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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs.	))))	Case No. 09-712-GA-AAM

OHIO PARTNERS FOR AFFORDABLE ENERGY'S APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT

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APPLICATION FOR REHEARING

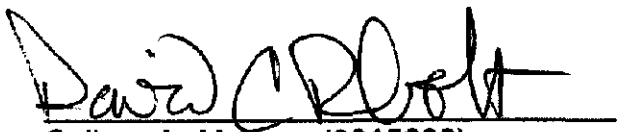
Pursuant to R.C. §4903.10 and Ohio Adm. Code 4901-1-35, Ohio Partners for Affordable Energy ("OPAE") hereby applies to the Public Utilities Commission of Ohio ("Commission") for rehearing of the Commission's November 12, 2009 Finding and Order in the above-captioned application of Duke Energy Ohio, Inc. ("Duke"). The Commission's November 12, 2009 Finding and Order is unreasonable and unlawful in the following respects.

A. The Commission acted unreasonably and unlawfully when it denied OPAE's motion to dismiss and found that Duke should be authorized to defer environmental investigation and remediation costs associated with properties that have not been shown to be used and useful in the provision of Duke's natural gas utility distribution service.

B. The Commission acted unreasonably and unlawfully when it failed to follow Supreme Court precedent and report the findings of the Staff of the Commission in the public record.

The reasons supporting OPAE's Application for Rehearing are set forth in the attached Memorandum in Support pursuant to Ohio Adm. Code 4901-1-35(A).

Respectfully submitted,



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BEFORE
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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

I. INTRODUCTION

On November 12, 2009, the Commission issued a Finding and Order in this case. In Finding No. 3, the Commission states that on August 10, 2009, Duke filed an application requesting authority to defer environmental investigation and remediation costs in those situations where Duke no longer owns the site in question or where the site is owned by Duke but is no longer used and useful in the rendition of gas service to customers. While the Commission should have granted OPAE's motion to dismiss on the basis stated in Duke's own application that the properties are no longer used and useful in the provision of gas service to customers, instead, the Commission relied on a letter filed by Duke on October 29, 2009 in response to an inquiry from the Staff of the Commission ("Staff"). The Duke letter states as follows:

> "Please accept this correspondence in response to an informal inquiry from Staff of the Public Utilities Commission of Ohio (Staff) relative to the captioned matter. To supplement Duke Energy Ohio's Application in this matter, Staff asked for confirmation that the properties in question were presently used and useful as set forth in R.C. 4909.15.
>
> The properties that are the subject of Duke's deferral request are used and useful *in Duke Energy Ohio's business.* [Emphasis added.] More specifically, located on these properties are the following: propane cavern, vaporization plant, gas operations

> district office, substation, parking lot, and an office building with conference facilities. At one time, the manufactured gas plants were used in the production of natural gas to gas utility customers of Duke Energy Ohio. Thus the plant locations are used in connection with the business operations of Duke Energy Ohio."

The Commission's Finding No. 3 states: "according to Duke, these sites are still involved in the provision of utility service as they include a propane cavern and vaporization plant, gas operations district office, substation, parking lot and office building." Finding and Order at 1-2. Contrary to the Commission's statement, the Duke letter is very careful **not** to state that the properties are involved in the provision of **utility** service, which, in this case, could only be natural gas distribution service. Duke uses the word "business" not "utility service." Duke never shows that these properties are included in its natural gas utility distribution rate base, a showing that would be easy to make if it were true. If the properties are not used and useful in the provision of utility service, then costs associated with these properties cannot be recovered from ratepayers. The Commission should have granted OPAE's motion to dismiss and not have allowed the deferral of costs that have not been shown to be lawfully recoverable from ratepayers.

Moreover, there is no public record of the recommendations of the Staff after its inquiry into the used and usefulness of the property for the provision of natural gas distribution utility service. Given that the Staff was making an inquiry into the used and usefulness of the property for the provision of natural gas utility service, the recommendations of the Staff must be in the public record. The record is devoid of information as to the Staff's findings whether the property is currently included in Duke's natural gas distribution rate base or whether it is currently used and useful for the provision of natural gas distribution service to ratepayers. The failure to create a public record of this information violates Ohio law.

II. ALLEGATIONS OF ERROR

A. The Commission acted unreasonably and unlawfully when it denied OPAE's motion to dismiss and found that Duke should be authorized to defer environmental investigation and remediation costs associated with properties that have not been shown to be used and useful in the provision of Duke's natural gas utility distribution service.

The Commission should have dismissed this application. Duke requested to defer on its books environmental investigation and remediation costs for future recovery through its Ohio jurisdictional natural gas distribution rates. These costs should not be deferred for future recovery because they are not lawfully recoverable in Duke's Ohio jurisdictional natural gas distribution rates.

Duke stated that the costs are related to former manufactured gas plant ("MGP") sites. Duke apparently owns two former MGP sites and may incur environmental investigation and remediation costs for one or both of these sites. However, these MGP sites no longer exist. Application at 2. In fact, they have not existed since 1950. Id. Not only does Duke make no claim that the MGP sites were ever included in Duke's Ohio jurisdictional natural gas distribution rate base, but it is also obvious that the sites are not currently used and useful for the provision of natural gas distribution service to Ohio jurisdictional customers and not part of Duke's current Ohio jurisdictional natural gas distribution rate base. Under the circumstances that Duke has not shown these properties to be used and useful or to be included in Duke's natural gas distribution rate base, there is no basis for the Commission to allow deferrals of costs associated with these properties.

While Duke claims that these remediation-related costs are prudent business costs, this is not relevant to the issue before the Commission. The

costs to be incurred have no relation to Duke's used and useful natural gas distribution plant or its operating expenses to maintain its used and useful distribution plant to serve Ohio jurisdictional customers. Therefore, there is no lawful means for Duke to recover these costs from Ohio jurisdictional ratepayers.

The Commission found that Duke was only requesting authority to modify its accounting procedures to reflect the deferral of costs and carrying charges. The Commission stated that Duke may request recovery of the deferred costs in a future rate proceeding but that the Commission is not determining what costs may be appropriate for recovery in Duke's distribution rates. Finding No. 7. In fact, Duke is deferring these costs for only one purpose, as Duke itself states in its application: to recover them through a separate proceeding or in Duke's next gas distribution base rate proceeding. Duke Application at 5. Therefore, there is no other purpose for granting the deferrals except that the costs may be recovered from gas distribution utility customers of Duke.

Under the circumstances, the costs should not be deferred for future recovery when future recovery cannot lawfully occur. This is consistent with Ohio law and past Commission precedent that costs are not recoverable when they are associated with plant that is not used and useful to serve Ohio jurisdictional utility customers. In this case, the plant was apparently never included in Ohio jurisdictional rate base at any time and certainly not currently.

In sum, the application seeks to defer costs that are not lawfully recoverable from Ohio jurisdictional ratepayers. Costs should not be deferred when there is no likelihood of recovery. Therefore, the application should have been dismissed. The Commission should grant rehearing and dismiss this application on the basis that the applicant has not shown that the costs to be deferred are actually recoverable from Ohio natural gas distribution ratepayers.

B. The Commission acted unreasonably and unlawfully when it failed to follow Supreme Court precedent and report the findings of the Staff of the Commission in the public record.

In addition to unlawfully allowing deferrals of costs that cannot be recovered from distribution ratepayers, the Commission also acted unlawfully when it failed to place in the public record the evidence supporting the Commission's decision. Thus, the Commission approved the deferrals without any evidentiary support in the record.

It is clear from Duke's letter that the Commission's Staff made an inquiry into the used and useful nature of these properties. The Commission should have followed Supreme Court precedent and ordered the filing of a Staff Report setting forth the recommendations of the Staff of the Commission. The Staff should have reported to the Commission its findings in the public record so that the intervenors would have had the opportunity to review them.

The Staff Recommendation to the Commission must be included in the public record. This is the essence of the Supreme Court's ruling in *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87 (*Tongren*). In *Tongren*, the Court held that the Commission failed to meet the requirements of R.C. §4903.09 by not providing an adequate record. Where the Commission fails to meet the requirements of R.C. §4903.09 by not disclosing the sources of its information in a contested proceeding to those who most require it, thereby preventing the complaining party from demonstrating prejudice, the matter must be remanded for development of an

appropriate record, to leave open the potential demonstration of prejudice by a party based upon that record in a subsequent appeal. Id.

Tongren requires a Staff Recommendation to the Commission to be part of the public record. In *Tongren,* the Commission had referred to "findings" of its Staff. The Court noted that "there is nothing in the record containing those findings, much less the factual bases for them." Id. The Court noted that the record was "devoid of what data, information, or facts the staff reviewed or considered in support of its recommendation." Id. The Court also noted that there was "nothing in the record below to evince the bases for the commission's acceptance of such recommendations and adoption of such findings." Id.

Here, the Commission refers to an application filed on August 10, 2009 by Duke "as supplemented on October 29, 2009." Finding No. 3. What Duke filed on October 29, 2009 was a "correspondence" in response to an informal inquiry from Staff" relative to the application. According to the correspondence: "To supplement Duke Energy Ohio's Application in this matter, Staff asked for confirmation that the properties in question were presently used and useful as set forth in R.C. §4909.15." Thus, the correspondence states that the Staff was requesting supplemental information in order to confirm that the properties were used and useful. Did the Staff make the necessary inquiries to determine the properties' inclusion in rate base at the time of Duke's last natural gas distribution base rate case? Did the Staff make the necessary investigation to determine if the properties are currently used and useful in the provision of natural gas distribution service? What did the Staff report back to the Commission as a result of its inquiry? This information must be in the

public record. How could the Commission conclude that the properties were used and useful to Duke's provision of natural gas distribution utility service when Duke never made such a claim and no Staff recommendations or findings are in the public record? There is no indication on the record as to the Staff's recommendations or findings to the Commission as a result of its inquiry into this matter.

Thus, the Commission's finding violates the Supreme Court's ruling in *Tongren* because the Staff Recommendation is not evidence in the public record, when, as here, the proceeding is contested. The failure to follow mandatory procedural safeguards requires that the Commission grant rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing and Memorandum in Support was served by regular U.S. Mail upon the parties of record identified below in this case on this 9th day of December, 2009.

Colleen L. Mooney, Esq.

Counsel for Ohio Partners for Affordable Energy

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