(B). First, while there are three columns of labor costs in the Duke—Indiana spreadsheet of 14(B), one representing regular hours, one representing overtimes hours, and a third representing supplemental pay, there are only two columns representing labor costs in the Ohio spreadsheet 13(B). On the Duke Ohio spreadsheet there was a column for supplemental pay and only one other labor column, designated "lke \$/Hour." Therefore, it is

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<sup>66</sup> Transcript Vol. III (Cross Examination of Freeman) at 400.

impossible to know by looking at the Ohio spreadsheet whether any of the labor charged to Duke in Ohio was regular hours.

Duke employee Clippinger, called in response to an Ohio subpoena, claimed that some of the labor done for Duke in Ohio was regular time.<sup>67</sup> But at another time she stated that in Duke's efforts to distinguish labor dollars for the purpose of capitalization, Duke assumed that all labor in Ohio was overtime.<sup>68</sup> Ms. Clippinger concluded that the one column of labor costs designated "Ike \$/Hour" was a blended rate of regular and overtime pay, but she was unable to explain how it was calculated.<sup>69</sup>

Another area of lax accountability was the area of supplemental pay. Ms Clippinger stated that the Duke affiliates all rely upon a supplemental pay policy that prescribes some limitations,<sup>70</sup> but Ms. Clippinger further stated that the granting of supplemental pay was at the discretion of the supervisor and not based upon reasonable and concrete standards.<sup>71</sup>

## **2. Inadequate Documentation Of Splices And Cutouts**

Additionally, Duke was unable to provide sufficient evidence to allow either itself or other parties to audit the splices and cutouts for which it requests collection of costs. Because Duke made no effort to account for the locations of the 31,880 splices and 942 cutouts that were made in response to the storm this work would be next to impossible to check.<sup>72</sup> Not only did Duke fail to document the locations of the work for which Duke is

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<sup>67</sup> Transcript Vol. III (Cross Examination of Clippinger) at 357.

<sup>68</sup> Transcript Vol. I (Cross Examination of Clippinger) at 66.

<sup>69</sup> Id.

<sup>70</sup> Transcript Vol. III (Cross Examination of Clippinger) at 359.

<sup>71</sup> Id.

<sup>72</sup> Transcript Vol. I (Cross Examination of Mehring) at 51-52.

requesting recovery, but it also has not documented the teams who completed the splices and cutouts nor documented the time consumed in completing the splices and cutouts.<sup>73</sup> Duke Witness Mehring explained that the only accounting of the splices and cutouts that was made came from material management system, which estimated only the raw numbers of splices and cutouts that were performed.<sup>74</sup>

Without the locations of splices and cutouts, no one can ensure that the splices and cutouts for which Duke is requesting recovery were actually done. In addition without the locations of splices and cutouts, no one can ensure that the time that Duke claims it took to make the splices and cutouts was reasonable.

**3. Duke Has Been Unable To Document How Its Storm Restoration Costs Were Contained In Any Way**

Generally, Duke was ill-prepared to deal with the storm restoration work. Neither Duke Witness Mehring, who is responsible for storm response work,<sup>75</sup> or Duke Witness Wathan, responsible for Duke's accounting<sup>76</sup> were able to identify any plans or policies that address the expenditure of money for the use of internal labor in response to emergencies such as the 2008 Windstorm. Moreover, Duke apparently has no policy or plan that addresses the expenditure of money for the use of contractors in response to emergencies such as the 2008 Windstorm.<sup>77</sup> Duke has revealed no plan or policy that addresses the expenditure of money for logistical support in response to emergencies

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<sup>73</sup> Id.

<sup>74</sup> Transcript Vol. I (Redirect Examination of Mehring) at 58.

<sup>75</sup> Transcript Vol. I (Cross Examination of Mehring) at 53.

<sup>76</sup> Transcript Vol. I (Cross Examination of Wathan) at 176-177.

<sup>77</sup> Id.

such as the 2008 Windstorm.<sup>78</sup> Nor does Duke have a special method of approving costs during a state of emergency. There is no one person or group of people who are responsible for overseeing an effort to contain costs during an emergency such as the 2008 Windstorm.<sup>79</sup>

Although Mr. Don Wathen was presented by Duke as the Company's expert on the accounting procedures of Duke, Mr. Wathen did not know the percentage or the total number of storm response workers or crews that came from outside of Ohio.<sup>80</sup> In addition, Mr. Wathen did not, and apparently could not, explain why the Company initially sought to improperly collect a sum of \$800,000 in non-incremental labor expenses in this proceeding.<sup>81</sup> Mr. Wathen also could not say with certainty that the Company now has presented an accurate non-incremental labor expense.<sup>82</sup> In addition, Mr. Wathen either did not or could not provide details of various cost items identified in his testimony.<sup>83</sup>

Because it appears that Duke is unable to demonstrate that it had adequate control over the costs expended during the 2008 Windstorm restoration work, Duke has not met its burden of proof to show that the restoration work costs were reasonable or were prudently incurred.

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<sup>78</sup> Id.

<sup>79</sup> Id. at 54.

<sup>80</sup> Transcript Vol. I (Cross Examination of Wathen) at 152.

<sup>81</sup> Transcript Vol. I (Cross Examination of Wathen) at 154-157.

<sup>82</sup> Transcript Vol. I (Cross Examination of Wathen) at 160.

<sup>83</sup> Transcript Vol. I (Cross Examination of Wathen) at 167-172, 175-176.



#### **IV. CONCLUSION**

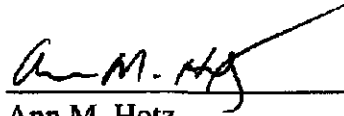
The Commission should not permit Duke to collect from customers the 2008 Windstorm restoration costs because the hearing produced significant evidence that the costs are not reasonable and were not prudently incurred. Additionally, the 2008 Windstorm was both an extraordinary and nonrecurring event. Costs associated with such events are not typically considered reasonable for the purpose of collection. Losses were widespread and significant with businesses closed, revenues and wages lost, schools closed, water and groceries unavailable and fear and anxiety abundant due to lost utility and governmental services. The 2008 Windstorm was an Act of God for which all should be willing to share in the losses.

Further, the Commission should not allow Duke to collect from customers the costs of the restoration efforts because it is clear that Duke did not have cost containment procedures in place to ensure their efficiency. In addition Duke has been unable to adequately provide reliable documentation that the costs were reasonable and prudently incurred.

Finally, given that Duke has decided not to seek cost recovery in Indiana, it should not seek cost recovery here in Ohio. That decision to not seek cost recovery is a recognition of the illegitimacy of its claim to ratepayer funds. Ohio regulators should not force consumers who have already suffered and sustained economic losses for which there will be no recovery, to cover Duke's costs resulting from extensive outages. The message should not be sent that the wallets of every Ohio consumer—as distinct from Indiana—are open for the utility to take some cash. Duke has not made a case for recovery and so it should be denied.

Respectfully submitted,

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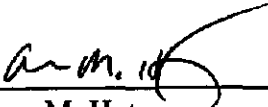
A handwritten signature in black ink, appearing to read "Ann M. Hotz", is written over a horizontal line.

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## CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing *Initial Brief* by the  
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this 15th day of June, 2010.

  
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