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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.)

In the Matter of the Application of)
 Cincinnati Gas & Electric Company for) Case No. 06-718-EL-ATA
 Approval of its Rider BDP, Backup)
 Delivery Point.)

**MEMORANDUM CONTRA
APPLICATION FOR REHEARING OF ALBERT E. LANE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra¹ to Albert E. Lane's ("Mr. Lane") Application for Rehearing, dated July 21, 2009. The Public Utilities Commission of Ohio ("PUCO" or "Commission"), in its Opinion and Order dated July 8, 2009 ("Order"), approved a rate increase for Duke Energy Ohio ("Duke" or "Company") and adopted a Stipulation and Recommendation filed on March 31, 2009 ("Stipulation"). OCC was a signatory party to that Stipulation.

In his Application for Rehearing, Mr. Lane argues that the Commission should have ordered an independent audit, that the Order did not provide benefits to the majority

¹ Ohio Adm. Code 4901-1-35.

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of residential customers, and that a hearing to receive public comment in Cincinnati should have included information related to settlement discussions.² Mr. Lane expressed his disagreement with OCC's decisions, in addition to his dissatisfaction with the Stipulation and the PUCO's Order.³

Mr. Lane has a right to express his disagreement with matters in these cases. However, OCC opposes his rehearing arguments. In so doing, OCC will focus -- just as parties and the PUCO should focus -- on legal standards that apply to approval of the Stipulation by the Order and not on the individuals who were involved in the case.

II. ARGUMENT

A. **R.C. 4909.19 Outlines Procedures That the Commission Must Follow In Investigating An Application for An Increase In Rates.**

Mr. Lane seeks an independent audit that is not required in the instant rate case.⁴ R.C. 4909.18 prescribes the procedure that the Commission must follow in investigating an application for a rate increase. R.C. 4909.19 specifies the nature of the investigation that must accompany a request for an increase in distribution rates:

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory . . . , and the commission shall at once cause an investigation to be made of the facts set forth in said application Within a reasonable time as determined by

² Application for Rehearing at 4.

³ Id.

⁴ Id.

the commission after the filing of such application, a written report shall be made and filed with the commission

* * *

If objections are filed with the commission, the commission shall cause a pre-hearing conference to be held between all parties, intervenors, and the commission staff in all cases involving more than one hundred thousand customers.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party.⁵

This is the procedure the Commission properly relied upon in this rate case.

Mr. Lane argues that because “an outside neutral audit” was conducted in Case No. 07-974-EL-UNC and Case No. 07-975-EL-UNC, an outside neutral audit should have been conducted in this rate case.⁶ Case Nos. 07-974-EL-UNC and 07-975-EL-UNC are purchased power and fuel procurement adjustment proceedings. The Commission’s decision in Duke’s Rate Stabilization Plan, Case No. 03-93-EL-ATA, among other things, established the procedure to be followed in Duke’s purchased power and fuel procurement adjustment proceedings that provide for audits.⁷

Mr. Lane seeks to apply the same legal procedure to two different types of cases, but that is not consistent with law as determined by the Ohio General Assembly. Mr. Lane also claims that OCC was mistaken in not insisting upon an audit (and that the PUCO apparently erred in not ordering an audit). While OCC has been supportive of an audit process in many PUCO cases and considers support for an audit process according

⁵ R.C. 4909.19.

⁶ Application for Rehearing at 4.

⁷ *In re Duke Rate Stabilization Plan*, Case No. 03-93-EL-ATA, et. al., Entry on Rehearing at 10-12 (November 23, 2004).

to the circumstances of specific cases, there was not a legal requirement that OCC insist upon an audit in this case.

B. The Stipulation Provided for Benefits To All of Duke's Residential Customers.

Mr. Lane believes that the Stipulation benefited only 10,000 low-income residential customers.⁸ But the Stipulation benefits all 670,000 of Duke residential customers in multiple ways, such as:

- The revenue increase was decreased to \$55.3 million, which is lower than the \$85.5 million requested by the Company and lower than the midpoint of the Staff's recommendation of approximately \$58.5 million.
- The customer charge was decreased to \$5.50 per month from the \$10 per month the company requested and the \$5.71 recommended by the Staff.
- The Company agreed to make its three-phase residential rate available throughout its service territory to eligible customers.
- The Company agreed to implement new depreciation rates as requested by OCC in its objections.
- The Company agreed to remove from the rate case its request for recovery of \$31 million in windstorm costs and instead would have to request recovery in a different proceeding that will provide for more detailed review of the costs.
- The Company agreed to implement rates on a service rendered rather than bills rendered basis, which saves customers a significant amount of money.

The benefits listed above are in addition to benefits the Stipulation provides to low-income customers. These benefits may not all have been achieved through litigation, and the Stipulation therefore provided benefits to all of Duke's residential customers.

⁸ Application for Rehearing at 4.

C. There Was No Error With Regard To Evidence Of Negotiations Not Being Entered In The Record.

Mr. Lane states that the hearing on March 19, 2009 in Cincinnati should have included information regarding the contents of negotiations that resulted in the Stipulation filed on March 31, 2009.⁹ Although not properly the subject of an application for rehearing regarding the Commission's Order, pursuant to R.C. 4903.10, Mr. Lane also believes that OCC should have revealed information on the state of settlement discussions at the Cincinnati hearing for the public.¹⁰ Aside from the fact that the Stipulation had not been completed and was not filed until 12 days after the public hearing, applicable legal requirements did not allow for revelation of information from settlement discussions that may have been available on March 19, 2009.

Ohio Rule of Evidence 408 ("Rule 408") and Ohio Adm. Code 4901-1-26(E) ("Rule 26") prevent the type of revelations that Mr. Lane requests. Rule 408 does not generally allow information from settlement discussions to be entered into the record, subject to exceptions not applicable here.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to provide liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations are likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

⁹ Id. at 8.

¹⁰ Id.

None of the exclusions identified under the rule cited above apply to the public hearing of March 19, 2009. Accordingly, the evidence of negotiations could not be properly entered into the record.

Similarly, the PUCO's Rule 26(E) does not allow for entering such information in the record, except for valid reasons not applicable here:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a disputed matter in a commission proceeding is not admissible to prove liability for or invalidity of the dispute. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another valid purpose.

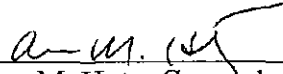
Mr. Lane's Application for Rehearing takes the position that it is, or should be common practice to make a record of the content of settlement discussions. While there may be a place for making such a record, the situation is not the typical practice in cases before the Ohio courts or the PUCO. Nothing justified a departure from that typical practice in the above-captioned cases.

III. CONCLUSION

The matters complained of in the Application for Rehearing do not set forth any bases that meet the standard for rehearing in R.C. 4903.10. The Application for Rehearing should be denied.

Respectfully submitted

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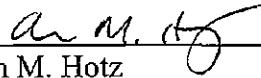
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum Contra Application for Rehearing of Albert E. Lane has been served upon the below-named persons via regular U.S. Mail service, postage prepaid, this 31st day of July, 2009.



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