

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO 2009 JAN -9 PM 4:08

- In the Matter of the Application of Duke Energy Ohio, Inc. For an Increase in Electric Rates. ) Case No. 08-0709-EL-AIR PUCO
- In the Matter of the Application of Duke Energy Ohio, Inc. For Tariff Approval. ) Case No. 08-0710-EL-ATA
- In the Matter of the Application of Duke Energy Ohio, Inc. for Approval To Change Accounting Methods. ) Case No. 08-0711-EL-AAM
- In the Matter of the Application of Cincinnati Gas & Electric Company for Approval of its Rider BDP, Backup Delivery Point. ) Case No. 06-718-EL-ATA

**MEMORANDUM CONTRA  
DUKE ENERGY OHIO'S MOTION FOR APPROVAL TO CHANGE  
ACCOUNTING METHODS TO DEFER AND CREATE A REGULATORY  
ASSET FOR COLLECTING STORM RESTORATION COSTS FROM OHIO  
CUSTOMERS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") submits this Memorandum Contra<sup>1</sup> to Duke Energy Ohio's ("Duke" or "Company") Motion for Approval in which Duke seeks to defer and then collect millions of dollars from customers for storm-related costs. Duke filed its Motion with the Public Utilities Commission of Ohio ("Commission" or "PUCO"), on December 22, 2008. Duke states that its current

<sup>1</sup> Ohio Adm. Code 4901-1-12(B)(1).

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estimate of storm-related costs is \$31 million, \$30 million attributable to O&M expenses and \$1 million for capital-related expenses.<sup>2</sup>

In its Motion, Duke explains that through the settlement the PUCO recently approved in the Duke Electric Security Plan (“ESP”), the Company will be allowed to recover SmartGrid investment through a Rider DR-IM. Therefore, Duke indicates that it will not seek recovery of SmartGrid investment through the “similar mechanism” requested in these current proceedings (i.e. Rider DR).<sup>3</sup> In regards to Rider DR, Duke now instead seeks to rename this rider as Rider DR-IKE and to recover through it deferred “incremental O&M expense and carrying charges related to storm damage” incurred as result of the September 14, 2008 windstorm.<sup>4</sup>

In the alternative to collection of such costs through Rider DR-IKE, Duke proposes to recover the costs of the storm restoration through an adjustment to test year expenses for a three-year amortization of the incremental storm restoration costs in the rate case proceeding captioned above. But the storm was an unusual and extraordinary event and the related costs are inappropriate for recovery through test year expenses. Accordingly, the Commission should not approve Duke’s Motion for recovery of the storm related costs.

Duke has not attempted to collect the storm-related costs through its electric security plan case. In that regard, the Commission could not approve recovery of these claimed costs under R.C. Chapter 4928 because the storm-related costs were not incurred during the ESP.

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<sup>2</sup> Motion at 5.

<sup>3</sup> Motion at 3.

<sup>4</sup> Motion at 6-7.

**II. THE COMMISSION SHOULD NOT APPROVE DUKE'S MOTION FOR RECOVERY OF THE STORM-RELATED COSTS AS PART OF TEST YEAR EXPENSES (NOR APPROVE ANY DEFERRALS OF THE COSTS) BECAUSE THEY ARE EXTRAORDINARY AND UNUSUAL COSTS AND NOT REPRESENTATIVE OF TEST YEAR EXPENSES AND SUCH RECOVERY WOULD ALLOW DUKE TO OVERRECOVER DISTRIBUTION COSTS IN THE FUTURE.**

R.C. 4909.15(A)(4) allows the Commission to approve recovery of costs incurred during the test year under certain conditions:

- (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:
  - (4) The cost to the utility of rendering the public utility service for the test period less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

The test year for the above-captioned rate case is January 1, 2008 through December 31, 2008.<sup>5</sup> The costs associated with the wind storm of September 14, 2008 were incurred during the test year. But R.C. 4909.15(D)(2)(b) does not allow the Commission to approve test year expenses that the Commission finds would allow the utility to over-recover.

The Ohio Supreme Court has interpreted the Commission's obligations, under R.C. 4909.15(D)(2)(b), to allow the Commission to make adjustments to test-period costs and revenues to "smooth out anomalies" in test-period data.<sup>6</sup> The Court has explained:

It is our view that R.C. 4909.15(D)(2)(b) is designed to allow the commission to make minor adjustments to rates ascertained by the statutory formula when the criteria upon which rates are based are

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<sup>5</sup> Motion at 6.

<sup>6</sup> *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535 at 539; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153 at 166.

skewed for one reason or another. Thus, under R.C. 4909.15(D)(2)(b), the commission may smooth out anomalies in the ratemaking equation that tend to make the test year data unrepresentative.<sup>7</sup>

Duke refers to the wind storm of September 14, 2008 as “historic” and “unprecedented.”<sup>8</sup> The storm resulted in 83% of Duke’s customers losing power and 822,000 sustained outages, which Duke refers to “as the largest documented electric outage in the history of DE-Ohio.”<sup>9</sup> Accordingly, the costs associated with the storm are unusual and extraordinary costs that Duke would not expect to incur in future test years.

Contrary to the Court’s ruling that anomalies are not to be the basis for ratemaking under the statutes, Duke would have the collection of cost anomalies be the rule. Accordingly, the Commission cannot include the storm costs in test year expenses. Nor should the Commission make “test year adjustments to amortize the storm restoration costs over three years for recovery in a manner similar to rate case expense”<sup>10</sup> as requested by Duke, because test year expense is an ordinary expense whereas the storm restoration costs are “unprecedented” and “historic” to use Duke’s words that describe an extraordinary cost.

Additionally, the Supreme Court has instructed the Commission that it may not create single-issue adjustment clauses, contrary to what Duke requests in its Motion for a

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<sup>7</sup> *Consumers’ Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153 at 166.

<sup>8</sup> Motion at 3.

<sup>9</sup> Id. at 4.

<sup>10</sup> Motion at 7.

rider in the rate case.<sup>11</sup> The Court emphasized that the Commission is a creature of statute and its authority is limited to those actions authorized by legislation.<sup>12</sup> In light of that limitation, the Court stated:

Whether a given adjustment clause, based upon these or other factors, should be adopted is not a question for the commission, or for this court; rather, its resolution lies with the General Assembly.<sup>13</sup>

While the General Assembly has provided the Commission some new authority in SB 221 to implement some single-issue ratemaking, that authority is not applicable to costs incurred before January 1, 2009 as discussed below and is not applicable to rate cases.

In this regard, R.C. 4928.141 would not allow for Duke's collection of the costs.

That statute provides for the filing of an ESP:

**Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. (Emphasis added)**

Although under R.C. 4928.143(B)(2)(h) electric utilities could seek approval of what might otherwise be considered unlawful ratemaking for a single issue, nothing in that section allows Duke to recover costs incurred before January 1, 2009, as part of the ESP.

For costs incurred before January 1, 2009, the only recovery mechanism available to Duke is the generation ratemaking provisions approved for Duke's Rate Stabilization Plan ("RSP") and the traditional rate case provisions of R.C. 4909.15 for distribution

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<sup>11</sup> *Pike Natural Gas Company v. Pub. Util. Comm.* (1981), Case No. 68 Ohio St. 2d 181.

<sup>12</sup> *Id.* at 183.

<sup>13</sup> *Id.* at 186.

ratemaking. But Duke has not demonstrated that it qualifies for cost recovery under those provisions.

Moreover, under Duke's Rider DR-IKE proposal, there is no provision for investigation into the actions taken by Duke during and after the storm to ensure that its actions resulted in costs that were prudently incurred and lawful, as is typically required in any dollar for dollar recovery mechanism.<sup>14</sup>

### III. CONCLUSION

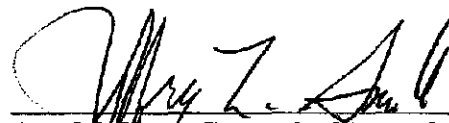
Duke's Motion for recovery of costs and deferrals, associated with the September 14, 2008 wind storm, would increase rates to its 690,000 customers. Duke's request to recover the storm restoration costs as a test year rate case expense is unlawful because the costs are extraordinary and unusual and would unjustly create the anomaly in test year expenses that the Supreme Court of Ohio has determined to be inappropriate for ratemaking. Additionally, the request for collection of storm restoration costs would constitute a request of an adjustment clause that has not been approved by the General Assembly. Although the General Assembly may have authorized the Commission to approve such an adjustment as part of an electric security plan, such authority would apply only (if at all) to costs that were incurred after January 1, 2009, under R.C. Chapter 4928.141. Accordingly, the Commission should not approve Duke's Motion. In any event, the Commission should not approve recovery of any of the storm-related costs until Duke's actions during and after the storm are reviewed for their prudence and lawfulness in a proceeding without any of the limitations that Duke proposes for what the PUCO may consider and parties may argue.

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<sup>14</sup> See, Gas Cost Recovery Mechanism, R.C. 4905.302; R.C. 4928.

Respectfully submitted,

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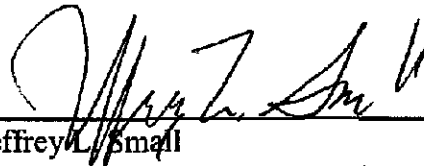
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum Contra by the Office of the Ohio Consumers' Counsel has been served upon the below-named counsel via regular U.S. Mail Service, postage prepaid, this 9th day of January, 2009.



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