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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. For an Increase in) Case No. 08-0709-EL-AIR
Electric Rates.)

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) Case No. 08-0711-EL-AAM
Change Accounting Methods.)

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**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the 611,000 residential customers of the Duke Energy Ohio, Inc. ("Company" or "Duke") and pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Finding and Order ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on January 14, 2009, in the above-captioned case. The Order approved the application filed by Duke on December 22, 2008 ("Application") requesting authority to modify its accounting procedures in order to defer incremental operation and maintenance ("O&M") costs, with carrying costs, related to the September 14, 2008 wind storm restoration efforts. The approval of the Application by this Commission was unjust, unreasonable and unlawful and the Commission erred in the following particulars:

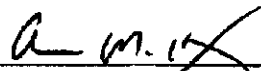
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**THE COMMISSION ERRED WHEN IT FAILED TO
ORDER THAT THE REASONABLENESS AND
LAWFULNESS OF THE DEFERRED AMOUNTS AND ANY
COLLECTION THEREOF FROM CUSTOMERS WILL BE
EXAMINED AND ADDRESSED IN A FUTURE RATE CASE
UNDER R.C. 4909.18, 4909.15, AND RELATED STATUTES.**

The reasons for granting this Application for Rehearing are set forth in the
attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On December 22, 2008, Duke filed its Motion for Approval to Change Accounting Methods (“Motion”) with the PUCO for authority “to change accounting methods to defer and create a regulatory asset for storm restoration operation and maintenance (O&M) costs incurred during the test year.”¹ Duke proposed to defer the O&M expenses, along with carrying charges, for future recovery from all customers, over a three year period “to be recovered in a future application to set and adjust Rider DR-IKE.”² Additionally, Duke proposed that the scope of the proceeding be “limited to a review of the reasonableness of the calculation of the amount to be recovered.”³ Or in the

¹ Motion at 1.

² Id. at 2.

³ Id. at 7.

alternative, Duke asked that the costs be included in the test year expenses or this rate case, amortized over three years.⁴

On January 14, 2009, the Commission issued an Order that approved the Application with modifications.

II. ARGUMENT: THE COMMISSION ERRED WHEN IT FAILED TO ORDER THAT THE REASONABLENESS AND LAWFULNESS OF THE DEFERRED AMOUNTS AND ANY COLLECTION THEREOF FROM CUSTOMERS WILL BE EXAMINED AND ADDRESSED IN A FUTURE RATE CASE UNDER R.C. 4909.18, 4909.15, AND RELATED STATUTES.

The proper mechanism for Duke to seek an increase in its distribution rates due to increased O&M expenses is the filing of an application pursuant to R.C. 4909.18 that would be subject to review according to the rate setting procedures set out in R.C. Chapter 4909. The Commission erred when it simply stated that “the reasonableness of the deferred amounts and the recovery thereof, if any, will be examined and addressed in a future proceeding before the Commission.”⁵ On rehearing, the Commission should find (or clarify) that the reasonableness and lawfulness of the deferred amounts, and any recovery thereof from customers, will be examined and addressed in a future rate case proceeding under 4909.18, 4909.15 and related statutes before the Commission.

A diligent review of any deferred amounts and the prudence of the activities associated with the O&M expenses, conducted in an appropriate procedural context, is essential to protect customers from paying unreasonable rates for their electric distribution service. A future electric security plan (“ESP”) case under R.C. 4928.143

⁴ Id. at 7.

⁵ Order at 3.

would not be an appropriate proceeding to consider Duke's windstorm O&M deferrals. Fundamental to an ESP case is a utility proposal to provide generation service,⁶ and no ESP proposal by Duke can propose generation service in connection with distribution expenditures that took place during 2008.

Only a future distribution rate case can provide an appropriate procedural setting for considering any recovery of Duke's proposed windstorm deferrals. While the Commission cited in its Order a decision of the Supreme Court of Ohio for the proposition that "deferrals do not constitute ratemaking,"⁷ the Court stated in the same decision that any recovery of the deferrals from customers would be considered in a rate case.⁸ Within the appropriate procedural setting of a future rate case, the Commission Staff should carefully investigate Duke's windstorm restoration activities and the related expenditures and make recommendations in its staff report. Review of the restoration activities is particularly crucial due to number of complaints the Commission has received from customers about Duke requesting recovery of its storm restoration costs. The Commission's call center has received over 350 such customer complaints and numerous such letters have been filed in this docket.

The Staff Report released on January 17, 2009 in this case did not address the prudence of the restoration activities and the related expenditures resulting from the September 2008 windstorm. Moreover, a three year amortization of the costs related to "unprecedented winds"⁹ in the current rate case test year expenses would overstate test

⁶ R.C. 4928.143(B).

⁷ Finding and Order at 3.

⁸ *Elyria Foundry Co. v. Public Util. Comm.*, 114 Ohio St. 3d 305, 309, 2007-Ohio-4164 at ¶22.

⁹ Motion at 3-4.

year expenses and the costs cannot be recovered through Duke's alternative proposal as test year expenses in this rate case.

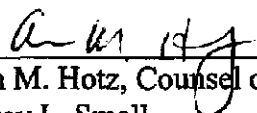
Accordingly the Commission should not consider permitting Duke to recover these costs, until the costs and the associated activities are reviewed in the next distribution rate case under R.C. 4909.18, 4909.15, and related statutes. The Commission should so state in its Entry on Rehearing.

III. CONCLUSION

The Commission should grant rehearing in this case because Duke has no authority to seek recovery of storm-related expenses through an increase in the distribution rates that residential consumers pay unless there is compliance with the protections of Ohio's rate-making statutes. On rehearing, the Commission should make determinations consistent with the OCC's arguments on behalf of Duke's 611,000 residential customers.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel* was served via Regular U.S. Mail Service, postage prepaid, to the persons listed below, this 13th day of February, 2009.



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