

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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**DUKE ENERGY OHIO, INC.'S MEMORANDUM IN OPPOSITION
 TO THE APPLICATION FOR REHEARING OF THE OFFICE
 OF THE OHIO CONSUMERS' COUNSEL**

Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and, for its memorandum in opposition to the Application for Rehearing of the Office of the Ohio Consumers' Counsel (Application), states as follows.

- I. The Commission properly found that Duke Energy Ohio's recovery of storm restoration costs is not influenced by whether Duke Energy Ohio's customers incurred damages as a result of the storm.**

In its first assignment of error, the Office of the Ohio Consumers' Counsel (OCC) argues that the Commission's Opinion and Order of January 11, 2011, (Opinion) is unjust and unreasonable in that it does not compare Duke Energy Ohio's storm costs to the damages, if any, sustained by the Company's customers as a result of the same storm. The OCC also contends that any rate determination must consider the adequacy of the facilities and services provided by the utility company and that, because some of Duke Energy Ohio's customers endured extended power outages, its facilities and services were somehow inadequate.¹ The OCC thus reasons that any cost recovery is prohibited. The OCC's argument is misplaced.

¹ *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, Application for Rehearing of the Office of the Ohio Consumers' Counsel, pages 2-4 (February 10, 2011)(hereinafter "OCC Application").

Significantly, there is no regulation that conditions a utility company's recovery of prudently incurred storm costs upon the level of losses that customers may have sustained from that same storm. And the OCC has admitted the absence of any such regulation.² But the OCC now attempts to manufacture a basis for its Application, citing to R.C. 4909.152. A closer review of that statutory provision confirms the conclusion that Duke Energy Ohio is entitled to recover its storm costs.

First, the statute is discretionary in that the Commission *may* consider the facilities and services provided by the utility when fixing rates. Further, the Commission *may* also consider the value of the service provided by the utility and the ability of the utility to improve upon that service.

Here, the service provided by Duke Energy Ohio – immediate storm response and restoration of service – is invaluable. Absent the Company's comprehensive and effective storm response plan, as acknowledged by the Commission,³ and its ability to leverage skilled field workers from other jurisdictions, Duke Energy Ohio's customers would have endured outages lasting longer than nine days given the magnitude of the storm and the damage left in its wake. Further support for the importance of the services provided by Duke Energy Ohio is the undisputed fact that 40 percent of the Company's customers had their power restored within forty-eight hours of the storm. And 70 percent of Duke Energy Ohio's customers had their power restored within four days.⁴ In the days following the storm, Duke Energy Ohio installed 707 utility poles – many along rural areas inaccessible by vehicles. The Company also installed 499 transformers and repaired more than 32 miles of overhead conductor. Duke Energy Ohio's storm

² *Id.*, Transcript of Hearing, Vol. II, page 229.

³ *Id.*, Commission Opinion and Order, page 5 (January 11, 2011).

⁴ *Id.*, Transcript of Hearing, Vol. II, pages 6-8.

response management was undeniably efficient, adequate, and valuable and the Company is thus entitled to recover its costs.

The OCC relies upon the decision in *Columbus and Southern Ohio Electric v. Public Utilities Commission of Ohio*, (1980), 64 Ohio St.2d 175, 413 N.E.2d 128, for the proposition that Commission need not authorize recovery of costs incurred in responding to an emergency.⁵ But this generalization inaccurately references the facts relevant to that decision. The issue before the Court in that case was *not* whether the utility could recover costs for fuel that needed to be procured in the market in the wake of a crisis. Rather, the issue was whether the utility company's constitutional rights were infringed upon when the Commission determined that it could not recover non-fuel costs, which were undefined by the Court. In affirming the Commission's determination, the Court concluded that the utility had been ordered to do that which it already had a statutory obligation to do and, consequently, there could be no taking of private property without just compensation. Notably, however, the utility in the cited case was authorized full recovery of the fuel costs incurred to maintain a supply of service to its customers. It is critical to understand, in evaluating that decision, that the situation only had to do with the provision of adequate generation and had nothing whatsoever with the repair of distribution facilities in the wake of an unprecedented storm. Here, there is no dispute that costs directly related to the repair of the distribution system were incurred by the Company. And these are the costs for which Duke Energy Ohio seeks recovery.

Further undermining the OCC's current argument is its prior agreement. As the Commission observed in its Opinion, parties to a Stipulation and Recommendation filed in Case No. 08-709-EL-AIR, *et al.*, acknowledged that the Company incurred costs in responding to the wind storm. And these parties, including the OCC, also agreed to a deferral mechanism through

⁵ *Id.*, OCC Application, page 4.

which recovery of reasonably and prudently incurred costs would be addressed.⁶ For the OCC to suggest now that Duke Energy Ohio should be denied any recovery whatsoever reflects a continued disregard for its prior agreement as reflected in the Stipulation and Recommendation referenced herein and negatively impacts the ability for parties to negotiate settlements in good faith. Accordingly, the proposition now advanced by the OCC, namely, that utilities should bear the risk that storm costs will not be recoverable, even when the utilities are forced to rebuild their systems due to catastrophic natural disasters, is neither supported by the relevant case law nor the OCC's prior commitments.

The OCC's first argument on rehearing belies its prior admissions. The OCC, through its witness, admitted that a utility company must be allowed to recover reasonable storm costs.⁷ The OCC, by signing a Stipulation and Recommendation, admitted to some recovery by Duke Energy Ohio. And its own disregard of these prior admissions cannot support rehearing.

II. The Commission properly found that Duke Energy Ohio's recovery of storm restoration costs is not contingent on the business decisions of public utilities beyond the Commission's jurisdiction.

For the second ground for rehearing in its Application, the OCC argues that the "Commission should pay heed to the *Company's* decision not to ask for recovery of costs in Indiana."⁸ But Duke Energy Ohio did not make any decisions in Indiana with respect to the recovery of costs incurred by Duke Energy Indiana. Any decision on whether to pursue cost recovery in Indiana would have been made by Duke Energy Indiana and its parent company, Duke Energy Corporation. In this regard, it is significant that the OCC admitted, through its witness, that a parent company should not be required to make the same decision for each of its

⁶ *Id.*, Opinion and Order, page 7 (January 11, 2011).

⁷ *Id.*, Transcript of Hearing, Vol. II, page 275.

⁸ *Id.*, OCC Application, page 4.

operating utility.⁹ The OCC's faulty premise aside, the Commission correctly found that Duke Energy Ohio should not forego recovery of the storm costs that it incurred. Again, the Commission rightfully observed that the OCC, along with other parties to a prior Stipulation and Recommendation, consented to a mechanism by which Duke Energy Ohio would recover storm costs and thus admitted to some recovery by the Company.

Given the OCC's eagerness to abandon its commitments from prior Stipulations to which it is a signatory, Duke Energy Ohio would be remiss if it did not respond to the OCC's insistence that the decisions in a foreign jurisdiction drive the Commission's determinations.

The rates in Ohio, including those for cost recovery, are determined by this Commission in the exercise of its own statutory jurisdiction. Ohio utility rates are not set, reviewed, or approved pursuant to the actions of a utility company in a foreign jurisdiction. Significantly, the Commission is entrusted with the obligation to set just and reasonable rates for public utilities operating in Ohio.¹⁰ Fulfillment of this obligation is not dependent upon action or inaction in other states. As the North Carolina Supreme Court instructs:

The Corporation Commission (now the Utilities Commission) in this State is empowered and directed to make reasonable and just rates as applied to the distribution and sale of power in this State and not otherwise, and such power cannot be directly controlled or weakened by conditions existent in other states, either from the action or nonaction of official bodies there, or the dealings between private parties. To do otherwise would, in its practical operation, be to withdraw or nullify the power that the statute professes to confer and should not for a moment be entertained.¹¹

As the above language confirms, neither the Commission nor any other entity in Ohio can reasonably apply the decision of other utility companies in other states to the circumstances of

⁹ *Id.*, Transcript of Hearing, Vol. II, page 236.

¹⁰ See generally, R.C. 4909.15 and 4905.22.

¹¹ *State of North Carolina ex rel. Utilities Commission v. Lee Telephone Company*, 263 N.C. 702, 709, 140 S.E.2d 319 (1965)(internal citations omitted). See also, *State of Alabama v. Alabama Public Service Commission*, 293 Ala. 553, 563, 307 So. 2d 521 (1975)("The reasonableness of rates to be fixed by the state must be decided with reference exclusively to what is just and reasonable in respect of domestic business.")(Internal citations omitted.)

Ohio utility companies. The Commission's authority does not extend such that it can scrutinize the decisions of entities it does not regulate. And it would be illogical to do so as the regulatory policies and practices as well as other relevant facts and circumstances vary significantly from state to state. Of course, the converse is also true – this Commission's regulation of Ohio public utilities cannot, and will not, be challenged or undermined by circumstances in foreign jurisdictions.

The OCC's request for rehearing on this issue should be denied.

III. The Commission properly found that Duke Energy Ohio is not already recovering the costs related to the 2008 wind storm through base rates.

The OCC seeks rehearing of the Commission's Opinion on the basis that Duke Energy Ohio is already recovering storm costs in base rates and, presumably, it has or will recover these storm costs. But this contention is incorrect and unsupported by any credible or reliable evidence.

The OCC's witness admitted that, astonishingly, he formed his opinion on which the OCC now relies without knowing the amount of storm costs included in the Company's base rates at the time of the windstorm. The OCC's witness further admitted that he formed this opinion without knowing – or even inquiring into – whether Duke Energy Ohio had ever over-recovered on storm costs.¹² Thus, while the OCC wants the Commission to believe that Duke Energy Ohio has, in effect, built up a reserve for storm costs through base rates and will continue to do so, such that any recovery here must be disallowed, its witness offers no evidence to justify this erroneous conclusion. And it is indeed erroneous.

It is undisputed that, at the time of the windstorm, Duke Energy Ohio's base rates included about \$2 million for operating and maintenance (O&M) storm costs as established in

¹² *Id.*, Transcript of Hearing, Vol. II, page 233.

2005 rate case. In the intervening years, Duke Energy Ohio incurred O&M storm costs well in excess of that which was included in base rates. As Duke Energy Ohio witness William Don Wathen Jr., General Manager and Vice President of Rates, Ohio and Kentucky, confirmed, even excluding costs associated with the windstorm, the Company had incurred more than \$5 million in O&M storm costs in 2008, while base rates recovered only \$2 million for such costs. Similarly, and by way of example only, total storm costs in 2007 were approximately \$5.4 million. Of the 2008 storm costs that were not already being recovered through base rates, the Company is seeking recovery only of those costs related to the windstorm that occurred during the test year of a pending rate case, thus leaving at least the \$3 million of 2008 storm-specific costs unrecovered.

The OCC's argument is further problematic in that it ignores the well-established rate-making principle that costs are fixed, known, and measurable. Instead, the OCC proposes that the Commission determine cost recovery on the notion that, at some point in the future, everything evens out. But regulatory policy and rate recovery, administered pursuant to statutory law and Commission oversight, cannot be based upon a naïve optimism that everything will simply "work out in the end."

Some simple math might help explain why the OCC's proposal here is misguided. No party disputed that the Company's recovery of storm costs in base rates is approximately \$2 million.¹³ Following OCC's logic, it would take over 14 years, at the current rates, for the Company to the \$28.4 million in storm costs incurred in respect of Hurricane Ike (assuming no carrying costs). Of course, there is one important, albeit absurd, assumption that must be made. Specifically, one would have to assume that storm costs are \$0 for all these 14 years. It is

¹³ *Id.*, Duke Energy Ohio Exhibit 5, pages 4-5.

unlikely that any reasonable person would assume that the Company would have no storm damages for the next 14 years; however, that *unreasonable* assumption must be made to accommodate the OCC's assertion that the Company will *eventually* recover the storm costs associated with Hurricane Ike in base rates.

The OCC's Application fails to warrant rehearing on this issue.

IV. The documents offered into evidence in this proceeding provide a proper foundation for Duke Energy Ohio's cost recovery.

The OCC asks, in its fourth assignment of error, the Commission to review its Opinion, claiming that such Opinion is not adequately supported by the record.¹⁴ Duke Energy Ohio agrees with the OCC that the Commission's decision cannot be reconciled with the evidence. But the agreement ends here. As set forth in its Application for Rehearing, incorporated herein by reference, Duke Energy Ohio submits that the Commission's Opinion merits review and revision such that the Company is authorized to recover all of its storm costs, totaling \$28,473,244, plus carrying costs. To the extent the OCC is seeking a revision to the Opinion such that Duke Energy Ohio recover none of its storm costs, that request should be denied.

As detailed in its filing and confirmed by the testimony and documents admitted into evidence, Duke Energy Ohio identified and documented the costs for which it is seeking recovery in this proceeding. These costs were subject to a customary audit by Commission Staff that supported the recovery of the amount requested by Duke Energy Ohio, or \$28,473,244.

A. Labor Reporting

Amazingly, the OCC argues in its Application that the Commission should reject *all* costs associated with internal, hourly labor not otherwise reduced by the Commission's Opinion.¹⁵ The OCC reasons that Duke Energy Ohio did not provide sufficient detail in its records as

¹⁴ *Id.*, OCC Application, page 6.

¹⁵ *Id.*, OCC Application, page 7.

compared the records regarding Indiana storm costs. This argument is predicated upon a blatant manipulation of the evidence.

The OCC offered into evidence OCC Exhibit 13-B, which is only a *portion* of the information otherwise provided to the OCC, and it attempted to assert that Duke Energy Ohio's records were incomplete or inadequate. But the testimonial evidence does not support such an assertion. Indeed, in response to examination by counsel for the OCC, Duke Energy Ohio witness Beth Clippinger explained that Exhibit 13-B did not mirror OCC Exhibit 14-B because the OCC had reformatted and *reduced* the amount of detail contained in OCC Exhibit 13-B.¹⁶ Furthermore, Duke Energy Ohio Exhibit 8-B detailed *every* employee who participated in the Ohio storm restoration efforts as well as total amount paid, total hours worked, total composite rate of pay, normal rate of pay, total overtime paid, total overtime hours, and total overtime rate of pay for *each* of these employees.

Despite its admission that "the restoration efforts of the Company's hourly paid linemen and other field crews were commendable" such that there was no review or challenge to the costs and expenses associated with these efforts, the OCC now argues that Duke Energy Ohio failed to adequately support these costs and expenses. In doing so, the OCC attacks the credibility of Duke Energy Ohio witness Clippinger, suggesting that she provided inconsistent statements. But an accurate review of the record compels a conclusion to the contrary.

Ms. Clippinger properly and sufficiently explained how the information reflected under the "\$/Ike" column was calculated. As Ms. Clippinger succinctly stated, when asked how "this Ike dollar-per-hour rate" was established, "it's very simply just the Ike dollars recorded versus the Ike hours reported in the payroll system to come up with a dollar per hour. It represents a

¹⁶ *Id.*, Transcript of Hearing, Vol. III, page 345.

composite.”¹⁷ Attempting to inject inconsistency where none exists, the OCC now argues that Ms. Clippinger described the “Ike\$/Hour” as representing overtime but also a blended rate of regular time and overtime. The OCC glosses over a critical distinction here. Ms. Clippinger’s statement that “Ike\$/Hour” reflected overtime was relevant only to calculating labor costs to capitalize units of property. In other words, the characterization of overtime was used only in respect of moving labor dollars from O&M to capital accounts.¹⁸ This calculation is predicated upon the assumption that a majority of storm restoration work occurs during overtime hours, which was confirmed by the undisputed evidence that, in response to the wind storm, 78 percent of the hours worked were overtime hours.¹⁹ Ms. Clippinger’s description of the “Ike\$/Hour” reflecting a composite or blended rate for purposes of O&M costs is also correct in that employees understandably worked regular and overtime hours when responding to the storm.

The statements by Ms. Clippinger are not inconsistent and, instead, reflect responses to different questions posed by the OCC. And the OCC’s request for rehearing on the basis of an improper manipulation of the evidence should be rejected.

B. Splices and Cut Outs

The OCC suggests that because Duke Energy Ohio could not identify the exact locations at which a splice or cut out was used during storm restoration, it must not recover “the dollar amounts associated with both the labor and other expenses.”²⁰ In other words, the OCC wants the Commission to reduce labor costs and other expenses further because it does not record with specificity where splices and cut outs were installed during the restoration process. As Duke Energy Ohio witness James E. Mehring testified, splices and cut outs are integral to the

¹⁷ *Id.*, Transcript of Hearing, Vol. III, pages 356-357.

¹⁸ *Id.*, Transcript of Hearing, Vol. I, page 74.

¹⁹ *Id.*, Transcript of Hearing, Vol. I, page 42.

²⁰ *Id.*, OCC Application, pages 8-9.

restoration process. Simply stated, splices put wires back together so that they can provide power. Destroyed cut outs must be replaced before transformers can be energized. Thus, cut outs are also necessary to getting power restored. Duke Energy Ohio's records regarding materials and supplies were undisputed with regard to the equipment at issue. The 31,880 splices and 942 cut outs, as documented by the record evidence, were used during storm restoration activities. And it is absurd to suggest that the labor associated with equipment that was undeniably incorporated into the process of rebuilding the overhead distribution system must be excluded from recovery.

The OCC's argument should not warrant reconsideration.

C. Storm Cost Management

The OCC maintains that there is no evidence on which the Commission can rely in concluding that Duke Energy Ohio's storm cost management was reasonably controlled and, as a result, that the OCC argues that the Company cannot recover any storm costs. The OCC is wrong. As Duke Energy Ohio witnesses confirmed – without opposition – every employee at Duke Energy is responsible for controlling costs. This attention to costs, and controlling them, was evident from the Company's response to this storm. Among other things:

- It did not employ external labor, at overtime and double time rates, to complete tasks that could be more efficiently completed by using internal labor.
- It secured resources from affiliated utilities in the Carolinas that had been identified for restoration efforts in Texas and Louisiana, thereby enabling efficient restoration.
- It called upon all departments – from IT to warehousing – to answer customer calls and did not engage contractors, at contractor rates, to complete this work.
- It did not require employees to spend valuable time during restoration efforts to document the precise locations on the system where splices and cut outs were installed.

The OCC advocates for an overly burdensome process that would only cause delays in restoring power. It proposes some sort of “special method” for approving costs that are incurred

in the midst of an emergency. Duke Energy Ohio's confirmed culture – where everyone is responsible for controlling costs – served to expeditiously restore power in a reasonable and prudent manner for which full cost recovery should be allowed. OCC's proposed process should be rejected.

D. Capital Costs

The OCC seeks to shift O&M costs into capital accounts because, according to the OCC, Duke Energy Ohio did not explain its capitalization policy. To be clear, the OCC is asking that the Commission impose upon the Company capitalization rates used by two unaffiliated utilities operating in another state under entirely different regulatory systems. The Commission properly concluded that Duke Energy Ohio's capitalization policy was correct.

The policy selected by Duke Energy Ohio was appropriate. As Duke Energy Ohio witness Clippinger explained, the amounts capitalized include the cost of the material as well as the labor to install such material. The amount of labor capitalized during the restoration efforts was determined with reference to standard overtime rates for Company employees. This was done under the assumption that most storm restoration work would be performed during periods of overtime and, importantly, to ensure that all labor costs are transferred to capital accounts.²¹

In contrast to the sound explanation provided by Duke Energy Ohio, the OCC offered only speculation and conjecture in challenging the Company's capitalization policy. The ratio proposed by the OCC's witness is arbitrary and fails to acknowledge several facts. Significantly, in urging a higher capitalization ratio, the OCC's witness could not identify the amount of material used by these other utilities in their respective service territories. Rather, because he did not look any further than a high level overview contained in a third party study, the OCC's witness cannot – and did not – address whether these other companies, for example, replaced the

²¹ *Id.* Transcript of Hearing, Vol. I, page 70 and pages 73-74.

same number of utility poles as were replaced by Duke Energy Ohio.²² Moreover, the OCC's witness fails to acknowledge that a company subject to generally accepted accounting principles has some degree of latitude in establishing its capitalization policies. Differences in respect of types of material capitalized, application of overheads, and timing of capitalizing select items can yield different ratios. The OCC's witness did not delve into these differences and thus cannot now substantiate imposing another entity's undefined capitalization policy upon Duke Energy Ohio.

Furthermore, the OCC's recommended ratio would burden customers, who would pay more money over a longer period of time if additional sums were capitalized.²³ The evidence supports the Commission's determination with regard to the Company's capitalization policy.

The OCC's request for rehearing on this issue should be denied.

V. The Commission did not err in concluding that Duke Energy Ohio's storm response procedures and protocol were appropriate and not in need of further evaluation.

As its final argument for rehearing, the OCC criticizes Duke Energy Ohio's storm response. Although it had no personal knowledge as to the level of destruction caused by the storm, when it was first safe to conduct helicopter fly-overs, or when roads were first accessible to motor vehicle travel after the storm, the OCC inexplicably asserts that Duke Energy Ohio was slow to respond. And it wants the Commission to expend time and resources to satisfy the OCC's unsubstantiated and incorrect assumptions by mandating review and evaluation of the Company's storm response procedures.

In attempting to portray the Company's storm response as delayed and ill-informed, the OCC argues that the person responsible for getting the lights back should, instead, focus on

²² *Id.*, Transcript of Hearing, Vol. II, pages 264-265.

²³ *Id.*, Transcript of Hearing, Vol. I, page 81.

freezer defrosting times and conducting further analysis of how and why weakened trees can eventually fall into overhead power lines.

First, the OCC argues that Duke Energy Ohio could not substantiate the reasons for outages that occurred in the days following the storm. This statement ignores the evidence, not to mention common sense. As Duke Energy Ohio witness Mehring explained, the storm not only brought down trees, it weakened and damaged them. Thus, trees and trees limb continued to fall and make contact with power lines in the days following the storm, thereby causing additional outages. There is nothing more for the Company to substantiate in terms of the reason for lingering outages. And there is nothing more for the Company to know about the potential for damaged trees to break or fall that would render its storm response more effective or efficient in this regard.

The OCC next criticizes the fact that Mr. Mehring did not know how long schools or government offices were closed after the storm or how long it took for freezers to defrost. This criticism is unfounded. Mr. Mehring's responsibility was to get the lights back on as quickly and safely as possible. And he did this; 40 percent of the Company's customers had power restored within 48 hours of sustained hurricane winds raging through southwest Ohio. Seventy percent of Duke Energy Ohio's customers had power restored within four days. Despite the fact that the event resulted in a declared state of emergency, the OCC would rather have had Mr. Mehring conduct an inventory of what businesses were closed after September 14 and, presumably, why they were closed, and analyze whether ice cubes melt faster in a Kenmore or a Whirlpool freezer.

Duke Energy Ohio does not need an analysis such as that urged by the OCC to know that customers are impacted by outages. Indeed, it implements storm response activity to first address

critical sites (e.g., hospitals, police and fire stations, nursing homes) and then, next, those outage locations that, when repaired, will enable power to the largest populations of customers.

The Commission properly found Duke Energy Ohio's storm response to be appropriate and not in need of further review.

VI. Conclusion

For reasons stated herein and in its Application for Rehearing, Duke Energy Ohio respectfully requests that the Commission deny the OCC's Application and, more specifically, reject its request that the Company recover none of the costs incurred in responding to a catastrophic wind storm.

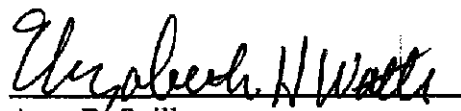
Respectfully submitted,



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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 22nd day of February 2011.


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