

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Report of Duke )  
Energy Ohio, Inc. to Establish and ) Case No. 09-1946-EL-RDR  
Adjust the Initial Level of its )  
Distribution Reliability Rider. )

PUCO

2011 FEB 10 PM 4:47

RECEIVED-DOCKETING DIV

24

DUKE ENERGY OHIO, INC.'S APPLICATION FOR REHEARING  
AND REQUEST FOR CLARIFICATION OR,  
ALTERNATIVELY, REQUEST FOR STAY

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35 of the Ohio Administrative Code (O.A.C.), Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) applies for rehearing of the Opinion and Order (Order) of the Public Utilities Commission of Ohio (Commission) issued in the above-captioned proceeding on January 11, 2011.

There is no dispute that the 2008 wind storm was unprecedented, both in terms of the extent of the physical damage and the widespread nature of the power outages. It is also undisputed that Duke Energy Ohio reacted as expeditiously as possible, with the first priority being to safety, in restoring power to its customers. Indeed, the Commission found that the Company's emergency plan sufficiently detailed the Company's response to this catastrophic event.<sup>1</sup> Thus, the only question central to this proceeding is whether the costs incurred by Duke Energy Ohio in connection with its prompt and diligent response are recoverable from customers.

The Commission's Order decided a number of issues related to Duke Energy Ohio's recovery of costs incurred in responding to the unprecedented damage caused by the remnants of Hurricane Ike. In doing so, the Commission rejected the conclusions of its Staff and found that the

<sup>1</sup> In the Matter of the Application of Duke Energy Ohio, Inc., to Establish and Adjust the Initial Level of its Distribution Reliability Rider, Case No. 09-1946-EL-RDR, Opinion and Order, at page 5 (January 11, 2011).

This is to certify that the images appearing are an  
accurate and complete reproduction of a case file  
document delivered in the regular course of business  
technician Sm Date Processed 2/11/11

Company should not be authorized to recover approximately 50 percent of its documented storm restoration costs.

The Commission's Order is unjust and unlawful for the following reasons:

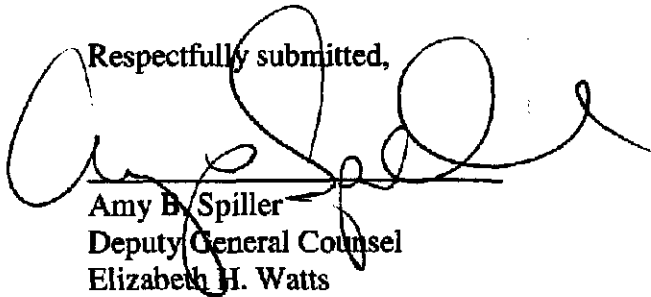
1. The Commission erred in precluding recovery of supplemental compensation for salaried employees as such compensation was a necessary and prudently incurred expense that reasonably enabled prompt restoration of electric services following the storm.
2. The Commission unreasonably ordered a reduction of \$371,196, based on the erroneous conclusion that this amount reflects additional sums paid to salaried employees.
3. The Commission unreasonably ordered a reduction of \$2,052,454 for labor loaders and supervision costs allegedly associated with the supplemental compensation and regular pay to salaried employees.
4. The Commission erred in reducing Duke Energy Ohio's request by an amount equal to the costs charged by Duke Energy Ohio to affiliates for storm restoration services provided by Duke Energy Ohio employees and the Commission's determination in this regard is unjust, unreasonable, and against the manifest weight of the evidence.
5. The Commission's finding that Duke Energy cannot recover \$9,717,564 of the costs associated with contractor labor is unjust, unreasonable, and against the manifest weight of the evidence.

In its January 11, 2011, Order, the Commission instructed Duke Energy Ohio to file tariff pages consistent with its findings. Such tariff pages would serve to initiate recovery of the authorized \$14,104,577 in costs, plus carrying charges. As Duke Energy Ohio seeks rehearing – and reconsideration of the amount storm costs that it is authorized to recover – it will not file tariffs if doing so renders moot its application for rehearing or any subsequent appeals. Consequently, Duke Energy Ohio is also seeking a determination from this Commission that its filing of implementation tariffs reflecting recovery of the first \$14,104,577 in storm costs, plus carrying costs, shall not and does not prejudice the Company in the review process with regard to the amounts not authorized by the Commission for recovery. Alternatively, Duke Energy Ohio respectfully requests a stay of the

Commission's directive that it file tariff pages and initiate new rates for Rider DR-IKE consistent therewith until such time as the review and appeal process has been exhausted.

Duke Energy Ohio respectfully requests that the Commission reconsider and modify its Order and, to the extent such modification does not authorize total recovery of \$28,473,244, in addition to carrying costs, further conclude that implementing tariffs to collect the amount authorized for recovery will not have a prejudicial effect, as more fully explained in the attached Memorandum in Support.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Amy B. Spiller', is written over a horizontal line.

Amy B. Spiller  
Deputy General Counsel  
Elizabeth H. Watts  
Associate General Counsel  
Duke Energy Business Services LLC  
139 East Fourth Street  
1303-Main  
P.O. Box 960  
Cincinnati, Ohio 45201  
(513) 287-4359

*Attorneys for Duke Energy Ohio, Inc.*

## MEMORANDUM IN SUPPORT

- I. The Commission erred in precluding recovery of supplemental compensation for salaried employees as such compensation was a necessary and prudently incurred expense that reasonably enabled prompt restoration of electric services following the storm.**

This case concerns the Commission's approval of cost recovery related to a September 2008 wind storm resulting from Hurricane Ike. It is undisputed that this wind storm caused widespread and catastrophic damage. It caused the worst electric outage in history of Duke Energy Ohio and its predecessor companies.<sup>2</sup> Despite the magnitude of the storm, Duke Energy Ohio was able to restore service safely to its customers in an expeditious fashion. Indeed, 40 percent of the Company's customers had their power restored within forty-eight hours of the storm; 70 percent had service restored within four days; and all customers had their service restored within nine days.<sup>3</sup> In order to complete all service restorations within this period of time, the Company called upon all available resources – salaried employees, employees of affiliated companies, and third-party contractors. And despite the diligent efforts of these three categories of resources, the Commission has concluded that the Company may recover only about one-half of its documented, and Staff-audited, costs.

Insofar as it concerns salaried employees, the Commission found that it was not reasonable for the Company to recover amounts paid to salaried employees in the form of supplemental compensation. Specifically, the Commission concluded that it was not appropriate to recover such costs through Rider DR-IKE and further intimated that the Company did not demonstrate that recovery of such costs was appropriate or reasonable. But this conclusion cannot be reconciled with evidence and thus merits reconsideration.<sup>4</sup>

---

<sup>2</sup> *Id.*, Opinion and Order, at page 5.

<sup>3</sup> *Id.*, Opinion and Order, at page 4.

<sup>4</sup> *Id.*, Opinion and Order, at pages 11-13.

The Office of the Ohio Consumers' Counsel (OCC) argued that it was incumbent upon as many employees as possible to focus on timely restoration of electric service.<sup>5</sup> And Duke Energy Ohio fulfilled this expectation, in part, by securing the support of salaried employees. As the evidence clearly demonstrates, this internal labor served to expedite the storm restoration efforts.<sup>6</sup> Indeed, it is undisputed that those individuals most familiar with internal company systems, process, and procedures, Duke Energy Ohio's service territory, and local logistics should and did contribute to the prompt restoration efforts.<sup>7</sup> Consistent with its supplemental pay policy, Duke Energy Ohio provided only certain of the salaried employees who dedicated their skills to this urgent effort with additional compensation.<sup>8</sup> There was no automatic award of additional pay; rather, as the uncontroverted evidence confirmed, such pay was awarded only after an employee had met an objective threshold of hours worked and had obtained supervisor approval.<sup>9</sup>

It was appropriate for the Company to pay selected salaried employees this supplemental compensation to recognize their commitment to Ohio customers and the first priority of getting the lights back on. Rejecting this moderate benefit to employees is not warranted in the circumstances giving rise to this proceeding. Furthermore, the conclusion that some reasonable monetary recognition in the face of extreme adversity is not recoverable forces utility companies to consider the more costly alternative of engaging more contract labor, which, as even the OCC admits, would not yield efficient and cost-effective results.

As the evidence in this proceeding confirms, these external contractors would have been paid as much as double time to perform functions such as logistics, material handling, material

---

<sup>5</sup> *Id.*, Transcript of Hearing, Volume II, at page 246.

<sup>6</sup> *Id.*, Transcript of Hearing, Volume II, at pages 243-244.

<sup>7</sup> *Id.*, Transcript of Hearing, Volume II, at pages 246.

<sup>8</sup> *Id.*, Transcript of Hearing, Volume III, at pages 359.

<sup>9</sup> *Id.*, Transcript of Hearing, Volume III, at pages 359.

delivery, and resource coordination.<sup>10</sup> And the OCC admitted that Duke Energy Ohio should not have used contractors to perform these functions.<sup>11</sup> Duke Energy Ohio acted reasonably and prudently in avoiding these additional contractor costs and, instead, using the most appropriate resources to aid in the timely restoration of services.

The Commission thus erred in finding that Duke Energy Ohio failed to show that costs for supplemental labor were appropriate and reasonable. Its decision to exclude \$855,796 in such costs is therefore unjust, unlawful, and unsupported by the record.

**II. The Commission unreasonably ordered a reduction of \$371,196, based on the erroneous conclusion that this amount reflects additional sums paid to salaried employees.**

In the Order, the Commission determined that the Company could not recover \$371,196 in hourly pay to salaried employees, seemingly putting this into the same category as the supplemental compensation discussed above.<sup>12</sup> But the apparent conclusions that there is no distinction between the supplemental compensation and regular pay, and that the latter should not be recoverable, misinterpret the evidence and thus necessarily warrant revision.

Significantly, this hourly pay category does not reflect *additional* compensation paid to salaried employees. Rather, this figure simply reflects a summary of time recorded for storm restoration efforts in Ohio and the costs associated with such time. The figure is merely a compilation of hours that salaried employees, who are not paid hourly wages, specifically directed to the Ohio storm efforts as they were not performing their usual duties. As confirmed by the exhibits offered into evidence by the OCC:

The regular time costs charged to the Ike storm event are where salaried *employees charged their regular time* directly to the storm. The Supplemental compensation [in

---

<sup>10</sup> *Id.*, Transcript of Hearing, Volume II, at pages 243-244.

<sup>11</sup> *Id.*, Transcript of Hearing, Volume II, at pages 243-244.

<sup>12</sup> *Id.*, Opinion and Order, at page 13.

contrast] is payment made to salaried employees for time worked in excess of their normal schedule.<sup>13</sup>

The documents submitted into evidence by the OCC demonstrate that salaried employees were recording their time as related to the Ohio storm activities. The \$371,196 amount is *not* a total of additional amounts paid to salaried employees. Rather, it is only a summary of compensation based on hours charged directly by salaried employees to the Ohio restoration efforts. As the uncontroverted evidence confirms, \$855,796 represents the total of all supplemental pay to salaried employees. The \$371,196 should not have been included with that supplemental pay adjustment in the Commission's determinations.

The Commission's decision with regard to this element of costs is further complicated by the fact that it ignored the reductions previously taken by the Company. As a result of the detailed audit performed by Commission Staff, Duke Energy Ohio reduced the total regular time charged to the storm by salaried employees by \$41,267, an amount reflecting the regular time charged by Duke Energy Ohio employees.<sup>14</sup> Thus, to make another reduction that includes amounts already removed from this proceeding is incorrect. Giving proper consideration to the prior reduction leaves a total of \$329,927 for regular time charged by salaried employees of Duke Energy Ohio's affiliates to the Ohio storm restoration efforts.

The Commission's finding that further reductions for another purported form of supplemental pay reflects a misinterpretation of the undisputed evidence and should be revised. In this regard, Duke Energy Ohio notes that the Commission did not take exception with the *regular* pay paid to salaried employees in respect of their efforts in responding to the wind storm. Thus, Duke Energy Ohio submits that the Commission's Order should be amended to authorize recovery of the \$371,196 in regular pay for salaried employees working on the Ohio storm restoration

---

<sup>13</sup> *Id.*, OCC Exhibit 13-B (emphasis added).

<sup>14</sup> *Id.*, Duke Energy Ohio 6, at pages 2-3.

activities. At a minimum, it should be corrected to avoid a second reduction for amounts already removed from the Company's request.

**III. The Commission unreasonably ordered a reduction of \$2,052,454 for labor loader and supervision costs allegedly associated with the supplemental compensation and regular pay to salaried employees.**

The Order reduced labor loader and supervision costs by \$2,052,454. This amount was the total reduction based on multiple issues, all of which are incorrect and should be modified. Specifically, the Order reduced the recoverable total by (1) \$939,863 for labor loaders on total supplemental compensation and regular pay to salaried employees, and (2) \$1,112,591 for supervision costs.<sup>15</sup> As noted above, the evidence does not support a reduction in supplemental compensation paid to salaried employees. Similarly, the evidence cannot justify a reduction in the regular pay provided to salaried employees. As a general matter, therefore, a reduction in labor loaders and supervision costs for supplemental compensation and regular pay to salaried employees is not supported by the evidence. That is, just as the underlying, direct labor costs should not be disallowed, these additional costs for fringe benefits associated with the direct labor should not be disallowed.

With regard to the payroll costs reviewed by the OCC, it is important to understand both the information available to the OCC and the information on which it relied in calculating its proposed reductions for labor loadings and supervision costs. The importance in this comparison is reflected in the fact that the OCC only relied upon select information for purposes of this recommendation.

Overall costs for regular internal labor include certain loadings, such as fringe benefits, supervision, and transportation costs.<sup>16</sup> The costs for internal labor, as well as all other costs for which Duke Energy Ohio seeks recovery, were reviewed by Staff in the context of a detailed audit.

---

<sup>15</sup> *Id.*, Opinion and Order, at pages 12-13.

<sup>16</sup> *Id.*, Duke Energy Ohio Exhibit 2, at page 9.



Staff undertook extensive efforts in sampling more than 8,000 lines of data serving to document the costs at issue with the purpose of determining both the accuracy and reasonableness of the charges.<sup>17</sup> As a result of Staff's audit, Duke Energy Ohio reduced its internal labor costs by the amount of \$986,245 for regular labor and fringe benefits.<sup>18</sup> As a further result of Staff's audit, Duke Energy Ohio reduced costs associated with internal labor expense by \$293,768 for supervisory and service company labor.<sup>19</sup> Importantly, these reductions were recommended by Staff because they were already in Duke Energy Ohio's base rates. And Duke Energy Ohio accepted the revisions.<sup>20</sup> Further reductions for fringe benefits (*e.g.*, labor loaders) were also taken by the Company. These reductions totaled \$800,461<sup>21</sup> and are not in dispute.

It is also not disputed that the evidence reflected the specific breakdown, by company, of the amounts related to direct labor, labor loaders, fleet or transportation, and supervision.<sup>22</sup> Yet, despite the level of evidentiary detail available to the OCC and the admitted reductions in internal labor costs, the OCC performed an incomplete and thus inaccurate calculation of labor loaders and supervision costs associated with supplemental pay and regular pay for salaried employees. And based upon its inaccurate accounting, it recommended further reductions that the Commission accepted. As discussed below, the OCC's recommendation is speculative and not supported by the evidence; therefore, the Commission's reliance upon that recommendation is misplaced.

The OCC's first mistake in calculating the labor loaders was simply to compare total supplemental pay to *total* labor costs. Specifically, the OCC merely took the total of supplemental pay, divided by total labor, to arrive at what it believed to be the correct percentage to apply to labor

---

<sup>17</sup> *Id.*, Staff Exhibit 1, at pages 3-4.

<sup>18</sup> *Id.*, Staff Exhibit 1 at pages 3-4 and Staff Exhibit 2, Schedule 1 (recommending \$986,245 reduction in internal labor expenses). See also, Duke Energy Ohio Exhibit 6, at page 3 (Duke Energy Ohio agreed to remove from its request the sum of \$986,245, reflecting regular labor and fringe benefits already in base rates).

<sup>19</sup> *Id.*, Duke Energy Ohio Exhibit 6, at page 3.

<sup>20</sup> *Id.*, Staff Exhibit 1, at pages 3-4.

<sup>21</sup> *Id.*, OCC Exhibit 1-A, at page 21; *Id.*, Duke Energy Ohio Exhibit 6, at page 8.

<sup>22</sup> *Id.*, Duke Energy Ohio Exhibit 8-A.

loaders.<sup>23</sup> The OCC then calculated labor loaders on the total supplemental pay as being \$939,863. But the evidence reflects different labor loader percentages for the various affiliates that provided labor in support of the Ohio restoration efforts, and there is no justification for ignoring this specific information in favor of more generic math.

The OCC's math is also problematic in that it does not give consideration to the reductions in labor previously taken by the Company. Specifically, the OCC ignored the \$800,461 in reductions,<sup>24</sup> thereby inflating the percentage applicable to labor loaders. If one uses the labor loading rates for each individual pay company and adjusts for the \$800,461 reduction, the correct loading would be \$565,058 rather than \$939,863.

The tables below capture the inaccuracies resulting from the OCC's failure to calculate labor loaders on a company-specific basis and its failure to include prior reductions. The first table is directly from OCC Exhibit 8-A:

|                           | DEGS       | DE Carolinas     | DE Indiana     | DE Kentucky    | DE Ohio          | Svc Company      | Total             |
|---------------------------|------------|------------------|----------------|----------------|------------------|------------------|-------------------|
| Direct Labor-Payroll      | 238        | 1,230,378        | 35,919         | 66,580         | 3,230,483        | 1,317,095        | 5,880,694         |
| Labor loaders-Peoplesoft  | 87         | 1,975,885        | 66,948         | 117,221        | 1,779,028        | 565,381          | 4,504,551         |
| Loaded labor              | 325        | 3,206,263        | 102,867        | 183,802        | 5,009,512        | 1,882,476        | 10,385,245        |
|                           |            |                  |                |                |                  |                  |                   |
| Fleet                     | -          | 147,925          | 1,320          | 1,572          | 242,847          | 7,556            | 401,220           |
|                           |            |                  |                |                |                  |                  |                   |
| Supervision-Peoplesoft    |            |                  |                |                | 4,673,120        |                  | 4,673,120         |
|                           |            |                  |                |                |                  |                  |                   |
| Less transfers to capital |            |                  |                |                | (202,701)        |                  | (202,701)         |
| Journal corrections       |            | (10,861)         |                |                | (128,197)        | (76,430)         | (215,489)         |
|                           |            |                  |                |                |                  |                  |                   |
| <b>Grand Total</b>        | <b>325</b> | <b>3,343,328</b> | <b>104,186</b> | <b>185,374</b> | <b>9,594,580</b> | <b>1,813,602</b> | <b>15,041,395</b> |

Labor loaders can be calculated from OCC Exhibit 8A using the following formula: Loader = Labor loaders-Peoplesoft / Direct Labor-Payroll. These loaders are reflected as follows:

<sup>23</sup> *Id.*, OCC Exhibit 1-A, at page 16.

<sup>24</sup> *Id.*, OCC Exhibit 1-A, at page 21.

|               | DEGS  | DE Carolinas | DE Indiana | DE Kentucky | DE Ohio | Svc Company |
|---------------|-------|--------------|------------|-------------|---------|-------------|
| Labor Loaders | 36.6% | 160.6%       | 186.4%     | 176.1%      | 55.1%   | 42.9%       |

An adjustment to Duke Energy Ohio rates can then be made. The original labor and loaders are taken from chart above, as shown in OCC Exhibit 8-A. Removing the fringe rate adjustment from Ohio, based on Duke Energy Ohio Exhibit 6 (Wathen Supplemental Testimony), page 8, line 20, would produce the following fringe rate change:

| PayCompany | Labor     | Loaders   | Orig Rate | Less Adj  | Loader Adj | Adj Rate |
|------------|-----------|-----------|-----------|-----------|------------|----------|
| DEO        | 3,230,483 | 1,779,028 | 55.1%     | (800,461) | 978,567    | 30.3%    |

The re-calculated loadings are shown in the chart below, using the rates for each specific pay company,<sup>25</sup> with the rates for Duke Energy Ohio adjusted for the removal of the \$800,461:

| Pay Company | Suppl Comp | Rate | Loadings \$'s |
|-------------|------------|------|---------------|
| DEGS        | 132        | 37%  | 48            |
| DEC         | 175,411    | 161% | 281,696       |
| DEO         | 212,562    | 31%  | 65,247        |
| DEK         | 6,365      | 176% | 11,207        |
| DEI         | 6,824      | 186% | 12,720        |
| SvcCo       | 454,501    | 42%  | 190,599       |
| Total       | 855,796    |      | 561,516       |

These charts are significant in that they confirm the lack of evidentiary support for the OCC's calculations on which the Commission relied in reducing the Company's request. A reduction of \$939,863 for labor loaders is not supported by the record and this aspect of the Commission's decision should be reviewed.

As noted, the Order also reduces the total recovery by \$1,112,591 for supervision costs associated with supplemental pay and regular pay to salaried employees. This is also in error. First, Duke Energy Ohio does not load supervision costs on supplemental compensation or on

---

<sup>25</sup> *Id.*, OCC Exhibit 13-A, rows 1389 to 1896.

compensation for Duke Energy Corporation entities other than Duke Energy Ohio.<sup>26</sup> As such, the Company's request does not include *any* amounts for supervision costs associated with supplemental pay.

Second, the correct, post-audit figure for regular pay to salaried employees (that is, \$329,929)<sup>27</sup> does not represent additional monies paid to salaried employees on an hourly basis. Rather, this amount is merely a reflection of the time charged by salaried employees directly to the Ohio storm restoration efforts. To the extent the OCC proposed further reduction for supervision costs on the mistaken assumption that this amount reflected *additional* monies paid to salaried employees, it did so in error. Consequently, it is improper to reduce the request by \$1,112,591.

The OCC's errors in respect of calculating labor loader percentages, determining total labor loaders associated with supplemental pay, and including supervision costs on such pay, all of which have been perpetuated by the Commission's decision, merit reconsideration. Authorized recovery should therefore be increased by \$2,052,454.

**IV. The Commission erred in reducing Duke Energy Ohio's request by an amount equal to the costs charged by Duke Energy Ohio to affiliates for storm restoration services provided by Duke Energy Ohio employees and the Commission's determination in this regard is unjust, unreasonable, and against the manifest weight of the evidence.**

Despite the evidence of record, which included an audit by Staff confirming recoverability of affiliate labor,<sup>28</sup> the Commission has concluded that Duke Energy Ohio must reduce its recovery by \$1,371,657 for issues surrounding affiliate compensation. The Commission seemingly agrees with the OCC that, because Duke Energy Ohio employees provided storm response assistance for utility affiliates, Duke Energy Ohio customers are entitled to a credit commensurate with the labor

---

<sup>26</sup> *Id.*, OCC Exhibit 8-B.

<sup>27</sup> See footnote 14, *supra*, the regular pay of Duke Energy Ohio's salaried employees has already been adjusted, consistent with Staff recommendations.

<sup>28</sup> *Id.*, Duke Energy Ohio Exhibit 6, at page 3.

charged to affiliates. The Commission's determination is not supported by the evidence of record, reflects a mistake or misapprehension in the review of that evidence, and serves to complicate future storm restoration activities.

The OCC theorizes that Duke Energy Ohio received payments from affiliates that should be "flowed through" to ratepayers. Thus, the Commission concludes, the amounts recoverable under Rider DR-IKE should be reduced by the sum of the payments to Duke Energy Ohio from Duke Energy Indiana and Duke Energy Kentucky for services provided in those jurisdictions by Duke Energy Ohio employees. After reaching this conclusion, the Commission then relied on the OCC's speculation and unsubstantiated ratios to determine an amount by which to reduce Duke Energy Ohio's recovery for its storm restoration efforts. This rationale is flawed both from an affiliate accounting standpoint and because it bases recovery on pure conjecture.

The Commission's reduction ignores the Company's adherence to affiliate transaction agreements approved by the Commission and pursuant to which revenue does not flow from one utility to the other. As explained by Duke Energy Indiana witness Kent Freeman, internal accounting adjustments must be made to charge the expenses for the entity receiving labor from its affiliates. These accounting adjustments are critical to maintaining proper records of which affiliate incurred a given expense. Adherence to this charging mechanism is necessary to ensure that no improper cross-subsidies flow from one company to an affiliate.<sup>29</sup> These charges are not addressed by way of money flowing from the receiving entity to its affiliates. Rather, the expenses are addressed – and thus relevant – only in the context of the next rate case for that receiving entity.<sup>30</sup> As even the OCC, through its witness, admitted, where work is performed in Kentucky by Duke Energy Ohio employees, the labor associated with this work would be charged to Kentucky. And

---

<sup>29</sup> *Id.*, Transcript of Hearing, Volume III, at pages 411-412.

<sup>30</sup> *Id.*, Transcript of Hearing, Volume II, at page 274.

the total expenses for affiliate labor would be a factor in determining the revenue requirement in Duke Energy Kentucky's next rate case.<sup>31</sup> The converse is also true – when Duke Energy Ohio's affiliates provide labor in Ohio, the Company is charged for that labor. And this proceeding, authorized in Duke Energy Ohio's most recent rate case, is the means for recovering these additional expenses. The evidence thus confirms that Duke Energy Ohio does not receive actual dollars from its affiliates in return for allowing its employees to assist with the affiliates' emergencies and it should not be expected to flow through to ratepayers the non-existent payment from the affiliates for its employees' labor.

The method by which Duke Energy Ohio accounted for affiliate labor, including that labor charged to Duke Energy Kentucky, is consistent with long-standing practice, as confirmed by an audit of the Company's corporate separation plan.<sup>32</sup> Reducing the Company's request to account for expenses allocated to affiliates renders the affiliate transaction agreements a nullity, forces an actual flow of dollars to be exchanged between these affiliates to ensure proper accounting of revenue and labor, and undeniably complicates future storm restoration as Duke Energy Ohio will incur additional time and expense in processing accounts receivable and/or accounts payable. Such unnecessary administrative burden is not conducive to the timely and efficient restoration of electric service. Furthermore, such a reduction unfairly penalizes Duke Energy Ohio as its request for cost recovery in this proceeding never included amounts charged to affiliates for work performed in other states.

For these same reasons, the Commission must reconsider the reduction of \$1,063,785 in alleged costs charged to Duke Energy Indiana. Just as the accounting adjustments to reflect Duke Energy Ohio employees' labor performed in Kentucky cannot serve to reduce the Company's cost

---

<sup>31</sup> *Id.*, Transcript of Hearing, Volume II, at pages 272-274.

<sup>32</sup> *In the Matter of the Application of Duke Energy Ohio for Approval of the Second Amended Corporate Separation Plan*, Case No. 09-495-EL-UNC, Final Report of Auditor (March 29, 2010).

recovery, accounting adjustments to reflect Duke Energy Ohio employees' labor performed in Indiana cannot have that same effect. More troubling about the Commission's review of Indiana charges is the additional fact that it is certainly the product of speculation and conjecture. Notably, although the OCC subpoenaed records from Duke Energy Indiana in the context of this proceeding, it did not affirmatively present any evidence that would have established that Duke Energy Ohio allocated \$1,063,785 in costs to Duke Energy Indiana. Rather, the OCC simply compared the total charges allocated to Duke Energy Kentucky by Duke Energy Ohio to the overall storm costs in the Commonwealth and guessed that the same ratio was applicable in Indiana such that, according to the OCC's supposition, Duke Energy Ohio must have allocated \$1,063,785 in labor expense to Duke Energy Indiana. But this methodology is erroneous, is not supported by the evidence, and merits another review.

Notably, the OCC – and now the Commission, by accepting this methodology – overlooked the evidence that identifies \$3,385 as the actual amount charged to Duke Energy Indiana by Duke Energy Ohio.<sup>33</sup> Thus, to the extent the Commission elects to disregard affiliate transaction agreements and impose onerous accounting procedures on Duke Energy Ohio (that will invite inequities as its affiliates cannot be so compelled to adopt new procedures), it should disregard the arbitrary and haphazard methodology employed by the OCC and, instead, rely upon the undisputed factual evidence.

With regard to an additional issue, the Commission recited the OCC's concern that Duke Energy Carolina charged more to Duke Energy Ohio than it did to Duke Energy Indiana, for the same employees. The OCC contends that this is unreasonable, whatever the rationale. But the documents offered into evidence by the OCC confirm that Duke Energy Carolinas did not charge

---

<sup>33</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Duke Energy Ohio Exhibit 8-A, OCC Exhibit 14-A (\$1,182 plus labor loaders of \$2,203 (from Duke Energy Indiana rate of 186.4%) for a total of \$3,385).

markedly higher hourly rates to Duke Energy Ohio. Rather, using a straight average of hourly rates, Duke Energy Carolinas charged an hourly rate of \$43.31 to Duke Energy Indiana and an hourly rate of \$43.30 to Duke Energy Ohio.<sup>34</sup> Furthermore, as Duke Energy Ohio witness Beth Clippinger explained, overall labor rates may have been higher in Ohio than in Indiana because of union agreements and the manner in which employees of affiliated companies were deployed first to Indiana and then to Ohio. Understandably, if employees exceeded their regular shifts and thus were working hours in Ohio that contractually entitled them to overtime or double-time pay, Duke Energy Ohio would have compensated these employees consistent with their labor agreements.<sup>35</sup> This testimony cannot properly be rebutted by the OCC's speculative conclusion that Duke Energy Carolinas overcharged Duke Energy Ohio.

The Commission's conclusion that affiliate labor costs should be reduced by \$1,371,657 is in error and should be reversed. It is incorrect to state that Duke Energy Ohio "provided no evidence to rebut OCC's calculation."<sup>36</sup> Affiliate labor was appropriately charged to the companies for whom services were provided, pursuant to affiliate transaction agreements, and there is no regulation in Ohio that requires actual dollars to be credited to one utility when it performs work for an affiliate.<sup>37</sup>

**V. The Commission's finding that Duke Energy cannot recover \$9,717,564 of the costs associated with contractor labor is unjust, unreasonable, and contrary to the manifest weight of the evidence.**

Just as the Commission erred in reducing costs associated with affiliate labor, so too did it err in reducing costs associated with contract labor. The Commission's decision in this regard is not

---

<sup>34</sup> *Id.*, Duke Energy Ohio 8-A and OCC Exhibit 14-A.

<sup>35</sup> *Id.*, Transcript of Hearing, Volume III, at pages 371-372.

<sup>36</sup> *Id.*, Opinion and Order, at page 14.

<sup>37</sup> *Id.*, Transcript of Hearing, Volume II, at page 272.



predicated upon the evidence and, when taken to its logical conclusion, mandates additional, not less, cost recovery by Duke Energy Ohio.

Although not mentioned with any degree of significance in the Order, Staff conducted an audit of Duke Energy Ohio's request, based on its complete access to any and all of the records on which the Company relied in seeking recovery of reasonably and prudently incurred costs. Significantly, Commission Staff had access to over 8,000 entries of data, representing all of the journal entries related to the storm restoration, serving to document the expenses at issue. And Staff reviewed hundreds of documents to substantiate the accuracy and reasonableness of the charges. The documents reviewed by Staff included invoices, time sheets, receipts, and material requisition forms.<sup>38</sup> This review by Staff, which was conducted consistent with accepted and objective audit practices, demonstrates the evidentiary support for recovery of the disallowed amounts. Following this audit, Staff recommended a reduction of \$46,888 for contractor labor.<sup>39</sup> Duke Energy Ohio agreed to this reduction. Contrary to the recommendations of its Staff, the Commission concludes that Duke Energy Ohio cannot recover \$9,718,554<sup>40</sup> in contractor labor costs. This conclusion is unjust, unreasonable, and contrary to the manifest weight of the evidence.

The first reduction ordered by the Commission concerns amounts that the OCC argued were charged to entities other than Duke Energy Ohio. Specifically, in accepting the OCC's rationale, the Commission found that charges totaling \$2,748,442 must be removed from the Company's request because the PayCo associated with these charges was not Duke Energy Ohio.<sup>41</sup> A closer review of the evidence associated with this issue demonstrates the error in the OCC's reasoning.

---

<sup>38</sup> *Id.*, Transcript of Hearing, Volume I, at pages 134-135, 137.

<sup>39</sup> *Id.*, Post-Hearing Brief of the Staff of the Public Utilities Commission of Ohio, at page 5 (June 15, 2010).

<sup>40</sup> The Opinion and Order reflects an amount of \$9,717,564; however, this is assumed to be a typographical error as the numbers comprising this amount are \$6,970,112 and \$2,748,442.

<sup>41</sup> *Id.*, OCC Exhibit 1, at page 30; See also, Opinion and Order, at page 15.

To the extent records reflect a "PayCo" other than Duke Energy Ohio, such a notation is irrelevant to the question of the state in which contract labor was performed. As the evidence confirmed, the "PayCo" designation is meaningful only with regard to internal labor.<sup>42</sup> Consequently, the fact that a "PayCo" may have been listed as Duke Energy Indiana or Duke Energy Kentucky does not lead to the conclusion that contractors were not working in Ohio.

Furthermore, it is noteworthy that nearly *all* of the invoices that the OCC recommended be excluded from this proceeding reflect tree trimming expenses. Indeed, of the OCC's suggested \$2,748,442 reduction, \$2,741,291 reflects invoices from tree trimmers.<sup>43</sup> In comparison, the total tree trimmer costs identified by Duke Energy Ohio are \$3,083,704.<sup>44</sup> Thus, accepting the OCC's recommendation would yield a result in which Duke Energy Ohio recovers only \$342,414 in tree trimming expenses related to the catastrophic wind storm. Of course, the number of outages and extent of physical damage do not support such a result and, instead, confirm the fact that the "PayCo" reference cannot be used to discount contractor costs. Therefore, the \$2,748,442 reduction should be reconsidered.

The reduction of \$6,970,112 ordered by the Commission's is also based upon the arguments of the OCC, which maintain that two-thirds of the contractor labor costs must be rejected only because 66 percent "is less than 90 percent."<sup>45</sup> In supporting its finding, the Commission reiterates the OCC's purported justification for the reduction: (1) invoices were sent to an affiliate; (2) project codes reference another state; (3) the location of the work on the invoices is listed as another state; and (4) work *may* not have been done in Ohio because crews did not have meals, sleep, or wash

---

<sup>42</sup> *Id.*, Transcript of Hearing, Volume II, at page 280.

<sup>43</sup> *Id.*, at Duke Energy Ohio Exhibit 10-B and OCC Exhibit 12-B (both of which are confidential).

<sup>44</sup> *Id.*, at Duke Energy Ohio Exhibit 10-B and OCC Exhibit 12-B (both of which are confidential).

<sup>45</sup> *Id.*, Transcript of Hearing, Volume II, at page 278.

their clothes in Ohio.<sup>46</sup> Most disturbing about the OCC's argument, embraced by the Commission, is that it recommends a blanket two-third reduction in costs because contractors also assisted Duke Energy Ohio's sister utilities in storm restoration efforts in those jurisdictions. The Commission stated that the reduction would "account for other charges for which there is no evidentiary support for recovery."<sup>47</sup> But the Commission's statement cannot be reconciled with the evidence. And, of course, there was no dispute that Duke Energy Ohio actually paid these amounts to contractors.

The reasons offered by the OCC, and accepted by the Commission, must be considered with reference to the protocol used by the Company for purposes of charging labor, materials and suppliers and logistics. As Duke Energy Ohio witness James E. Mehring confirmed, storm codes were created at the beginning of the restoration activities; these codes were state-specific such that contractors working in Ohio would have used the Ohio charge code.<sup>48</sup> There is no evidence to refute the consistent use of these storm codes by contractors. Indeed, *all* of the summary invoices on which the OCC relied expressly and unambiguously reflect the Ohio storm codes.<sup>49</sup> The OCC's arguments, accepted by the Commission, that the summary invoices are wrong because of entries on time sheets are misplaced. The evidence clearly confirmed that Erlanger, Kentucky, served as a staging area for Duke Energy Ohio, which meant that contractors reported to Kentucky for their assignments prior to being dispatched to sites in Ohio. Furthermore, invoices for Ohio work were mailed to Kentucky, as the individual processing these invoices works out of an office located in Kentucky. And given the geographic proximity between Duke Energy Ohio's service territory in southwest Ohio and Kentucky, it is entirely reasonable for crews to have slept, dined, and washed their clothes in the Commonwealth.

---

<sup>46</sup> *Id.*, Opinion and Order, at page 15.

<sup>47</sup> *Id.*, Opinion and Order, at page 16.

<sup>48</sup> *Id.*, Transcript of Hearing, Volume I, at pages 48-49.

<sup>49</sup> *Id.*, OCC Exhibit 1-A, Exhibit AYJ-A (project number reference listed as "STMOH0812").

A determination of cost recovery cannot be made on a generic ratio, such as was done by the Commission. But even if such a determination were to be made, the evidence does not support a nearly \$7 million reduction in costs for Duke Energy Ohio. As the evidence confirms, between Duke Energy Ohio, Duke Energy Indiana, and Duke Energy Kentucky, the percentage of total outages from the wind storm for each company was 61 percent, 28 percent, and 11 percent, respectively. As further confirmed by the evidence, Duke Energy Ohio's percentage of total restoration costs was 58 percent, as compared to 33 percent for Duke Energy Indiana and 9 percent for Duke Energy Kentucky.<sup>50</sup> Thus, aligning the extent of the damage with the costs, it necessarily follows that the costs incurred by Duke Energy Ohio were consistent with the extent of the outages to which it responded.

Here, the Commission attempts to shift costs to utilities outside of its jurisdiction and that are regulated by other commissions. But the Commission lacks authority to do this. Unfairly treating almost \$7 million as if it had been additional costs incurred by Duke Energy Ohio on behalf of Duke Energy Indiana and Duke Energy Kentucky theoretically increases their percentage of total costs to 48 percent and 14 percent, respectively. And it reduces Duke Energy Ohio's percentage of the total costs to 39 percent. As a result, the jurisdiction that sustained the majority of the outages does not similarly incur the majority of the costs, as would be the result under standard cost-causation principles. But such a haphazard assignment of costs overlooks the uncontested fact that significant field work was performed in Ohio by contractors. These contractors assisted in replacing 707 utility poles and 499 transformers; they helped repair over 32 miles of conductor.<sup>51</sup> The Commission apparently glosses over the fact that Duke Energy Ohio's service territory sustained the brunt of this storm, which necessitated extensive restoration work in the field. Instead, the

---

<sup>50</sup> *Id.*, Transcript of Hearing, Volume III, at pages 377-378.

<sup>51</sup> *Id.*, Duke Energy Ohio Exhibit 2, at page 6.

Commission unreasonably and arbitrarily shifts expenses incurred for the benefit of Ohio customers to other states. But, as the Commission's Order demonstrates, randomly assigning costs without regard to the reasons for which such costs were incurred runs afoul of ratemaking principles and basic principles of fairness, as well as the rules of evidence.

Insofar as it concerns an arbitrary reduction, based solely on the number of states in which Duke Energy utilities were adversely affected by the 2008 wind storm, Duke Energy Ohio submits that the Commission's decision is also unreasonable and unjust as it ignores the undeniable consequence of that decision. Significantly, taking the Commission's logic to its natural conclusion, Duke Energy Ohio must be permitted recovery of some portion of the costs incurred for contract labor in the neighboring states. But the Commission did not authorize such recovery here. That is, of the approximate \$17 million in costs incurred in Indiana, the Commission does not apply the natural balancing adjustment to assign a similar, arbitrary amount of these costs to Ohio customers. The logic to do so is a mirror image of the logic employed by the OCC and adopted by the Commission in its Order. Nor does it employ the rationale set forth in its Order to assign some part of the nearly \$5 million in costs incurred in Kentucky to Duke Energy Ohio. But such a result is mandated by the Commission's logic in assigning costs, incurred in respect of the Ohio restoration efforts, to Duke Energy Indiana and Duke Energy Kentucky. After all, if the Commission is to unsystematically assign costs for contract labor to Duke Energy Indiana and Duke Energy Kentucky, it follows that it must also assign one-third of the Indiana contract labor costs (now inflated by \$3.5 million) and one-third of the Kentucky contract labor costs (also inflated by \$3.5 million) to Duke Energy Ohio. Of course, this discussion demonstrates the error in the Commission's decision. It cannot justify a nearly \$7 million reduction in costs on the faulty premise that such costs must have been incurred in other states affected by the storm. The Commission's decision reflects a misinterpretation of the evidence and is thus deserving of reconsideration.

## **VI. Request for Clarification**

In its Order, the Commission directed Duke Energy Ohio to submit tariff pages, consistent with the Order. The Commission further instructed that new rates for Rider DR-IKE cannot become effective until the final tariff pages are filed with the Commission. Those tariff pages would enable the recovery of part of the costs at issue in this proceeding; namely, \$14,104,577, plus carrying charges. Duke Energy Ohio does not contest the recovery of this amount; however, it does seek rehearing in respect of the costs the Commission found it could not recover, or \$14,368,667. Duke Energy Ohio does not believe that its ability to pursue further review of the Commission's decision will be undermined by implementing tariffs to commence recovery of the first \$14,104,577 in storm costs. Although Duke Energy Ohio will carry out the Commission's order by filing tariff pages allowing the recovery of \$14,104,577, its ability to recover the balance of its storm costs is currently undecided. Consequently, until such time as the appeal process is complete, there will be some part of the Commission's Order on which the Supreme Court's decision could operate. As a result, Duke Energy Ohio does not believe implementation of tariffs now will jeopardize its right of review.<sup>52</sup>

But as different opinions may be offered, Duke Energy Ohio seeks clarification from the Commission that initiating recovery of costs authorized to date will not render any subsequent requests for review, including appeals, moot. Toward that end, Duke Energy Ohio respectfully requests that the Commission accept tariff pages that expressly and unambiguously create the opportunity for revision to the tariff amounts following completion of the review process. Alternatively, Duke Energy Ohio seeks a stay of the Commission's directive to file tariff pages until such time as the review process has been exhausted. As a stay only operates to extend the amount

---

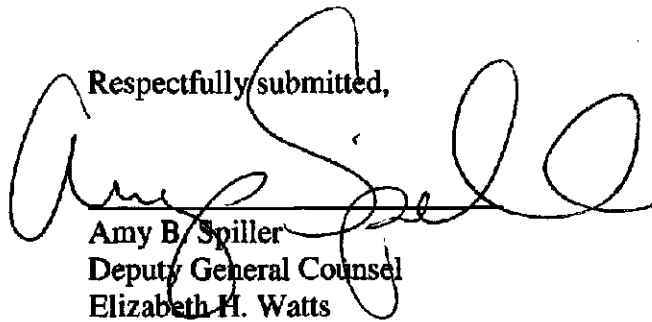
<sup>52</sup> *Cincinnati Gas & Electric Company v. Public Utilities Commission of Ohio*, (2004), 103 Ohio St.3d 398, 401, 2004 Ohio 5466, 816 N.E.2d 238 (where a commission order has been carried out, no stay has been granted, and there is nothing left upon which the court's decision could operate, appeal deemed moot).

of carrying charges, this is not the preferred option. But if the Commission cannot accept tariff language that expressly preserves Duke Energy Ohio's right of appeal, this would be the only option.

### **Conclusion**

For the reasons discussed above Duke Energy Ohio respectfully requests the Commission grant this Application for Rehearing to modify the Opinion and Order issued in the above-captioned proceeding.

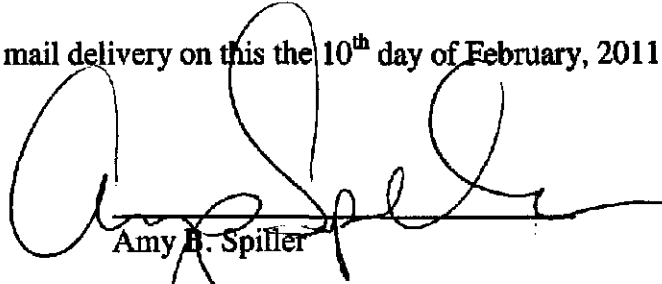
Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Amy B. Spiller', is written over the typed name and title.

Amy B. Spiller  
Deputy General Counsel  
Elizabeth H. Watts  
Associate General Counsel  
Duke Energy Business Services LLC  
Cincinnati office:  
139 East Fourth Street  
1303-Main  
P.O. Box 960  
Cincinnati, Ohio 45201  
(513) 287-4359

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following parties via ordinary mail delivery, postage prepaid, and/or electronic mail delivery on this the 10<sup>th</sup> day of February, 2011.



Amy B. Spiller

Ann Hotz  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215

Stephen Reilly  
Assistant Attorney General  
Public Utilities Section  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, Ohio 43215

John W. Bentine  
Mark Yurick  
Chester, Wilcox & Saxbe, LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215