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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Investigation Into The Development Of The Significantly Excessive Earnings Test Pursuant to S.B. 221 For Electric Utilities.	))))	Case No. 09-786-EL-UNC

MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S APPLICATION FOR REHEARING BY THE OFFICE OF OHIO CONSUMERS' COUNSEL, THE OHIO ENERGY GROUP, THE OHIO HOSPITAL ASSOCIATION, THE OHIO MANUFACTURERS' ASSOCIATION AND CITIZEN POWER INC.

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THE OFFICE OF OHIO CONSUMERS' COUNSEL, THE OHIO ENERGY GROUP, THE OHIO HOSPITAL ASSOCIATION, THE OHIO MANUFACTURERS' ASSOCIATION AND CITIZEN POWER INC.

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") (representing 4.5 million residential customers),the Ohio Energy Group ("OEG") (representing 22 of Ohio's most energy-intensive industries), the Ohio Hospital Association ("OHA") (representing 170 primary care facilities and 40 health systems across Ohio), the Ohio Manufacturers' Association ("OMA") (representing over 1600 large and small industrial manufacturers), and Citizen Power, Inc. (a not-for-profit research education and advocacy agency), collectively referred to as "Customer Parties," submit this Memorandum Contra to Duke Energy Ohio, Inc.'s ("Duke Energy Ohio") Application for Rehearing filed on July 26, 2010 at the Public Utilities Commission of Ohio ("PUCO" or "Commission"). Duke Energy Ohio's Application for Rehearing was filed in response to the Commission's Finding and Order dated June 30, 2010.

As explained in this memorandum, the reasons alleged in Duke Energy Ohio's Memorandum in Support ("Memo in Support") of its Application for Rehearing provide

no basis for Duke Energy Ohio's contention that the June 30, 2010 Order is either unlawful or unreasonable. Therefore, the Customer Parties urge the Commission to deny Duke Energy Ohio's Application for Rehearing. Additionally, Customer Parties urge the PUCO to modify its June 30, 2010 Finding and Order consistent with the Customer Parties' Application for Rehearing filed on July 30, 2010.

II. APPLICABLE LAW

Applications for rehearing are governed by R.C. 4903.10 and may be sought by any party who has entered an appearance in the proceeding on any matter determined in the proceeding. In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[1] Further, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same * * *."[2]

III. ARGUMENT

A. It Is Within The Commission's Discretion To Require 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.

In its Memo in Support, Duke Energy Ohio argues that 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

[1] R.C. 4903.10.

[2] Id.

have occurred had the preceding rate plan been in place."[3] Duke Energy Ohio contends, "Nothing in [R.C.] Section 4928.143 allows the Commission to test an ESP for excessive earnings as compared with prior rate plans."[4] Duke Energy Ohio further contends that it "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."[5]

Notwithstanding Duke's arguments, it is clear that the PUCO was merely exercising discretion in carrying out mandates of R.C. 4928.143(F). That statute directs the Commission to consider if any "adjustments" resulted in excessive earnings. For the purposes of R.C. Section 4928.143(F), the Commission has determined that an adjustment "includes any change in rates when compared to the rates in the electric utility's preceding rate plan."[6] In order to facilitate a valuation of the ESP adjustments, the Commission directed utilities to include in their SEET filings the difference in earnings between the ESP and what would have occurred had the preceding rate plan been in place,[7] in other words, what the utility's earnings would be with and without the ESP adjustments.

Requiring such information is related to determining how much additional profit the ESP adjustments provided, which adjustments establish the maximum amount of the

[3] Duke Energy Ohio's Application for Rehearing, at 2.

[4] Id., at 6.

[5] Id.

[6] Id.

[7] Id., at 15.

refund that may be ordered. The PUCO is not proposing that the pre-ESP earnings be calculated in order to permit a "clawback" of those earnings. Rather, the PUCO is simply attempting to implement the statute and fill in gaps the General Assembly has left in defining the SEET review process. As the agency with the expertise and statutory mandate to implement the statute, the PUCO is entitled to deference.[8] The Ohio Supreme Court has traditionally "deferred to the judgment of the commission in instances involving the commission's special expertise and its exercise of discretion, when the record supports either of two opposing positions."[9] The Supreme Court "will reverse a commission order only where it is unreasonable, unlawful, or against the manifest weight of the evidence or shows misapprehension, mistake, or willful disregard of duty."[10]

The Commission has broad statutory authority in determining whether any adjustments under the electric utility's ESP resulted in excessive earnings. Where the Commission has determined that information regarding the utility's level of earnings with and without the ESP adjustments is needed in order to assess the maximum refund potential, it is neither unreasonable nor unlawful to order the utilities to provide such information in their SEET application.

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[8] *Payphone Assn. of Ohio* (2006), 109 Ohio St.3d 453, 2006 Ohio 2988, 849 N.E.2d 4, citing *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530 at P51.

[9] *Cincinnati Bell Tel. Co. v. PUC.* (2001), 92 Ohio St.3d 177, 180, citing *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (1990) 51 Ohio St. 3d 150, 555 N.E.2d 288; *Dayton Power & Light Co. v. Pub. Util. Comm.* (1962), 174 Ohio St. 160, 21 Ohio Op. 2d 427, 187 N.E.2d 150.

[10] *Cincinnati Gas & Elec. Co.*, 86 Ohio St. 3d 53, 711 N.E.2d 670; *Ohio Edison Co. v. Pub. Util. Comm.* (1992), 63 Ohio St. 3d 555, 589 N.E.2d 1292; see also R.C. 4903.13.

B. The Commission's Order Requiring Electric Utilities To Include In Their SEET Filings A Discussion Of The Various Factors Listed By The Commission As Relevant To Its Investigation Of Significantly Excessive Earnings Was Reasonable And Lawful.

In its Application for Rehearing, Duke Energy Ohio argues that since the Commission's Order recognized a so-called "safe harbor,"[11] an electric utility that believed itself to fall within the safe harbor should not have to include in its SEET filing any of the factors determined by the PUCO to be relevant to its investigation.[12] In other words, Duke Energy Ohio contends that a utility should be excused from undergoing a complete analysis simply because it provides a preliminary analysis in support of the assertion that it is within the so-called safe harbor. More succinctly, Duke Energy Ohio would like utilities to be largely self-regulated as to SEET.

This argument puts the cart before the horse, in that it asks the Commission (and parties) to assume (1) the Company's computation of earnings is accurate, (2) the Company's treatment of off-system sales and deferrals is appropriate, and (3) the Company has appropriately defined its comparable group.

Duke Energy Ohio's arguments are contrary to the Commission's Finding and Order and seek to shift the burden of proof from the utility to the Commission and other parties. This is contrary to the express provisions of R.C. 4928.143(F), which place on the utility the burden of proof for demonstrating that significantly excessive earnings did not occur. It would inappropriate to allow utilities under the guise of self analysis to

[11] The safe harbor concept espoused by the PUCO in its Order is 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. See Finding and Order at 28-29.

[12] Duke Energy Ohio's Application for Rehearing at 11.

preclude the review of information the PUCO determined to be relevant to its analysis. Duke Energy Ohio's arguments should be rejected.

IV. CONCLUSION

For the reasons explained above, the Customer Parties urge the Commission to deny Duke Energy Ohio's Application for Rehearing. The SEET analysis, the consumer protection tool of S.B. 221, should be a full and complete analysis where significantly excessive earnings can be discovered, and if found, returned to customers. This requires that the utilities produce information that will allow a reasoned analysis of utilities' earnings. Limiting the scope of the information presented in the SEET filings threatens to impair the investigation, and unreasonably shift the burden of proof away from the utilities to those challenging the earnings. This is not what was intended by the Legislature. The PUCO should not go down this slippery slope. It should act to protect consumers from significantly excessive electric utility earnings and excessively high electric rates by maintaining the integrity of the SEET investigation.

Respectfully submitted,

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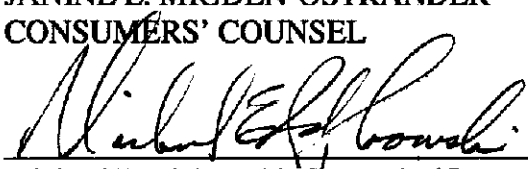

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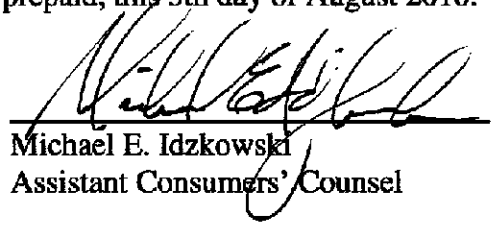
CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing *Memorandum Contra Duke Energy Ohio, Inc.'s Application for Rehearing* was served upon the persons listed below via electronic service and first class U.S. Mail, postage prepaid, this 5th day of August 2010.



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