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May 15, 2009

By: *Hand-Delivery*

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

RECEIVED-DOCKETING DIV
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PUCO

RE: *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, to Implement Senate Bill No. 221; Public Utilities Commission of Ohio, Case No. 08-888-EL-ORD*

Dear Ms. Jenkins:

Enclosed is an original and (7) copies of the Application of 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

Enclosures

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Adoption of Rules for)
Alternative and Renewable Energy Technologies)
and Resources, and Emission Control Reporting)
Requirements, and Amendment of Chapters)
4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of) Case No. 08-888-EL-ORD
the Ohio Administrative Code, pursuant to)
Chapter 4928, Revised Code, to Implement)
Senate Bill No. 221)

APPLICATION OF BUCKEYE POWER, INC. FOR REHEARING

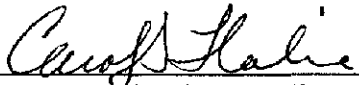
Pursuant to Rev. Code Section 4903.10 and Ohio Adm. Code 4901-1-35, Buckeye Power, Inc. ("Buckeye") hereby seeks rehearing of the Commission's April 15, 2009 Opinion and Order in this matter (the "Order"). The Order is unlawful, unreasonable and an abuse of discretion for the following reason:

The Order exceeds the Commission's statutory authority to adopt rules establishing greenhouse gas emission reporting requirements by subjecting electric utilities that are not subject to the Commission's jurisdiction, such as Buckeye, to the reporting requirements.

A Memorandum in Support of this Application is supplied herewith.

Respectfully submitted,

BUCKEYE POWER, INC.

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Its Attorneys

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Adoption of Rules for)	
Alternative and Renewable Energy Technologies)	
and Resources, and Emission Control Reporting)	Case No. 08-888-EL-ORD
Requirements, and Amendment of Chapters)	
4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of)	
the Ohio Administrative Code, pursuant to)	
Chapter 4928, Revised Code, to Implement)	
Senate Bill No. 221)	

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

Buckeye Power, Inc. hereby submits this Memorandum in support of its Application for Rehearing of the Commission's Opinion and Order dated April 15, 2009 ("Order"). Buckeye seeks rehearing of the Order and modification of the adopted rules that are the subject of this proceeding to the extent that the rules subject Buckeye to regulation beyond the scope of the Commission's statutory authority to impose greenhouse gas emission reporting requirements on owners/operators of electric generating facilities located in Ohio.

BACKGROUND

Buckeye is an Ohio nonprofit corporation and the provider of wholesale electric power and energy and transmission services to the 25 electric distribution cooperatives providing retail electric service in Ohio.¹ Buckeye owns electric generating facilities in the State of Ohio,

¹ The 25 members of Buckeye are Adams Rural Electric Cooperative, Inc., Buckeye Rural Electric Cooperative, Inc., Butler Rural Electric Cooperative, Inc., Carroll Electric Cooperative, Inc., Consolidated Electric Cooperative, Inc., Darke Rural Electric Cooperative, Inc., Firelands Electric Cooperative, Inc., The Frontier Power Company, Guernsey-Muskingum Electric Cooperative, Inc., Hancock-Wood Electric Cooperative, Inc., Holmes-Wayne Electric Cooperative, Inc., Licking Rural Electrification, Inc. d/b/a The Energy Cooperative, Logan County Cooperative Power and Light Association, Inc., Lorain-Medina Rural Electric Cooperative, Inc., Mid-Ohio Energy Cooperative, Inc., Midwest Electric, Inc., Midwest Energy Cooperative, North Central Electric Cooperative, Inc.,

including Unit Nos. 2 and 3 at the Cardinal Generating Station, a coal-fired power plant located near Brilliant, Ohio, and the Greenville Electric Generating Station, a natural gas-fired peaking power plant located near Greenville, Ohio. National Power Cooperative, Inc. ("National"), an Ohio nonprofit corporation and an affiliate of Buckeye, also owns the Robert P. Mone Plant, a natural gas-fired peaking power plant located near Convoy, Ohio. Buckeye and National operate their electric utilities on a non-profit cooperative basis for the mutual benefit of their members/consumers.

Pursuant to Amended Senate Bill 221 ("SB 221"), the Commission issued an entry on August 20, 2008 proposing, among other things, new chapter 4901:1-41 to the Ohio Administrative Code, which sets forth rules for the reporting of greenhouse gas emissions and carbon dioxide control planning (the "Initial Entry"). Buckeye submitted its Initial Comments on the Commission's proposed new greenhouse gas reporting rules on September 9, 2008, and its Reply Comments on September 26, 2008 (the Initial Comments, together with the Reply Comments, being referred to collectively herein as the "Comments"). The Commission issued the Order on April 15, 2009, establishing the final new greenhouse gas reporting rules.

In its Comments, Buckeye argued that the Initial Entry's proposed rules in Chapter 4901:1-41 exceeded the authority granted to the Commission under SB 221. As discussed in further detail below, Chapter 4901:1-41 as adopted continues to subject Buckeye to regulation beyond the Commission's statutory authority.

ARGUMENT

The Order exceeds the Commission's statutory authority to adopt greenhouse gas reporting requirements and it should be reheard.

North Western Electric Cooperative, Inc., Paulding-Putnam Electric Cooperative, Inc., Pioneer Rural Electric Cooperative, Inc., South Central Power Company, Tricounty Rural Electric Cooperative, Inc., Union Rural Electric Cooperative, Inc., and Washington Electric Cooperative, Inc.

1. The Order Exceeds the Commission's Statutory Authority by Subjecting Electric Utilities That Are Not Subject to the Commission's Jurisdiction to Greenhouse Gas Reporting Requirements.

The greenhouse gas reporting requirements under SB 221 do not apply to Buckeye and National. Section 4928.68 of the Ohio Revised Code authorizes the Commission to "adopt rules establishing greenhouse gas reporting requirements, including participation in the climate registry, and carbon dioxide control planning requirements for each electric generating facility that is located in this state, is owned or operated by a public utility that is subject to the commission's jurisdiction, and emits greenhouse gases" (Emphasis added.) Buckeye and National are not subject to the Commission's jurisdiction and, therefore, cannot lawfully be subject to any greenhouse gas reporting requirements imposed by the Commission pursuant to the authority granted to it under section 4928.68.²

Rule 4901:1-41-03 imposes greenhouse gas reporting requirements upon any "person" owning or operating an electric generating facility that is capable of producing electricity of fifty megawatts or more. As defined in Rule 4901:1-41-01 "Person" has the meaning set forth in sections 4906.01 of the Ohio Revised Code which is "an individual, corporation, business trust, association, estate, trust, or partnership or any officer, board, commission, department, division, or bureau of the state or a political subdivision of the state, or any other entity." As such, Buckeye and National would be subject to Rule 4901:1-41-03, as adopted.

By subjecting Buckeye and National to the reporting requirements, the Commission has clearly exceeded the scope of authority granted to it under section 4928.68. As discussed in Buckeye's Comments, it is a well settled principle of law that the Commission, "as a creature of

² The definition of "public utility" set forth in Ohio Revised Code section 4905.02 explicitly exempts electric light companies that operate their utilities not for profit from Commission jurisdiction. Buckeye and National operate not for profit and therefore, are not subject to the Commission's jurisdiction.

statute, has and can exercise only the authority conferred upon it by the General Assembly."³ As the Commission recently acknowledged, rules issued by the Commission can only apply to entities to the extent that the Commission has statutory authority over those entities.⁴ The Commission's statutory authority to enact rules relating to greenhouse gas reporting is limited to the express language of section 4928.68 of the Ohio Revised Code. Because Buckeye and National are not subject to the Commission's jurisdiction, the Commission cannot impose greenhouse gas reporting requirements on them.

2. The Commission Cannot Expand the Applicability of Section 4928.68 to Electric Utilities That Are Not Subject to the Commission's Jurisdiction.

The Commission has failed to legally justify its expansion of the applicability of section 4928.68 to entities outside of its jurisdiction.

A. The Commission's justification for imposing greenhouse gas reporting requirements on entities that are not subject to its jurisdiction is unfounded.

In response to the parties who argued that the provisions of Chapter 4901:1-41 cannot lawfully apply to entities that are not subject to the Commission's jurisdiction, the Commission stated in the Order that "if only those under the Commission's traditional direct jurisdiction are subject to greenhouse gas reporting requirements, such a narrow interpretation would exempt so many entities from the monitoring and reporting requirements as to essentially render the rule meaningless."⁵ This argument is meritless. The Commission has already narrowed the scope of the rule by limiting the entities subject to the reporting requirements to owners or operators of electric generating facilities that are capable of producing electricity of fifty megawatts or more.

The vast majority of electric generating facilities capable of producing electricity of fifty

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

⁴ *In the Matter of the Review of the Emergency Rules contained in 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*, Case No. 06-1201-AU-ORD (Entry on Rehearing at 5, May 6, 2009).

⁵ Order at 41.

megawatts or more are owned or operated by public utilities that are subject to the Commission's jurisdiction. Under the Commission's adopted rule, only a small number of owners or operators of such electric generating facilities would be exempted from the reporting requirements if the applicability of the rule was properly limited to jurisdictional entities as section 4928.68 requires. Therefore, the proper exclusion of non-jurisdictional entities would not render the rule meaningless.

The Commission also attempted to justify imposing reporting requirements on non-jurisdictional entities by stating that a broad interpretation is "consistent with, and necessary for, the Commission's oversight of IRP [integrated resource plan] planning and the advanced energy portfolio standards, as mandated in SB 221."⁶ This argument fails because there is no connection between expanding the reporting requirements to non-jurisdictional entities and the Commission's responsibilities with respect to resource planning or the new portfolio standards under SB 221. The integrated resource plan requirements and the advanced energy portfolio standards are only applicable to entities subject to the Commission's jurisdiction and in no way relate to greenhouse gas emission reporting. Indeed, the whole purpose of excluding non-jurisdictional entities from the scope of the greenhouse gas reporting rules is to avoid placing the burden of the reporting requirements on those entities over which the Commission has no jurisdiction or authority to impose any requirements or rules using the data obtained from the reporting requirements.

Finally, Buckeye is already reporting carbon dioxide emission data to the U.S. Environmental Protection Agency (the "EPA") on a quarterly basis under the federal Acid Rain Program. In addition, the EPA has issued a proposed rule creating a national system for reporting greenhouse gas emissions that would apply to direct emitters of greenhouse gasses.

⁶ *Id.*

Therefore, concerns that greenhouse gas emission data will be unaccounted for if non-jurisdictional entities are exempted from Rule 4901:1-41-03 should be alleviated by the existing and proposed federal regulations. Regardless, notwithstanding the Commission's flawed reasoning for expanding the reporting requirements to non-jurisdictional entities such as Buckeye and National, the Commission cannot exceed the statutory authority granted to it under section 4928.68.

B. The Commission has failed to provide a legal justification for imposing greenhouse gas reporting requirements on entities outside of its jurisdiction.

The Commission does not have the authority to expand the applicability of section 4928.68 to entities outside its jurisdiction. The Order provides no legal justification for imposing the reporting requirements on electric utilities that are not subject to the Commission's jurisdiction because no such justification exists. The Ohio Supreme Court has held that "[t]he question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact."⁷ The Ohio Supreme Court has further held that "[a]n unambiguous statute is to be applied, not interpreted."⁸ There is no ambiguity in section 4928.68. The statute clearly limits the entities subject to the greenhouse gas reporting requirements to those that are subject to the Commission's jurisdiction.

As the court in *Storer Communications* held, "[t]here is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for."⁹ By expanding the applicability of section 4928.68 the Commission has assumed the role of the General Assembly¹⁰ and done just what the Ohio Supreme Court proscribed. The Commission has clearly exceeded its authority by ignoring the

⁷ *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St. 3d 193, 194).

⁸ *L.J. Minor Corp. v. Breitenbach* (1996), 77 Ohio St. 3d 168, 171 (citations omitted).

⁹ *Storer Communications*, 37 Ohio St. 3d at 194.

¹⁰ See *Sears v. Weimer* (1944), 143 Ohio St. 312, 316.

plain language of section 4928.68 and reading its own interpretation of the legislature's intent into the statute.

3. The Rules Must be Modified to Properly Reflect the Commission's Limited Authority under SB221 to Impose Reporting Requirements.

As Buckeye proposed in its Comments, the rules must be modified as follows:

Rule 4901:1-41-01 Definitions – Replace the definition of "Person" in subsection (F) with the following definition of "Public Utility":

(F) "Public Utility" has the meaning set forth in section 4905.02 of the Revised Code.

AND

Rule 4901:1-41-03 Greenhouse gas reporting and carbon dioxide control planning –

Revise subsections (A) and (B) as follows:

(A) ~~Any person owning or operating~~Public Utility that owns or operates an electric generating facility within Ohio shall become a participating member in the climate registry, and shall report greenhouse gas emissions according to the protocols approved by the climate registry, or as otherwise directed by the commission.

(B) ~~Any person who~~Public Utility that owns or operates an electric generating facility within Ohio shall file with the commission by April fifteenth of each calendar year an environmental control plan, including carbon dioxide control planning. A copy of such plan shall also be provided to the director of the Ohio environmental protection agency, or his designee.

CONCLUSION

Although Buckeye and National anticipate that they would voluntarily comply with the reporting requirements under Chapter 4901:1-41 based upon Buckeye's and National's existing reporting requirements under federal law, the Commission has no authority to require their compliance. Accordingly, Buckeye's Comments should be fully adopted. For the reasons discussed herein, Buckeye Power, Inc. requests that the Commission grant the foregoing Application for Rehearing.

Respectfully submitted,

BUCKEYE POWER, INC.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing filed on behalf of Buckeye Power, Inc. was served by first-class, postage prepaid U.S. mail, and, where indicated, electronic mail, upon the individuals listed on this 15th day of May 2009.


Sarah P. Chambers

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