BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities.	))))))	Case No. 09-786-EL-UNC

DUKE ENERGY OHIO, INC.'S APPLICATION FOR REHEARING

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) applies for rehearing of the Finding and Order (Order) of the Public Utilities Commission of Ohio (Commission) issued in the above-captioned proceeding on June 30, 2010. The Commission's Order decided on the methodology for a test to determine whether the earnings of electric utilities under their approved standard services offers produce significantly excessive earnings (SEET), to the detriment of Duke Energy Ohio and its customers and shareholders.

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

1. The Commission, without statutory authority, unreasonably ordered each electric utility to include in its SEET filing the difference in earnings between its current electric security plan (ESP) and what would have occurred had the preceding rate plan been in place.

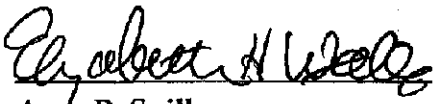
2. The Commission's Order concludes, incorrectly and contrary to existing administrative requirements, that it will review a 12-month period of equity book values without considering 13 month-end balances.

3. The Commission's Order is unclear as to whether Duke Energy Ohio's stipulation that was approved in Case No. 08-920-EL-SSO stands fully as approved and, to the extent it does not so stand, the Order violates Ohio law.

4. The Commission's Order is unclear as to the impact of its "safe harbor" (of 200 basis points above the mean of the comparable group) on the information required to be included in SEET filings.

Duke Energy Ohio respectfully requests that the Commission reconsider and modify its Order, as more fully explained in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

The Commission is required, under certain circumstances, to determine whether an electric utility's rates result in the utility garnering significantly excessive earnings, as set forth in various provisions of Amended Substitute Senate Bill No. 221 (S.B. 221), Sections 4928.142(D), 4928.143(E), and 4928.143(F), Revised Code. On September 23, 2009, in its development of a significantly excessive earnings test (SEET) to be used in these circumstances, the Commission determined that a workshop should be held to discuss several identified issues. Following the workshop, on November 18, 2009, Staff of the Commission (Staff) issued its recommendations for the Commission's consideration in this proceeding. On November 19, 2009, the attorney examiner ordered that comments and reply comments relating to the Staff recommendations may be filed by December 14, 2009, and January 4, 2010, respectively. The Commission issued its Finding and Order on June 30, 2010.

I. The Commission, without statutory authority, unreasonably ordered each electric utility to include in its SEET filing the difference in earnings between its current electric security plan (ESP) and what would have occurred had the preceding rate plan been in place.

The Ohio legislature enacted provisions, in S.B. 221, that require the Commission to test electric security plans (ESP). Under division (E) of Section 4928.143 of the Revised Code, the Commission performs certain tests on ESPs that exceed three years in length. This division is inapplicable to Duke Energy

Ohio. The provision that does apply to Duke Energy Ohio's ESP is found in division (F) of that section. That division requires the Commission to consider, annually, whether "any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk ..."

This language, although not a model of clarity, is misinterpreted by the Commission's Order. The Order states that the Commission agrees with the FirstEnergy reasoning that the term "such adjustments" must refer to "provisions that are included in an electric security plan under this section." Duke Energy Ohio also agrees with this interpretation. Based on that reading, the statute would have the Commission evaluate whether an ESP's provisions resulted in excessive earnings, as measured by comparison to other publicly traded companies.

The Order, on the other hand, states that "an adjustment for purposes of Section 4928.143(F), Revised Code, includes any change in rates when compared to the rates in the electric utility's preceding rate plan." It goes on, based on this conclusion, to require electric utilities to include in their filings "the difference in earnings between the ESP and what would have occurred had the preceding rate

plan been in place." Order at p. 15. Nothing in Section 4928.143 allows the Commission to test an ESP for excessive earnings as compared with prior rate plans. Such an effort by the Commission is undeniably without statutory authority. The legislature specifically directed the Commission to measure ESPs against other comparable companies, not against a fictitious guess as to what the company might have earned if the prior rate plan had continued in effect.

Indeed, Duke Energy Ohio cannot imagine how it could make an honest appraisal of what its earnings would have been if the provisions of its rate stabilization plan (RSP) had continued in effect into the current ESP period. Just to mention the most obvious unknowns, how many customers who have switched to a competitive retail electric service (CRES) provider for their generation supply would have done so if the RSP were still in effect? How many customers who have not switched to a CRES provider would have chosen to do so under the RSP? How many CRES providers would even be active in Duke Energy Ohio's territory under the RSP rates? The comparison that the Commission seeks to have Duke Energy Ohio make is impossible.

Additionally, Duke Energy Ohio respectfully submits that it is impossible to consider an RSP under the legislative parameters for an ESP or, in reverse, an ESP outside of the requirements that gave rise to it. S.B. 221 established numerous requirements that were to be addressed by electric distribution

utilities in their rate plans, such as the important and far-reaching energy efficiency and alternative energy resource mandates. Therefore, a comparison between the ESP and the RSP would be of no relevance whatsoever. Even if Duke Energy Ohio were to make a variety of assumptions concerning switching and other similar issues, the resultant information would be useless to the Commission as it would not portray any element of reality.

The Commission's test of excessive earnings must, as stated in the statute, be a comparison against other comparable companies, not against a guess about what would have happened without the existence of the ESP.

II. The Commission's Order concludes, incorrectly and contrary to existing administrative requirements, that it will review a 12-month period of equity book values without considering 13 month-end balances.

The Commission, with some clarifications, agreed with Staff's proposal that a company's earned return should be the "net income for the year divided by the average common equity over all months of the year with extraordinary items excluded." Order at p. 17. The Order notes that Dayton Power & Light (DP&L) had commented that the test should use 13 monthly common equity book balances rather than 12 such balances. The Commission concluded that this would not be likely to lead to a significantly different result and therefore declined to make this change.

The Commission is required to consider the ESPs at the end of each annual period. Section 4928.143(F), Revised Code. Presumably, it is to test the entire year's results. Indeed, this is exactly what the Commission agrees should be in the formula. The denominator is to reflect the average common equity over all months of the year.

The suggestion by DP&L was correct. Without starting with the balance from the preceding December, the test will not capture the change that occurred during January. The Commission's own rules recognize this accounting principle. When filing applications for an increase in rates, utilities are required to calculate yearly averages on the basis of thirteen month-end balances. The definition of "average data" makes this clear:

> "Average data" – some schedules throughout these filing requirements require that "average" data be provided. The term average refers to a thirteen-month average. The test year thirteen-month average calculation shall be based on the same timeframe as the test year. Where actual month end balances are not available, utilities shall use estimated data for those months of the test year. The test year thirteen-month average calculation shall be updated to reflect no less than four actual month end balances.

Rule 4901-1-09, Chapter II(A)(5)(e), O.A.C.

To decide otherwise in the context of the SEET test is both inconsistent with the standard filing requirements and an incorrect calculation of earnings.

III. The Commission's Order is unclear as to whether Duke's stipulation that was approved in Case No. 08-920-EL-SSO stands fully as approved and, to the extent it does not so stand, the Order violates Ohio law.

In Duke Energy Ohio's ESP proceeding, Case No. 08-920-EL-SSO, the Commission approved a stipulation among various parties. The stipulation explicitly defined how Duke Energy Ohio's return on common equity would be computed. Among the items covered in the stipulation were the source of financial data to be used, the specific adjustments to be made to net income and common equity, and the level of return on common equity that would be deemed not excessive.

In the context of its resolution of issues relating to adjustments, write-offs, and deferrals, the Commission addressed the existence of Duke Energy Ohio's stipulation. It stated:

> In regards to Staff's recommendation 11, the Commission further finds that where an electric utility's ESP or MRO has been resolved by stipulation, which includes a method for the treatment of write-offs and deferrals in calculating the SEET, the Commission is not modifying the stipulation with this proceeding, to the extent that the issue is adequately addressed in the stipulation and the order approving the stipulation. Accordingly, the approved standard service offer stipulations of Duke and FirstEnergy shall stand as approved by the Commission to the extent the treatment of deferrals and write-offs in the SEET calculation were addressed.

Order at p. 16.

The meaning of this paragraph is unclear to Duke Energy Ohio. Does this mean that the Duke Energy Ohio stipulation in its ESP proceeding stands as it

was approved, in light of the fact that the stipulation includes a method for the treatment of write-offs and deferrals in calculating the SEET? If that is the case, as it should be, then other issues that are decided in the Order but that conflict with Duke Energy Ohio's approved stipulation should not impact Duke Energy Ohio under this ESP. Therefore, for example, the Commission's "safe harbor" of 200 basis points above the mean of the comparable group would similarly not apply to Duke Energy Ohio. Rather, the limit of 15 percent return on common equity, set forth in the stipulation, would apply for the duration of the ESP.

For the Commission to decide otherwise in this proceeding would violate every notion of appropriate due process. Duke Energy Ohio participated in the negotiation process, and has abided by the Commission's ruling, in the ESP proceeding on the assumption that the ESP would be predictable and unchanging. There is no authority in the Revised Code to allow the Commission to single-handedly alter a previously approved rate plan. Duke Energy Ohio respectfully submits that the language in the Order that upholds the existing, approved stipulation be clarified to recognize that the current SEET proceeding is not altering such stipulation in any way. Where the stipulation does not address issues relating to the Commission's SEET, of course this proceeding can and should resolve those open questions.

IV. The Commission's Order is unclear as to the information required to be included in SEET filings if an EDU's return on common equity does not exceed the "safe harbor" limit (200 basis points above the mean of the comparable group).

In the Commission's resolution of the issues related to significantly excessive earnings, it decided to recognize a "safe harbor." It concluded that "any electric utility earning less than 200 basis points above the mean of the comparable group will be found not to have significantly excessive earnings."

It appears, since the safe harbor discussion immediately follows the Commission's discussion of the various factors that might influence its determination of whether a company had significantly excessive earnings, that an electric utility that believed itself to fall within the safe harbor would not have to include in its SEET filing any discussion of the factors listed by the Commission as relevant to its investigation of significantly excessive earnings. Even if the EDU's earnings exceeded the safe harbor in the test, it should be up to each company whether or not to submit what will be a substantial amount of testimony to address all of the factors listed in the Commission's Order. If the utility's earnings are within the safe harbor, it is hard to imagine what end can be served by such a requirement. It will unnecessarily add to the administrative burden on all parties prosecuting the case; it could require the utilities to hire consultants to address some of the issues; and could mire the adjudication of the filings by invoking potentially new areas of controversy that may have little to

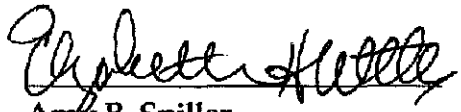
do with whether the utilities have significantly excessive earnings. Similarly, if it is within the safe harbor, an electric utility should not be required to provide other SEET information, such as a comparison of its current ESP to its preceding rate plan. Even if earnings are outside the safe harbor, it should be up to the utility to decide how best to defend what may be excessive earnings.

The Order should be modified to state clearly how an electric utility may demonstrate conclusively that it falls within the safe harbor and, following that demonstration, that no further SEET information is required in that filing.

V. Conclusion

For the reasons fully discussed above Duke Energy Ohio respectfully requests the Commission grant this Application for Rehearing to modify the SEET parameters and methodologies as set forth herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following parties, this 26th day of July 2010, via electronic mail and regular mail delivery, postage prepaid.

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