

March 13, 2009

By: *Hand-Delivery*

Reneé J. Jenkins, Secretary
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

PUCO

2009 MAR 13 AM 10:25

RECEIVED-BOOKLETING DIV

RE: In the Matter of the Review of Chapters 4901:5-17, 4901:5-19, 4901:5-21, 4901:5-23, 4901:5-25, 4901:5-29, 4901:5-33, 4901:5-35, and 4901:5-37 of the Ohio Administrative Code, Public Utilities Commission of Ohio, Case No. 06-1201-AU-ORD

Dear Ms. Jenkins:

Enclosed is an original and (7) copies of the Joint Application of Ohio Rural Electric Cooperative, Inc. and Buckeye Power, Inc. for Rehearing, filed in connection with the above-referenced matter.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Very truly yours,



Carolyn S. Flahive

cc: Jeanne Kingery, Attorney Examiner
Christine M.T. Pirik, Attorney Examiner

Enclosures

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Technician 3 Date Processed **MAR 13 2009**

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Chapters 4901:5-)
17, 4901:5-19, 4901:5-21, 4901:5-23, 4901:5-25,)
4901:5-29, 4901:5-33, 4901:5-35, and 4901:5-37) Case No. 06-1201-AU-ORD
of the Ohio Administrative Code)

RECEIVED-DOCKETING DIV
2009 MAR 13 AM 10:25
PUCO

JOINT APPLICATION OF
OHIO RURAL ELECTRIC COOPERATIVES, INC.
AND BUCKEYE POWER, INC.
FOR REHEARING

Pursuant to Rev. Code Section 4903.10 and Ohio Adm. Code 4901-1-35, Ohio Rural Electric Cooperatives, Inc. ("OREC") and Buckeye Power, Inc. ("Buckeye") (together with their respective members, the "Cooperatives") hereby seek rehearing of the Commission's February 11, 2009 Finding and Order in this matter (the "Order"). The Order is unlawful, unreasonable and an abuse of discretion for the following reasons:

1. The Order exceeds the Commission's statutory authority to regulate the Cooperatives by subjecting the Cooperatives to rules pertaining outside of declared energy emergencies.
2. The Order exceeds the Commission's statutory authority to regulate the Cooperatives by subjecting the Cooperatives to overly broad regulation during declared energy emergencies.

A Memorandum in Support of this Application is supplied herewith.

Respectfully submitted,

OHIO RURAL ELECTRIC COOPERATIVES, INC.
and BUCKEYE POWER, INC.

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Their Attorneys

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Chapters 4901:5-)
17, 4901:5-19, 4901:5-21, 4901:5-23, 4901:5-25,)
4901:5-29, 4901:5-33, 4901:5-35, and 4901:5-37) Case No. 06-1201-AU-ORD
of the Ohio Administrative Code)

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

Ohio Rural Electric Cooperatives, Inc. and Buckeye Power, Inc. (together with their respective members, the "Cooperatives") submit this Memorandum in support of their Application for Rehearing of the Commission's Finding and Order dated February 11, 2009 ("Order"). The Cooperatives seek rehearing of the Order and modification of the adopted rules that are the subject of this proceeding to the extent that the rules subject electric cooperatives (1) to regulation outside of declared energy emergencies and (2) to regulation beyond the scope of the Commission's statutory authority over electric cooperatives during declared energy emergencies.

BACKGROUND

In connection with the Commission's obligation under Sections 111.15 and 119.032 of the Ohio Revised Code to conduct a review of its rules every five years, and to determine whether to continue its rules without change, or amend or rescind its rules, the Commission issued an entry on October 11, 2006, proposing new and revised regulations governing fuel emergencies related to the generation of electricity (4901:5-19) and emergency reporting by electric entities (4901:5-37), among other situations and emergency obligations (the "Initial Entry"). The Cooperatives submitted their Initial Joint Comments on the Commission's proposed

new and revised energy emergency rules on December 15, 2006, and their Joint Reply Comments on January 16, 2007 (the Initial Joint Comments, together with the Joint Reply Comments, being referred to collectively herein as the “Comments”). The Commission issued the Order on February 11, 2009, establishing the final new and revised energy emergency rules.

In their Comments, the Cooperatives argued that the Initial Entry’s proposed rules were an overextension of the Commission’s limited jurisdiction over electric cooperatives. As discussed in further detail below, although the Cooperatives appreciate that the Commission adopted the Cooperatives’ comments in part, the rules continue to subject the Cooperatives to regulation beyond the Commission’s statutory authority.

DISCUSSION

The Order establishes final energy emergency rules imposing requirements over Buckeye and its and OREC’s members both during declared energy emergencies and at times prior to declared energy emergencies. Because the Cooperatives are not statutory “public utilities,” the Order purports to extend the Commission’s jurisdiction over the Cooperatives to circumstances well beyond the Commission’s limited statutory authority. The Cooperatives argued in their Comments that such unauthorized jurisdiction is unlawful, yet the final rules do not correctly reflect the Commission’s limited statutory authority to regulate the Cooperatives. Accordingly, the Order is in error in this regard and should be reheard with respect to the issues identified herein.

I. Legal Principles: The Commission’s Statutory Authority to Regulate the Cooperatives.

The Order exceeds the Commission’s statutory authority to regulate the Cooperatives. As discussed in the Cooperatives’ Comments, it is a well settled principle of law that the Commission, “as a creature of statute, has and can exercise only the authority conferred upon it

by the General Assembly.”¹ It is also settled that the Commission has no general jurisdiction over the Cooperatives.² Rev. Code §4905.04 vests the Commission with power and jurisdiction to supervise and regulate “public utilities,” a term which, as defined in Rev. Code §4905.02, explicitly excludes electric light companies that operate their utilities not-for-profit. Rev. Code §4905.05, which sets forth the scope of the Commission’s jurisdiction, provides that nothing in that section or Section 4905.06 (General Supervision) applies to entities that are excepted from the definition of “public utility” under Section 4905.02(A) of the Revised Code. Therefore, the Commission’s jurisdiction over the Cooperatives, which are electric light companies that operate their utilities not-for-profit, is limited to other express statutory grants of authority.

The Commission’s statutory authority to enact rules relating to energy emergencies, and to regulate electric cooperatives for such purposes, is limited to the express language of Section 4935.03 of the Revised Code, which provides that electric cooperatives may be regulated only upon the governor’s declaration of an energy emergency, and only for the purposes set forth therein. Pursuant to Rev. Code §4935.03(B), the governor’s declaration of an energy emergency must indicate the counties, utility service areas, or fuel market areas affected, or its statewide effect, as well as the fuels or forms of energy that are in critically short supply.

While the Order modifies the rules proposed by the Initial Entry to recognize in part the Commission’s lack of general jurisdiction over the Cooperatives, the Order still exceeds such limited jurisdiction by requiring that Cooperatives comply with rules that pertain in situations other than declared energy emergencies. Further, the rules subject the Cooperatives to overly broad regulation during declared energy emergencies. The rules are, therefore, an unlawful extension of the Commission’s statutory authority and must be modified as set forth herein.

¹ *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 88.

² See Rev. Code §§4905.02, 4905.04, 4905.05, 4905.06.

1. The Order Exceeds the Commission's Statutory Authority to Regulate the Cooperatives by Subjecting the Cooperatives to Rules Pertaining Outside of Declared Energy Emergencies.

In their Initial Joint Comments, the Cooperatives argued that the provisions of Chapters 4901:5-19 and 4901:5-37 establishing actions that the Commission may order to be taken outside of declared energy emergencies cannot lawfully apply to the Cooperatives.³ In response, the Commission removed the Cooperatives from application of 4901:5-19-04 and revised the rules of Chapter 4901:5-37⁴ so that the Cooperatives would be required to comply only with reporting requirements, and not with other actions, during scenarios that are not declared energy emergencies. These reporting requirements are found in 4901:5-19-02(E), (F) and (G), and 4901:5-37-03(A).

The Order states that “with respect to pre-emergency obligations, the energy emergency rules establish two types of rules: (1) rules that require the provision of information regarding available fuel supplies to the Commission [e.g., amended Rule 4901:5-19-02(E), (F), (G)] and (2) rules that require the taking of some type of action, i.e., conservation or curtailment [e.g., amended Rule 4901:5-19-02(A)].”⁵ The Commission goes on to agree that the proposed rules should be modified to remove the Cooperatives from application of the second general type of pre-emergency rules, but rejects the Cooperatives’ Comments with respect to the first general type of rules by continuing to subject the Cooperatives to such pre-emergency informational reporting requirements.⁶

³ Proposed Ohio Adm. Code 4901:5-19-02(E), (F), (G) and (H), 4901:5-19-03, 4901:5-19-04, 4901:5-37-02, 4901:5-37-03, 4901:5-37-04, 4901:5-37-05, as set forth in the Initial Entry.

⁴ The Commission accomplished this modification by adding language to the following rules limiting their application to Cooperatives only during declared energy emergencies: 4901:5-37-02(D), 4901:5-37-03(B), 4901:5-37-04, 4901:5-37-05.

⁵ Order at 11.

⁶ Id. at 11, 57.

Although the Cooperatives appreciate that the Commission has considered and partially adopted their Comments, the Order does not go far enough to conform the rules to the Commission's limited jurisdiction over the Cooperatives. The rules continue to subject the Cooperatives to reporting requirements during pre-emergency scenarios when the Commission has no statutory authority to regulate the Cooperatives.⁷ Nowhere does the Order describe where the Commission derives its authority to subject the Cooperatives to any regulatory requirement, including informational reporting, during pre-emergency situations. Although the Commission attempts to distinguish between these two types of rules, it does so without explanation as to why its statutory authority exists for the purpose of demanding the Cooperatives comply with informational reporting requirements, but not for the purpose of demanding the Cooperatives take other actions. Regardless, such distinction is meaningless, as the Commission has no statutory authority to regulate the Cooperatives outside of declared energy emergencies for any purpose.

Although Buckeye and OREC anticipate that they and their members would comply voluntarily with such reporting requirements in times when an energy emergency is anticipated, the Commission has no authority to require the Cooperatives' compliance. Accordingly, the Cooperatives' Comments should be fully adopted, and no provision of the energy emergency rules should apply to the Cooperatives outside of declared energy emergencies.

⁷ Although the Commission attempts to justify application of the pre-emergency reporting requirements of 4901:5-19-02 by making such requirements applicable only when an "imminent" energy emergency is anticipated, the modified rules are still outside of the Commission's statutory authority since *any* regulation of electric cooperatives outside of a declared energy emergency, even when an energy emergency is "imminent," is unlawful.

2. The Order Exceeds the Commission's Statutory Authority to Regulate the Cooperatives by Subjecting the Cooperatives to Overly Broad Regulation During Declared Energy Emergencies.

Although the Commission does have jurisdiction to regulate the Cooperatives during declared energy emergencies, the scope of such regulation is strictly limited to the Commission's statutory authority under Rev. Code §4935.03 because the Commission has no general jurisdiction over the Cooperatives. The Order clearly exceeds the Commission's limited authority to regulate the Cooperatives during declared energy emergencies.

a. The Commission Does Not Have the Authority to Require the Cooperatives to Initiate or Terminate "Any" Action During Emergencies.

The Cooperatives take specific issue with the language of 4901:5-37-02(D) which provides that: "[t]he commission may . . . in addition to the rules of this chapter, adopt orders to require any electric entity to take prescribed actions before an emergency and/or initiate or to terminate any action during an emergency. The provisions of this paragraph do not apply to any municipal or cooperative unless the governor has declared an energy emergency under section 4935.03 of the Revised Code."

Although the Cooperatives recognize the Commission's attempt to incorporate the Cooperatives' Comments by limiting application of this rule to Cooperatives only during declared energy emergencies, the Commission clearly does not have the statutory authority to adopt orders requiring unregulated electric entities to "initiate or to terminate *any* action during an emergency." (Emphasis added.) Such a broad grant of authority plainly exceeds the limited scope of the Commission's statutory authority to regulate the Cooperatives under Rev. Code §4935.03. This provision should either be (i) removed entirely, (ii) modified so as not to apply to the Cooperatives, even during declared energy emergencies, or (iii) modified to clarify that it applies to the Cooperatives only during declared energy emergencies and only with respect to the

limited scope of actions the Commission may require the Cooperatives to take pursuant to Rev. Code §4935.03.

b. The Cooperatives Should Not be Subject to the Requirements of 4901:5-37 Unless the Governor Implements Such Rules by Executive Order During a Declared Energy Emergency.

Rev. Code Section 4935.03 governs the process by which energy emergency rules are implemented and enforced. Among other things, the statute provides that the governor's declaration of an energy emergency must "state the counties, utility service areas, or fuel market areas affected, or its statewide effect, and what fuels or forms of energy are in critically short supply."⁸ Accordingly, each Chapter of the Ohio Administrative Code's energy emergency rules, other than 4901:5-35⁹ and 4901:5-37, contains a rule entitled "Enforcement on Governor's Instruction," which provides that "no rule shall be implemented and no person shall be penalized under any rule in this chapter . . . until the governor, by executive order, during a declared energy emergency, specifically designates by rule number and title which rule or rules are to be implemented and enforced and fixes the date and time after which the named rule or rules shall be implemented or enforced," and that the governor may request, in the alternative, that the Commission issue and enforce such orders effecting rule implementation.¹⁰

Unlike the other energy emergency chapters, however, Chapter 4901:5-37, which establishes rules pertaining to "critical situations"¹¹ in contrast to "declared energy emergencies," does not provide that its rules may be implemented and enforced only upon

⁸ Rev. Code §4935.03(B).

⁹ In lieu of this language, 4901:5-35-02(A) provides, with respect to the state set-aside program for heating oil, propane and transportation fuel, that "authority shall be delegated to the commission by order of the governor to administer the program."

¹⁰ Adm. Code 4901:5-19-03, 4901:5-23-03, 4901:5-25-03, 4901:5-29-03, 4901:5-33-03.

¹¹ A "critical situation" (referred to in the Initial Entry as an "emergency") is defined as "an anticipated or existing shortage in the supply of electric energy, or constraint in the transmission, distribution, or generation of electrical energy, which has adversely affected, or is likely to adversely affect, the operation or reliability of transmission, distribution, or generation facilities." 4901:5-37-01(C).

executive order of the governor. Therefore, since the Order subjects Cooperatives to the requirements of 4901:5-37 during declared emergencies, the Cooperatives are subject to the potential application of such rules without the governor's executive order to implement them.

While the Cooperatives agree that the Commission has the statutory authority to regulate Cooperatives under Chapter 4901:5-37 during declared energy emergencies, in accordance with Rev. Code §4935.03(B), the Commission should do so only upon the governor's executive order implementing the applicable rule(s). Otherwise, the Cooperatives could be unlawfully subjected to the rules of Chapter 4901:5-37 during unrelated energy emergencies. For example, if the governor declares an energy emergency as a result of a shortage in transportation fuel, as the rules currently stand, the Commission could require the Cooperatives to comply with the requirements of Chapter 4901:5-37, which deals with critical situations affecting electric utilities, during such unrelated transportation fuel energy emergency.

In order to eliminate the potential for such unlawful application of the rules to the Cooperatives, Chapter 4901:5-37 should be modified to clarify that its rules apply to the Cooperatives only upon the governor's executive order implementing such rules during a declared energy emergency. Therefore, the Cooperatives suggest that a new provision be added to Chapter 4901:5-37, stating that:

- (A) Cooperatives and municipals shall not be subject to, or penalized under, any rule in this chapter of the Administrative Code, until the governor, by executive order, during a declared energy emergency, specifically designates by rule number and title which rule or rules are to be implemented and enforced and fixes the date and time after which the named rule or rules shall be implemented or enforced.
- (B) Alternatively, the governor may request, under section 4935.03 of the Revised Code, that the commission issue and enforce orders effecting the implementation of this chapter.

II. Policy Considerations.

As discussed in the Cooperatives' Initial Joint Comments, policy considerations support the Commission's limited jurisdiction over the Cooperatives. The Cooperatives are organized on a not-for-profit, cooperative basis whereby their member/consumers (and their duly elected Boards of Trustees), in fact, own, control and regulate the Cooperatives. The duly elected Boards of Trustees of the Cooperatives control all aspects of the Cooperatives' operations, including the procedures for restoration of service, and the handling of emergencies. Their first priority, at all times, is meeting the electric service needs of their member/consumers. There is no divorce between the needs of the consumers of the Cooperatives and the requirements of investors/owners because the consumers and the owners are one and the same.

The Cooperatives are small, generally rural companies that, collectively, provide less than 5% of the electric load in Ohio. The Cooperatives generally do not serve large industrial electric loads, nor do they own transmission facilities. In addition, all of the Cooperatives' electric generation facilities are operated and maintained by third parties as integrated parts of investor-owned electric utility systems, and they are all located in PJM Interconnection, LLC, and are dispatched pursuant to instructions from PJM. Therefore, any regulation of the Cooperatives in non-emergency, pre-emergency or emergency situations is likely to have only a negligible effect on load curtailment, cannot remedy any emergencies caused by problems with the transmission grid, and would have very little effect on generation resources.

Finally, despite the lack of Commission jurisdiction over the Cooperatives in non-declared energy emergencies, the Cooperatives have cooperated with the Commission when requested to do so by the Commission, and the Cooperatives will certainly continue to do so. Although the Cooperatives protest the Commission's attempts to regulate the Cooperatives

during times outside of declared energy emergencies, the Cooperatives anticipate that they will comply voluntarily with the pre-emergency reporting requirements set forth in the rules.

CONCLUSION

The rules must be modified to properly reflect the Commission's limited jurisdiction over the Cooperatives by (1) eliminating the application of any pre-emergency requirements over the Cooperatives, specifically 4901:5-19-02(E), (F) and (G) and 4901:5-37-03(A) and (2) eradicating the overly broad regulation of the Cooperatives during declared energy emergencies by (a) modifying 4901:5-37-02(D) as suggested herein and (b) adding language to Chapter 4901:5-37 stating that the rules of that chapter that are applicable to the Cooperatives during declared energy emergencies shall not be implemented or enforced against the Cooperatives except upon the governor's issuance of an executive order designating implementation of such rules.

For the reasons discussed herein, Ohio Rural Electric Cooperatives, Inc. and Buckeye Power, Inc. request that the Commission grant the foregoing Application for Rehearing.

Respectfully submitted,

OHIO RURAL ELECTRIC COOPERATIVES, INC.
and BUCKEYE POWER, INC.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing has been served upon all parties listed on the attached Service List, by U.S. Mail delivery and, where indicated, also by electronic mail, this 13th day of March, 2009.


Ann B. Zallocco

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