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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of the Cincinnati Gas and Electric Company for an Increase in Rates.)	Case No. 01-1228-GA-AIR	PUCO
In the Matter of the Application of the Cincinnati Gas and Electric Company for Approval to Change Accounting Methods.)	Case No. 01-1539-GA-AAM	
In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.)	Case No. 07-589-GA-AIR	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for its Gas Distribution Service.)	Case No. 07-590-GA-ALT	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.)	Case No. 07-591-GA-AAM	

**MEMORANDUM CONTRA TO THE MOTION OF DUKE ENERGY OHIO, INC. TO MODIFY FILING DATE FOR RIDER AMRP APPLICATION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") submits this Memorandum Contra to the Public Utilities Commission of Ohio ("PUCO" or "Commission") in response to the Duke Energy Ohio, Inc. ("Duke" or "Company") Motion to Modify Filing Date for Rider AMRP Application ("Motion").¹ OCC, the state advocate for residential utility consumers, is an intervener in this case.

¹ Ohio Adm. Code 4901-1-12(B)(1).

On July 18, 2007, Duke filed its application (“Application”) in Case No. 07-589-GA-AIR, its current rate case proceeding (“Rate Case”). In the Pre-Filing Notice filed for the Rate Case, Duke requested the continuation of its accelerated main replacement program (“AMRP”).² The AMRP is Duke’s program designed to replace its cast iron and bare steel mains on an accelerated basis.³

On November 30, 2007, the Company filed a Motion with the stated intent to “maintain the present schedule for Rider AMRP filings and would allow DE-Ohio to continue receiving timely cost recovery of its Rider AMRP costs on the same schedule that the Commission approved in Case No. 01-1228-GA-AIR.”⁴ The Commission originally approved Duke’s AMRP program in a May 30, 2002 Order approving a stipulation and recommendation (“AMRP Stipulation”) in the above captioned Case No. 01-1228-GA-AIR, et al.⁵ The AMRP Stipulation states:

The AMRP Rider rates set in the May 1, 2007 proceeding shall continue until the effective date of the rates set in [Duke’s] next base rate case * * *.⁶

Thus, by the terms of the AMRP Stipulation, Duke’s AMRP Rider Rate will be ending with the effective date of the rates in this Rate Case.

A key component of the original AMRP is that it was part of a stipulation among the Company and a number of interested stakeholders, including the OCC. The AMRP Stipulation provided for annual filings and annual AMRP rider increases (within a ceiling or cap) which were approved by the Commission in annual Commission orders between

² Pre-Filing Notice at 5-1 (June 18, 2007).

³ Motion at 3.

⁴ Motion at 3.

⁵ Motion at 3.

⁶ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al. AMRP Stipulation at 6 (April 17, 2002).

2002 and 2007. It should be understood that there are two mechanisms at issue here—the AMRP that exists as a result of the AMRP Stipulation and whatever is the cost recovery mechanism going forward for Duke’s infrastructure replacements (which Duke also references as the AMRP).

On November 30, 2007, the same day as the filing of Duke’s Motion, Duke also filed a Pre-Filing Notice (“Pre-Filing Notice”). Oddly, it is the second such notice filed in the Rate Case. Duke’s Motion is an unlawful attempt to modify the filing date for Rider AMRP, with the effect of foreclosing for other parties the intended opportunity for them to present evidence and argue legal positions to the Commission on whether and how there will be an AMRP in the future. Duke’s end-run is not appropriate for the reasons that OCC will address in this pleading..

For the following reasons the Commission should deny Duke’s Motion, and Reject the Pre-Filing Notice.

II. ARGUMENT

A. Duke’s Motion is Unlawful and Attempts to Circumvent the Statutory Rate Case Process.

Duke’s Motion places the cart before the horse (and its notice of an AMRP Rider rate increase before the law). The Company filed the Motion because, by its own admission, the current procedural schedule (established in the AMRP Stipulation) is not achievable for the AMRP Rider rate change, that would result from the Rate Case, in light of the timing of the Company’s Rate Case Application.⁷

⁷ Motion at 4.

R.C. 4909.18 states:

* * * no public utility may issue the *notice of intent* to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. (Emphasis added).

Duke misstates the plain words of the statute. Duke states “R.C. 4909.18 prohibits overlapping *applications* for 275 days after the filing of an earlier *application*.”⁸ In reality, as the law plainly reads, the utility is prohibited from filing an over-lapping “Notice of Intent”⁹ Therefore, Duke’s Pre-Filing Notice, being a notice of intent, is unlawful in its timing that is long before the statute allows the filing of such notice. This Motion that seeks relief based on the Pre-Filing Notice cannot be granted. as a matter of law.

While the above law is dispositive of Duke’s Motion, there are other problems for the relief Duke seeks. Duke’s Motion is inconsistent with the AMRP Stipulation. The AMRP Stipulation provided for annual filings and annual AMRP rider increases (within a ceiling or cap) which were approved by the Commission in annual Commission orders between 2002 and 2007.¹⁰ Duke is attempting to use the existing AMRP process to reach a result on a possible new AMRP Rider rate that according to the AMRP Stipulation must

⁸ Motion at 4. (Emphasis added).

⁹ R.C. 4909.18.

¹⁰ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al. Opinion and Order (May 30, 2002); Second Opinion and Order (April 29, 2003); Third Opinion and Order (April 21, 2004); Fourth Opinion and Order (April 20, 2005); Fifth Opinion and Order (April 19, 2006); Sixth Opinion and Order (April 18, 2007).

come from “[Duke’s] next rate case.”¹¹ But the past and future for the AMRP cannot at this point be mixed as Duke would have the PUCO do.

A result through the statutory rate case process is what is contemplated by the AMRP Stipulation’s reference to a future rate case.¹² What emerges from the Rate Case may have a different schedule and different terms than the original settlement. OCC was a signatory party on the AMRP Stipulation, and is an intervening party in the Rate Case; therefore, OCC looks forward to the opportunity participate in the development of any new AMRP mechanism and process, especially given the large sums of money Duke wishes to collect from its approximately 375,000 residential customers through this program.

The AMRP Stipulation places responsibility on Duke to request the continuance of the AMRP, and provides for interested parties to challenge the program. The AMRP Stipulation states:

In any base rate case, filed subsequent to the effective date of rates established in the instant case, if [Duke] wishes to continue Rider AMRP, it must specifically request such continuance, and any party is free to challenge such continuance.¹³

Duke has requested the continuation of the AMRP in the Rate Case filing.¹⁴ Merely because Duke wishes to continue the AMRP there is no assurance that the Commission will approve continuation of the AMRP, or re-approve the current AMRP procedural structure. Through the rate case process interested parties will have the opportunity to conduct discovery, and present evidence challenging various aspects of the AMRP

¹¹ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al. AMRP Stipulation at 6 (April 17, 2002).

¹² *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al. AMRP Stipulation at 6 (April 17, 2002).

¹³ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al. AMRP Stipulation at 6 (April 17, 2002).

¹⁴ Pre-Filing Notice at 5-1 (June 18, 2007).

including the procedural schedule. Because the Rate Case proceeding is at a preliminary stage,¹⁵ it is unclear if and/or to what extent interested parties may choose to challenge Duke's request to continue the AMRP. Until such challenges become clear it would be unreasonable for the Commission to grant Duke's Motion.

It should also be considered that the Company has proposed an expansion to its AMRP to include the recovery of costs for replacement of service head adapter-style risers.¹⁶ This proposal alone will add an additional \$41 million in cost recovery through the Rider AMRP rate.¹⁷ Interested parties may challenge Duke's proposed expansion. The filing of the Company's Motion was premature, and should not be considered until such time as the Commission has an opportunity to hear any challenges or other alternative proposals to the AMRP that might be raised in the Rate Case.

Finally, the Company should assume the business risk of going forward with AMRP activity before receiving a Commission decision, in the Rate Case, regarding the future of this program, after interested parties have had the opportunity to present evidence to challenge the continuation of the program. The Commission did not originally approve the AMRP Rider rate until all interested parties had an opportunity to be heard.¹⁸ Duke started the AMRP in 2000;¹⁹ however, the Commission did not approve Duke's Rider AMRP until May 30, 2002.²⁰ That placed the recovery of Duke's

¹⁵ The Commission has not yet issued the Staff Report.

¹⁶ Pre-Filing Notice at 5-1 (June 18, 2007).

¹⁷ Pre-Filing Notice at tab 5 Attachment 1 (June 18, 2007).

¹⁸ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al. Opinion and Order (May 30, 2002).

¹⁹ Motion at 3.

²⁰ Motion at 3.

AMRP expenditures during 2000 through May 30, 2002 at risk for not receiving alternative rate treatment until the Commission approved the AMRP Stipulation.

Duke should be assuming that same risk now because that risk is no different than Duke initially assumed in 2000 through May 30, 2002. The decision to engage in AMRP activity subsequent to the Rate Case date certain, March 31, 2007, was a business decision, and the recovery of the costs of this ongoing AMRP activity is a risk that Duke should shoulder pending the Commission's order in the Rate Case. Duke's Motion is an attempt to mitigate this risk, and the Commission should not accept the invitation to impair the rights of other parties.

The Commission should deny Duke's Motion because it is unlawful in that it seeks to modify the filing date of its AMRP application contrary to the timelines in R.C. 4909.18 and is premature because it fails to take into consideration the possibility that the outcome of the Rate Case may necessitate changes to the existing AMRP structure or timing of the filings. Therefore, the Motion should be denied.

B. The Commission Should Reject the Filing of the Company's Pre-Filing Notice Because It Violates the AMRP Stipulation.

The AMRP Stipulation included the following procedural process for Duke to increase the AMRP Rider rate through annual filings:

CG&E²¹ will file an application annually, beginning November, 2002, with a pre-filing notice demonstrating the justness and reasonableness of the level of recovery of expenditures associated with the accelerated main replacement program (AMRP). The annual filing will support the adjustment to [Duke's] revenue requirement for increases to Rider AMRP as set forth in this paragraph. The November pre-filing notice will consist of nine months actual and three months of projected data, will set the then-current calendar year as the test year, and will set December 31 of

²¹ CG&E is now known as Duke Energy Ohio, Inc.

the applicable year as the date certain. [Duke] shall make its Application and file an update of full year actual data by February 28 of each year. Staff shall conduct an investigation of [Duke's] filing and, unless Staff finds CG&E's filing to be unjust or unreasonable or if any other party granted intervention by the Commission files an objection that is not resolved by [Duke] by April 1, of each year, the Staff shall recommend approval of CG&E's Application for an increase in Rider AMRP rate to the Commission to be effective with the first billing cycle for the May revenue month. If the Staff determines that [Duke's] Application to increase Rider AMRP is unjust or unreasonable, or if any other party granted intervention by the Commission files an objection that is not resolved by [Duke], the parties will not object to an expedited hearing process in order to effectuate, to the extent practicable, the implementation of Rider AMRP in the first billing cycle for the May revenue month, or the first billing cycle of the revenue month following the Commission's decision.²²

In fact Duke agreed to continue making its Rider AMRP annual filings *until the effective date of the Commission's Order in Duke's next base rate case.*²³

At the time the Commission approved the current AMRP Rider rate, the Commission in its Order stated:

Duke shall make annual informational filings to demonstrate that the capped AMRP Rider rates continue to be just and reasonable.²⁴

Duke filed a Pre-Filing Notice on November 30, 2007.²⁵ However, Duke, in that November 2007 filing presented the Commission with proposed AMRP Rider rates based upon data from the Rate Case with the rates to be effective after the Rate Case.²⁶ In the November 30, 2007 Pre-Filing Notice filing, Duke failed to provide information pertinent to support the reasonableness of Duke's current AMRP Rider rate, as required under the

²² *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al. AMRP Stipulation at 6-7 (April 17, 2002).

²³ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al. AMRP Stipulation at 8 (April 17, 2002). (Emphasis added).

²⁴ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al., Sixth Opinion and Order at 9 (April 18, 2007).

²⁵ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al., Pre-Filing Notice (November 30, 2007).

²⁶ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al., Pre-Filing Notice Exhibit 5 (November 30, 2007).

AMRP Stipulation. The fact that Duke is unable to increase the current AMRP Rider rates until after the Commission renders a decision in the Rate Case is not sufficient to satisfy the requirements of the AMRP Stipulation; the Company must continue to demonstrate the current AMRP Rider rates are just and reasonable.²⁷

Because the Company's filing violates the AMRP Stipulation, the Commission should reject the Company's November 30, 2007 AMRP Rider Pre-Filing Notice and order the Company to refile it so that such filing adheres to the requirements contained in the AMRP Stipulation (e.g. demonstrate that its current AMRP Rider rates are just and reasonable).

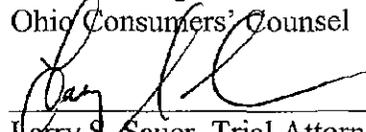
III. CONCLUSION

Duke's Motion is an attempt to seek authority to file the notice of the AMRP Rider rate increase in contravention of Ohio law, and to circumvent the rate case process. The PUCO lacks the authority and jurisdiction to hear a case based on Duke's notice, and cannot grant Duke's Motion. Duke's Motion to Modify Filing Date for Rider AMRP is also premature because all interested parties have not yet had an opportunity to present evidence challenging the structure or continuation of the AMRP -- and there will not be a continued AMRP unless the PUCO orders it. Furthermore, the Commission should reject the Company's Pre-Filing Notice because it violates the AMRP Stipulation.

²⁷ *In re AMRP Case*, Case No. 01-1228-GA-AIR, et al., AMRP Stipulation at Paragraph 5, page 6 and Paragraph 10, page 10.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the OCC's *Memorandum Contra to Duke Energy Ohio, Inc.'s Motion to Modify Filing Date for Rider AMRP Application* was served on the persons stated below via first class U.S. Mail, prepaid postage, and electronically served to all parties this 17th day of December 2007.



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