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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of a Commission Investigation)
Into the Reliability of the Electric)
Distribution Service Provided by Ohio's)
Investor-Owned Electric Companies.)

Case No. 08-1299-EL-UNC

**MEMORANDUM CONTRA THE DUKE ENERGY OHIO
MOTION TO DISMISS THE REQUEST FOR INVESTIGATION
BY
CONSUMERS FOR RELIABLE ELECTRICITY IN OHIO**

I. INTRODUCTION

On December 15, 2008, the Office of the Ohio Consumers' Counsel ("OCC"), AARP Ohio, Pro Seniors, Inc., the Edgemont Neighborhood Coalition, Appalachian People's Action Coalition, the May Dugan Center, the Ohio Farm Bureau Federation, the Ohio Farmers Union, the Northwest Ohio Aggregation Coalition, and the Citizens Coalition -- comprised of Citizens for Fair Utility Rates, the Neighborhood Environmental Coalition, the Cleveland Housing Network, and the Empowerment Center for Greater Cleveland (collectively "Consumers for Reliable Electricity in Ohio" or "CREO"), on behalf of the 4.5 million residential households of Ohio's Electric Distribution Utilities ("EDUs"), filed a Request for Investigation with the Public Utilities Commission of Ohio ("Commission" or "PUCO"). CREO did ask the Commission to order an investigation and conduct hearings regarding the reliability of the distribution service

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provided to customers by all of Ohio's electric utilities.¹ CREO did not ask the Commission to rewrite any pending rules on reliability.

On January 8, 2009, Duke Energy Ohio ("Duke Energy" or "the Company") filed a Motion to Dismiss CREO's Request for Investigation. CREO hereby submits this Memorandum Contra the Motion to Dismiss²

II. CREO PROPERLY REQUESTED A PUCO INVESTIGATION.

Duke Energy went to great lengths to argue that only the PUCO can initiate a complaint into service quality.³ CREO does not dispute the clear meaning and intent of R.C. 4905.26. The fact is that the CREO Request for an Investigation was not a complaint under R.C. 4905.26, although CREO does reserve the right to file such a complaint in the future. Nonetheless, Duke Energy fails to acknowledge the difference between a complaint under R.C. 4905.26 (that was not filed) and the Request for an Investigation (which was filed). Duke Energy's arguments are a distraction from the real issues in this case -- service quality and reliability or the lack thereof that residential customers of Duke Energy were forced to endure.

Duke Energy spends a great deal of effort arguing that only the Commission can initiate an investigation into service quality.⁴ Rather than be drawn into a debate that has

¹ Request for an Investigation at 1.

² For purposes of this Memorandum Contra, CREO consists of the Office of the Ohio Consumers' Counsel ("OCC"), AARP Ohio, Pro Seniors, Inc., the Edgemont Neighborhood Coalition, Appalachian People's Action Coalition, the May Dugan Center, the Ohio Farm Bureau Federation, the Northwest Ohio Aggregation Coalition, and the Citizens Coalition -- comprised of Citizens for Fair Utility Rates, the Neighborhood Environmental Coalition, the Cleveland Housing Network, and the Empowerment Center for Greater Cleveland.

³ Duke Energy Motion to Dismiss at 2.

⁴ Duke Energy Motion to Dismiss at 2-3.

no relevance to this issue, CREO points out that the Request for an Investigation merely asks the Commission to do that which Duke Energy readily concedes the PUCO is empowered to do:

this statutory provision does allow the Commission to initiate an inquiry into then service provided by a public utility.⁵

Duke Energy also argues⁶ that the Commission cannot initiate such a lawful investigation without the detailed factors that existed in the Ameritech Service Quality Investigation.⁷ Despite this claim, such a standard does not exist. To that end, the CREO Request for an Investigation provides the PUCO with ample reason to act -- that service quality and reliability are of paramount importance to the residential customers who rely on Duke Energy for high quality and reliable service, but were forced to endure the litany of problems associated with the wind storm.

In addition, rather than address the service quality and reliability issues raised by CREO, Duke Energy's defense is that the wind storm was a "cataclysmic" event that does not warrant a closer look into the reliability of its system.⁸ Duke Energy further posits that its compliance with the applicable rules and regulations must preclude any service reliability issues.⁹ On one hand, Duke Energy hides behind the severity and magnitude of the windstorm, yet its reaction is one of business-as-usual, instead of a

⁵ Duke Energy Motion to Dismiss at 3.

⁶ *Id.* at 4.

⁷ *In the Matter of the Commission Ordered Investigation of Ameritech Ohio Relative to Its Compliance With Certain Provisions of the Telephone Minimum Service Standards Set Forth in Chapter 4901:1-5 Ohio Administrative Code*, Case No. 99-938-TP-COI, Entry (August 13, 1999).

⁸ Duke Energy Motion to Dismiss at 4.

⁹ *Id.* at 4.

concern that its own practices and procedures may have contributed to the damage and hardship caused by the wind storm.¹⁰ Duke Energy nonchalantly added that “the outages experienced by DE-Ohio’s customers following the September wind storm was in no way exacerbated by the reliability of DE-Ohio’s system.”¹¹

Despite claims to the contrary, the magnitude of the problems experienced by Duke Ohio residential customers was significant and justifies the call for some formal review of Duke Energy’s reliability and the reasons underlying the problems experienced by customers. It is because of this very result that an investigation of Duke Energy’s overall service reliability is not only appropriate, but necessary. Duke Energy’s customers have the right to know whether they are receiving the reliable service they pay for and are entitled to.

Duke Energy’s Motion to Dismiss does not address the need CREO documented for an investigation of its distribution system reliability in Ohio. While CREO’s Request for Investigation cited the windstorm of September 14, 2008 as a triggering event for the need for an investigation of electric reliability in Ohio, CREO emphasized that an investigation was overdue.¹² As clearly pointed out in CREO’s Request for Investigation,¹³ Ohio law requires that the Commission “shall review” electric distribution utilities’ annual Electric Service and Safety Standards (“ESSS”) compliance reports in a “proceeding initiated under division (B) of section 4928.16 of the Revised

¹⁰ Duke Energy Motion to Dismiss at 5.

¹¹ *Id.* at 5.

¹² Request for an Investigation at 2.

¹³ *Id.* at 7.

Code.”¹⁴ The annual reports referenced above are currently filed pursuant to Ohio Adm. Code 4901:1-10-26(A). Duke Energy and Ohio’s other electric distribution utilities have not been subject to such a proceeding -- and such a proceeding is long overdue to ensure the protection of consumers.

In addition, the Ohio General Assembly charged the PUCO with the responsibility to ensure that electric utilities provide “necessary and adequate” service to Ohio consumers and businesses.¹⁵ An investigation into the reliability of the electric distribution service of Duke Energy will assist in ensuring the public that the Company is providing such adequate service.

Finally Duke Energy argues that the CREO Request for an Investigation is an improper attempt to avoid the applicable burden of proof.¹⁶ Duke Energy goes on to argue that CREO must file a Complaint under R.C. 40905.26 if it seeks to properly question the adequacy of its service.¹⁷ The only problem with such a claim by Duke is that it is wrong and there is no such requirement. The fact that Duke Energy could not cite any statute or case law support for this claim speaks volumes as to its inadequacy. Moreover, there is no such prohibition to preclude the Request for an Investigation. Duke Energy may not like the Request for an Investigation, but there is no prohibition against it. The bottom line is that when faced with the realities of the damage and hardship caused by the windstorm, rather than act to ensure that customers have good

¹⁴ R.C. 4928.11(B).

¹⁵ R.C. 4905.22.

¹⁶ Duke Energy Motion to Dismiss at 5.

¹⁷ *Id.* at 5.

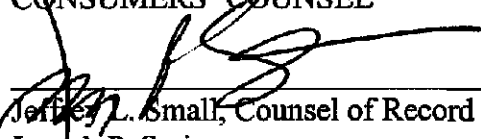
service reliability, Duke Energy's reaction has been to do nothing and to ask the PUCO to do nothing.

III. CONCLUSION

On behalf of residential customers in Ohio, CREO respectfully requests that the Commission reject the arguments put forth in the Company's Motion to Dismiss. The Commission should ensure that the residential customers in 4.5 million Ohio households are receiving the reliable electric service they pay for and are entitled to, by granting CREO's Request for an Investigation.

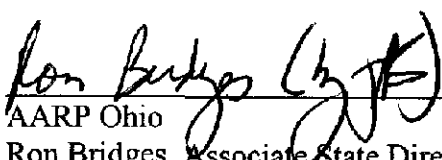
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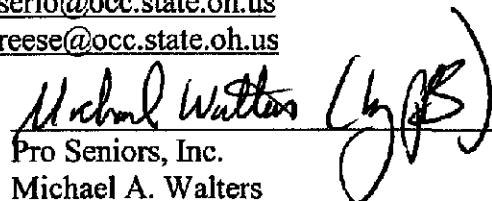


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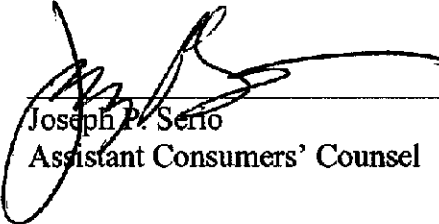
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Memorandum Contra* was served on the persons stated below via regular U.S. Mail Service, postage prepaid, this 26th day of January, 2009.



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