

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE APPLICATION  
OF DUKE ENERGY OHIO, INC. FOR  
AUTHORITY TO DEFER ENVIRONMENTAL  
INVESTIGATION AND REMEDIATION  
COSTS.**

**CASE NO. 16-1106-GA-AAM**

**IN THE MATTER OF THE APPLICATION OF  
DUKE ENERGY OHIO, INC. FOR TARIFF  
APPROVAL.**

**CASE NO. 16-1107-GA-UNC**

**FINDING AND ORDER**

Entered in the Journal on December 21, 2016

**I. SUMMARY**

{¶ 1} The Commission grants the application of Duke Energy Ohio, Inc. to extend its deferral authority for environmental investigation and remediation costs for an additional three years.

**II. DISCUSSION**

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is a natural gas company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission, pursuant to R.C. 4905.04, 4905.05, and 4905.06.

{¶ 3} R.C. 4905.13 authorizes the Commission to establish systems of accounts to be kept by public utilities and to prescribe the manner in which these accounts will be kept. Pursuant to Ohio Adm.Code 4901:1-13-13, the Commission adopted the Uniform System of Accounts (USOA), which was established by the Federal Energy Regulatory Commission, for gas and natural gas companies in Ohio, except to the extent that the provisions of the USOA are inconsistent with any outstanding orders of the Commission.

Additionally, the Commission may require the creation and maintenance of such additional accounts as may be prescribed to cover the accounting procedures of gas or natural gas companies operating within the state.

{¶ 4} On November 12, 2009, the Commission authorized Duke to defer environmental investigation and remediation costs related to two former manufactured gas plant (MGP) sites in Ohio for potential recovery of reasonable and prudent costs in a future base rate proceeding. *In re Duke Energy Ohio, Inc., Case No. 09-712-GA-AAM (2009 Deferral Authority Case)*, Finding and Order (Nov. 12, 2009) at 4.

{¶ 5} On November 13, 2013, the Commission authorized the recovery of such environmental investigation and remediation costs as had been incurred by the Company between 2008 and 2012. The Commission authorized Duke to recover and continue deferring environmental investigation and remediation costs. The Commission also established dates by which the deferral authority would end, absent the existence of exigent circumstances. Particularly, in respect to the costs applicable to the property designated as the East End site, the Commission determined that the Company could continue to defer and recover such reasonable and prudent costs through December 31, 2016. *In re Duke Energy Ohio, Inc., Case No. 12-1685-GA-AIR, et al. (Duke Rate Case)*, Opinion and Order (Nov. 13, 2013) at 70-74. On rehearing, the Commission stated that Duke would be permitted to file an application for an extension of its deferral and related recovery authority in the event of exigent circumstances. *Duke Rate Case, Entry on Rehearing* (Jan. 8, 2014) at 4.

{¶ 6} On May 16, 2016, Duke filed an application in the above-captioned proceedings, requesting Commission authorization to continue to defer environmental investigation and remediation costs subsequent to December 31, 2016, and seek recovery of those costs utilizing the same mechanism and process as provided in the *Duke Rate Case*. Duke states in its application that its request is limited to an extension of the Rider MGP

recovery mechanism for costs incurred in respect to the East End site. Duke also requests that the Commission authorize it to extend its current accounting procedures and permit Duke to defer income statement recognition of environmental investigation and remediation costs for the East End site after December 31, 2016.

{¶ 7} On October 27, 2016, the attorney examiner issued an Entry setting forth a procedural schedule for these proceedings and soliciting comments from interested parties.

{¶ 8} On November 23, 2016, comments were filed by Staff, Ohio Partners for Affordable Energy (OPAE), and jointly by Ohio Consumers' Counsel (OCC) and The Kroger Co. (Kroger) (collectively, OCC/Kroger). Duke filed reply comments on December 2, 2016.

**A. Procedural Matters**

**1. Motions for Intervention**

{¶ 9} OCC, OPAE, and Kroger timely filed motions to intervene in these proceedings on June 3, 2016, November 7, 2016, and November 23, 2016, respectively.

{¶ 10} In its memorandum in support of its motion to intervene, OCC argues it has authority under R.C. Chapter 4911 to represent the interests of Ohio's residential utility customers and that the interests of such customers may be adversely affected by these proceedings because residential customers will likely pay charges for the deferred costs through Rider MGP as part of their natural gas distribution rates. OCC further submits that its participation will not unduly prolong or delay the proceedings and that its advocacy will significantly contribute to the full development and equitable resolution of the issues.

{¶ 11} Similarly, OP&A explains that it is an Ohio non-profit corporation with the stated purpose of advocating for affordable energy policies for low and moderate income Ohioans, many of whom are customers receiving natural gas service from Duke. OP&A asserts that those constituting its wide customer base may also be adversely affected by the outcome of these proceedings, adding that its experience and its membership will provide an important and unique perspective toward the resolution of the issues in these cases.

{¶ 12} Kroger states that it has a real and substantial interest in these proceedings and may be adversely affected by the outcome. Kroger also notes that, as a substantial consumer of natural gas in Duke's service territory, it cannot be adequately represented by any other party. As a final matter, Kroger claims that, as a regular and active participant in Commission proceedings, Kroger will contribute to the full development and equitable resolution of the issues in these proceedings.

{¶ 13} No memoranda contra the motions to intervene were filed.

{¶ 14} The Commission finds that the motions to intervene filed by OCC, Kroger, and OP&A comply with the requirements set forth in R.C. 4903.221 and Ohio Adm.Code 4901-1-11, and should, therefore, be granted.

## **2. Motions for Protective Order**

{¶ 15} On November 23, 2016, Staff filed a motion for protective order and memorandum in support, seeking protection of information asserted to be confidential by Duke during Staff's investigation of these matters. While Staff does not concede that the information designated as confidential by Duke constitutes trade secrets, Staff requests that the redacted portions of its comments be protected to the extent deemed necessary by the Commission.

{¶ 16} Subsequently, on December 2, 2016, Duke filed a motion for protective order and memorandum in support in conjunction with its reply comments. In support of its motion, Duke asserts that it addresses critical utility infrastructure in its reply comments, information which the Commission previously afforded confidential treatment in the *Duke Rate Case*. As such, Duke requests that the Commission grant its motion for protective order in these proceedings, consistent with prior practice. Additionally, Duke notes that the comments filed by Staff in these cases are predicated on confidential material produced in another proceeding. Duke states that it questions the appropriateness of using the material in the present cases and, thus, reserves the right to challenge Staff's use of the material.

{¶ 17} No memoranda contra the motions for protective order were filed.

{¶ 18} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

{¶ 19} Similarly, Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed \* \* \* to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

{¶ 20} The Commission has reviewed the information that is subject to Staff's and Duke's respective motions for protective order, as well as the assertions set forth in the supportive memoranda. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court,<sup>1</sup> the Commission finds that the information described in the motions for protective order constitutes proprietary trade secret information. Furthermore, we find the redactions are consistent with prior safeguards and measures taken during the course of the *Duke Rate Case* to protect confidential trade secret information, and, more specifically, to protect information that has been designated as pertaining to critical utility infrastructure. Its release is, therefore, prohibited under state law. The Commission also finds that the nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Therefore, the Commission finds that the motions for protective order filed by Staff and Duke are reasonable and should be granted.

{¶ 21} Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Therefore, confidential treatment shall be afforded for a period ending 24 months from the date of this Finding and Order. Until that date, the docketing division should maintain, under seal, the information filed confidentially.

{¶ 22} Ohio Adm.Code 4901-1-24(F) also requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If Staff or Duke wishes to extend this confidential treatment, they should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion

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<sup>1</sup> See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-25, 687 N.E.2d 661 (1997).

to extend confidential treatment is filed, the Commission may release this information without prior notice to Staff or Duke.

{¶ 23} The Commission would also note it does not appear that Staff utilized information in its public comments that was not otherwise publicly available in other Commission or Ohio Power Siting Board dockets. Moreover, Staff acknowledges the Commission's dedication to protect the location and detailed descriptions of Duke's critical utility infrastructure during the *Duke Rate Case* and, thus, states that its comments are consistent with those directives (Staff Comments at 7-8). Therefore, we find that Staff did submit appropriately-redacted public comments based on the information at its, and the public's, disposal.

**B. Summary of Application and Comments**

{¶ 24} In its application, Duke seeks an extension of the recovery period applicable to the East End site, noting that an extension is warranted by the occurrence of exigent circumstances. Specifically, Duke argues that its natural gas operations at the East End site are subject to heavy regulation by federal and state agencies and require careful environmental investigation and remediation activities around the propane peaking facility and related critical utility infrastructure. Moreover, Duke emphasizes that the subsurface conditions of a portion of the East End site, which includes the complex geology and the location of natural gas lines, required more extensive investigation than originally thought necessary and resulted in more negotiations between the Company and its consultant. Additionally, Duke argues that the critical utility infrastructure at the East End site is vibration-sensitive, necessitating additional precautionary measures to be taken to avoid excessive vibration, but also resulted in slowed remediation efforts occurring in that area. Duke also alleges that the unusually cold winters of 2013 and 2014 required a prolonged and substantial reliance on the propane peaking facility to supplement natural

gas service, which depleted propane reserves and prevented remediation efforts from continuing during those periods in the Middle Parcel and the area west of the West Parcel.

{¶ 25} In its comments, Staff argues that, in its opinion, Duke has failed to prove that the Company experienced exigent circumstances that prevented it from completing the remediation efforts of the East End site within the recovery period allotted by the Commission in the *Duke Rate Case*; rather, Staff asserts that the cited circumstances were all known at the time the Commission issued its decision in the *Duke Rate Case* and, thus, it was well within Duke's control to account for such events when scheduling remediation activities with its consultant. Staff first contends that Duke, as a natural gas company, has always operated in a heavily regulated industry and that this fact alone cannot be considered sufficient to grant an extension of deferral authority. Additionally, without divulging any details regarding the critical utility infrastructure, Staff claims that the record in the *Duke Rate Case* is replete with descriptions, references, and detailed engineering drawings of the underground structures and equipment Duke is claiming to be exigent in these proceedings, further establishing that the Commission was aware of the infrastructure and its sensitivities when establishing the original ten-year recovery period.

{¶ 26} Similarly, Staff and OCC/Kroger argue that it is not unusual for propane peaking equipment to be used during the winter months. In fact, Staff notes that Duke utilized its propane injection facilities during the winter months in years 2002 through 2007 and 2009 through 2014, and adds that, by Duke's own admission, federal and state regulations "prevented, and continue to prevent, the Company from investigating or remediating the Middle Parcel during the winter heating months when propane facilities are integral to the provision of natural gas service." (Staff Comments at 8; Duke App. at 6). Staff then contends that the extreme cold temperatures in the winter months of 2013



and 2014 made no difference as Duke would have been disallowed from engaging in remediation efforts during that time nevertheless.

{¶ 27} Staff also emphasizes the fact that the scheduling of environmental investigation and remediation activities at the East End site were completely within Duke's discretion and Duke fails to raise any circumstances that occurred which would have jeopardized these efforts. As an additional matter, Staff cites to Black's Law Dictionary, which defines "exigent circumstances" as "[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside." Black's Law Dictionary (10th ed., 2014). Staff also cites to the Commission's own definition in the *Duke Rate Case*, identifying exigent circumstances as "an event beyond the control of the Company." *Duke Rate Case*, Entry on Rehearing (Jan. 8, 2014) at 4. Using both of these definitions, Staff argues that Duke has failed to provide any catastrophic events that would equate to an "exigent circumstance," but rather, Duke chose to assert circumstances that were already considered by the Commission in the *Duke Rate Case* or could have easily been mitigated through Duke's discretion to schedule environmental investigation and remediation efforts. (Staff Comments at 12.)

{¶ 28} Staff also notes that the Commission recently delineated factors that it may consider during its evaluation of deferral applications. *In re East Ohio Gas Co. d/b/a Dominion East Ohio*, Case No. 15-1712-GA-AAM, Opinion and Order (Nov. 3, 2016) at 6; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 15-1741-GA-AAM, Opinion and Order (Nov. 3, 2016) at 5-6. As Duke has failed to address these factors in its application, Staff suggests that the Commission either deny Duke's application or, in the alternative, postpone ruling on the application until Duke has fully demonstrated that these criteria have been satisfied. As a final matter, Staff claims that, if the Commission grants Duke's application in these proceedings and subsequently authorizes Duke to collect deferred

environmental investigation and remediation costs after the initial ten-year recovery period, customers may be required to pay for a new pipeline proposed by the Company in Case No. 16-253-GA-BTX before the Ohio Power Siting Board. Staff notes that the proposed pipeline is meant to allow for the retirement of the two propane-air facilities on Duke's system, one of which is located on the East End site, and that, if approved, customers will be charged both to remediate and replace the propane facilities.

{¶ 29} OPAE raises many of the same arguments as Staff and OCC/Kroger, but requests that, in the event the Commission grants Duke's application in these proceedings, the Commission includes language in its decision that states the Commission will reserve the right to rule on the appropriateness of any rate recovery in a future proceeding, similar to language utilized in the *2009 Deferral Authority Case*. *2009 Deferral Authority Case*, Finding and Order (Nov. 12, 2009), Entry on Rehearing (Jan. 7, 2010).

{¶ 30} For all of the above stated reasons, Staff, OPAE, and OCC/Kroger argue that Duke has failed to show exigent circumstances that would warrant an extension of the Company's deferral authority and request that the Commission deny Duke's application, thereby reaffirming its decision in the *Duke Rate Case* to protect customers from paying for remediation efforts occurring beyond the initial ten-year recovery period.<sup>2</sup>

{¶ 31} In response, Duke first contends that many of the arguments raised by OCC/Kroger and OPAE are inappropriate as they seek to challenge the Commission's original decision in the *Duke Rate Case* (Duke Reply Comments at 3-4, 13). Turning to the arguments directed toward the appropriate definition of "exigent circumstances" for the purposes of these proceedings, Duke alleges that Staff and OCC/Kroger attempt to change the Commission's standard for determining whether exigent circumstances exist, noting

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<sup>2</sup> OCC/Kroger and OPAE further note that the *Duke Rate Case* has been appealed to the Ohio Supreme Court and is currently scheduled for oral argument on February 28, 2017.

that the Opinion and Order in the *Duke Rate Case* set a broad governing definition that acknowledged environmental investigation and remediation efforts cannot be so inflexible as to risk the efficient, safe, and reasonable completion of such work. Duke argues that the Commission recognized in the *Duke Rate Case* that factors outside of the Company's control, such as project coordination, will ultimately influence completion dates. Moreover, Duke asserts that the Commission never indicated that the circumstances needed to be "unusual, new, or unknown," "unforeseeable," or require contractual force majeure clauses to be triggered to properly qualify as exigent, as alleged by Staff or OCC/Kroger. Duke requests that the Commission continue to apply its own definition and to reject the elevated standards as proposed by Staff and OCC/Kroger. (Duke Reply Comments at 4-5, 12.)

{¶ 32} Furthermore, Duke asserts that the Commission's determination should not depend on Duke's knowledge of foreseeable or potential circumstances that may or may not have impacted its environmental investigation and remediation efforts, but rather on whether Duke encountered circumstances beyond its control that impacted the timing of such efforts. Specifically, Duke contends that the 2014 polar vortex cannot reasonably be considered irrelevant when making this determination, as Staff argued in its initial comments. Duke also asserts that the Company was only able to evaluate the condition and determine the necessary precautions to take going forward for the buried facilities and infrastructure after their discovery in 2014, as part its investigation of the Middle Parcel and area west of the West Parcel. Duke contends that a safe and reasonable remediation plan could only be constructed after the site assessments of these parcels had been conducted, further necessitating scheduling modifications. (Duke Reply Comments at 6-9.)

{¶ 33} Duke notes that it has conducted its environmental investigation and remediation efforts in a reasonable and prudent manner, considering the unexpected

delays and safety restrictions it has encountered that fall beyond its control (Duke Reply Comments at 9-11). However, Duke states that it recognizes that it has an ongoing obligation to conduct these activities in a reasonable and prudent manner, and, thus, proposes an extension of the current East End site recovery period of five years, through the end of 2021. Duke asserts this revised time period will allow Duke to perform the environmental investigation and remediation efforts in an efficient and reasonable manner. (Duke Reply Comments at 11.)

{¶ 34} Duke also responds to Staff's argument that the Company should provide additional information to ensure it satisfies the deferral authority factors included in recent Commission decisions, stating that no such showing is required by the Company as it has already been authorized to defer environmental investigation and remediation costs and the present proceedings are merely to grant an extension of that deferral authority. Duke indicates that the Commission set the Company's burden to only show that exigent circumstances exist in order to extend such authority and no other showing should be necessary. (Duke Reply Comments at 12-13.) As a final matter, Duke notes that Staff is merely speculating as to the continued use of the propane injection facilities or existing natural gas infrastructure at the East End site, further noting that Duke will maintain any infrastructure to ensure the continued provision of safe, reliable, and efficient natural gas service to its customers (Duke Reply Comments at 14-15). As such, Duke respectfully requests that the Commission find exigent circumstances have occurred and warrant an extension of its deferral authority.

### **C. Commission Decision**

{¶ 35} As noted in the *Duke Rate Case*, the Commission believes that the imposition of a reasonable timeframe in which remediation efforts should be concluded, in accordance with R.C. Title 49, "is reasonable and in the public interest, and will ensure that the remediation will be carried out in a responsible and expeditious manner, so that recovery

through Rider MGP will be finite." In that Opinion and Order, we also found that "absent exigent circumstances," the ten-year period was "reasonable and necessary" in order to protect the public interest and ensure the Company and its shareholders would be held accountable. *Duke Rate Case*, Opinion and Order (Nov. 13, 2013) at 72. Thereafter, the Commission reaffirmed its initial decision, stating "it is essential that recovery from customers of the costs incurred to remediate the MGP sites be limited to a reasonable timeframe of 10 years," adding that the Opinion and Order provided for the opportunity to request an extension of the initial timeframe in the event of an exigent circumstance, "i.e., an event beyond the control of the Company." *Duke Rate Case*, Entry on Rehearing (Jan. 8, 2014) at 4. Upon review of the Company's application and the comments submitted in these proceedings, we find that Duke has established that exigent circumstances have occurred, warranting an extension of the Company's deferral authority. Therefore, we find that Duke's application for an extension of its authority to defer environmental investigation and remediation costs incurred in regard to the East End site beyond December 31, 2016, should be granted to the extent set forth in this Finding and Order.

{¶ 36} In our decisions for the *Duke Rate Case*, we consistently emphasized that the ten-year initial timeframe was necessary and essential in order to protect the public interest and ensure that remediation efforts were carried out expeditiously, but also responsibly. However, we also explicitly provided Duke the opportunity to seek an extension in the event the Company faced exigent circumstances during its remediation efforts. Duke is correct that the Commission utilized a broad definition of what constitutes an exigent circumstance in order to afford flexibility due to circumstances falling outside the control of the Company. As Duke explains in its application, the composition of the Middle Parcel, which includes sensitive underground infrastructure, has complicated the Company's efforts to undertake the necessary environmental investigation and to identify the appropriate remediation techniques for the Middle Parcel and the area west of the West Parcel. Duke further explains that, although it was previously aware of the general nature

of the subsurface conditions of the Middle Parcel, the Company was unable to reasonably or accurately confirm the level of contamination for that parcel and the area west of the West Parcel, or the specific portions requiring remediation, until site assessments were completed in 2014. According to Duke, the site assessments confirmed that there are unique complexities present in these areas that will require further investigation and remediation. We agree with Duke that these are unexpected circumstances beyond the Company's control. Moreover, we made it very clear that any decision to grant an extension of deferral authority would be in the sole discretion of this Commission. Duke has also demonstrated a consistent and ongoing commitment to carry out its remediation efforts in a prudent and responsible manner during the initial ten-year period, and asserts that the Company will continue to do so in the event the Commission grants its request. Accordingly, we find that Duke's application for an extension of its authority to defer environmental investigation and remediation costs incurred in regard to the East End site beyond December 31, 2016, should be granted.

{¶ 37} Although there is merit to some of the arguments raised by Duke justifying an extension, such as the discovery of additional subsurface structures in proximity to vibration-sensitive infrastructure in certain parcels of the East End site that required more extensive planning and excavation, we find Duke's suggested timeframe of five years to be excessive and contradictory to the Commission's reasoning for the initial ten-year timeframe. Therefore, we will limit the extension of deferral authority for the East End site to three years, or until December 31, 2019. We also stress that any future request submitted by Duke for an additional extension of deferral authority beyond December 31, 2019, will be heavily scrutinized, in order to ensure that the Commission's original intent to protect the public interest and hold Duke and its shareholders accountable, in part, for the remediation continues to be realized.

{¶ 38} Additionally, and as OP&AE correctly points out, we note that deferrals do not constitute ratemaking. *See, e.g., Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176. Through this application, Duke is only requesting the authority to modify its accounting procedures to reflect the deferral of the costs related to the environmental investigation and remediation, as well as the associated carrying charges. The Commission notes that OP&AE's comments address the possibility that Duke may request recovery of these deferred costs and carrying charges in a future rate proceeding. By considering this application, the Commission is not determining what, if any, of these costs may be appropriate for recovery in a subsequent proceeding.

{¶ 39} In conclusion, we find that Duke's application for an extension of its authority to defer environmental investigation and remediation costs incurred in regard to the East End site beyond December 31, 2016, should be granted for an additional three years.

### III. ORDER

{¶ 40} It is, therefore,

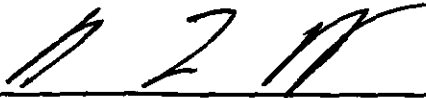
{¶ 41} ORDERED, That the motions to intervene filed by OCC, Kroger, and OP&AE be granted. It is, further,

{¶ 42} ORDERED, That the motions for protective order filed by Staff and Duke be granted, as set forth herein. It is, further,

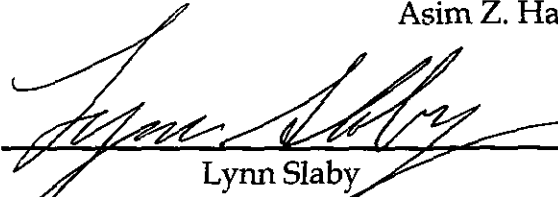
{¶ 43} ORDERED, That Duke's application for an extension of its authority to defer environmental investigation and remediation costs incurred in regard to the East End site beyond December 31, 2016, be granted, to the extent set forth in this Finding and Order. It is, further,

(¶ 44) ORDERED, That a copy of this Finding and Order be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



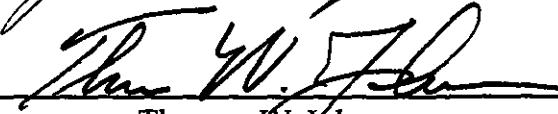
Asim Z. Haque, Chairman



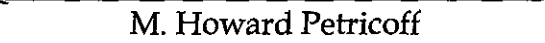
Lynn Slaby



M. Beth Trombold



Thomas W. Johnson

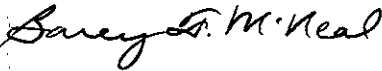


M. Howard Petricoff

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**DEC 21 2016**



Barcy F. McNeal  
Secretary