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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Investigation Into The Development Of The Significantly Excessive Earnings Test Pursuant to S.B. 221 For Electric Utilities.	))))	Case No. 09-786-EL-UNC

MEMORANDUM CONTRA DUKE ENERGY OHIO'S MOTION TO EXTEND DEADLINE AND REQUEST FOR EXPEDITED TREATMENT
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE OHIO ENERGY GROUP, THE OHIO HOSPITAL ASSOCIATION, THE OHIO MANUFACTURERS' ASSOCIATION AND CITIZEN POWER INC.

The Office of the Ohio Consumers' Counsel ("OCC") (representing 4.5 million residential customers), the Ohio Energy Group ("OEG") (representing 22 of Ohio's most energy-intensive industries), the Ohio Hospital Association ("OHA") (representing 170 primary care facilities and 40 health systems across Ohio), the Ohio Manufacturers' Association ("OMA") (representing over 1600 large and small industrial manufacturers), and Citizen Power, Inc. (a not-for-profit research education and advocacy agency), referred to herein as "Customer Parties" submit this Memorandum Contra[1] Duke Energy Ohio, Inc.'s ("Duke") motion. Duke filed its motion on June 6, 2010.

Customer Parties urge the Commission to deny Duke's motion. Duke's motion would relieve Duke (and arguably the other electric utilities) from complying with the

[1] See Ohio Admin. Code 4901-1-12(C) which permits the filing of a memorandum contra within seven days of service of a motion with a request for expedited ruling, where the moving party fails to certify that no party objects to the issuance of an expedited ruling. Duke indicated in its motion that "other parties of record" including OCC, did not have an opportunity to respond prior to Duke filing its motion. See Motion to Extend Deadline at 5 (July 6, 2010). OCC indicated to Duke, on July 6, 2010, subsequent to its filing, that it objected to both the motion and the request for an expedited ruling.

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Finding and Order[2] of the Public Utilities Commission of Ohio ("PUCO" or "Commission") that is intended to fulfill a key provision in Ohio's new energy law--to protect Ohio customers from paying utilities for significantly excessive profits. Alternatively, Duke's motion may operate to stay or postpone the enforcement of the PUCO's Finding and Order.

On June 30, the Commission issued its Finding and Order, which contained the directive that all electric utilities file, by July 15, 2010, their proposed SEET applications, in accordance with the PUCO's findings. Duke asserts that this filing deadline precedes the deadline by which applications for rehearing of the Finding and Order may be filed.[3] Duke indicates that it intends to file an application for rehearing, and absent an extension it will be required to respond to the Commission's directives—which address matters that in its opinion, "warrant further consideration and perhaps, revision or clarification."[4]

Duke's motion should be denied. First, Duke's motion is contrary to the provisions of R.C. 4903.10 which specifically state that the making of an application for rehearing[5] (let alone a statement that a party intends to apply for rehearing) does not excuse any person from complying with the order, or operate to stay or postpone the enforcement, without a special order of the Commission.[6] The inconvenience that Duke

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[2] *See In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010).

[3] See Duke Motion to Extend at 3 (July 6, 2010).

[4] Id.

[5] Although Duke indicates it intends to apply for rehearing of the Commission's order, it has yet to do so. Such an application for rehearing can be filed prior to the thirty-day deadline under R.C. 4903.10.

[6] Customer parties contend that the Commission's Order was effective when issued, on June 30, 2010. It requires the electric utilities, including Duke, to make its SEET filings on July 15, 2010. July 15, 2010 is the deadline for the filings and nothing more. There has been no stay order issued by the Commission to delay the filing of the SEET applications which are due July 15, 2010.

has pled as rationale for a special order does not justify an exception to the statute. On this basis alone, the PUCO should overrule the motion.

Second, as a practical matter, Duke's proposal would delay, for an undefined, and potentially protracted time period, any refunds to its customers that are required if the provisions of the electric security plan resulted in excess earnings for 2009, as measured by the Significantly in Excess Earnings Test (SEET). This type of delay in and of itself would be unjust and unreasonable and would threaten to undermine the protection from excessive earnings that is envisioned by the SEET review process.

Third, if Duke's motion is granted, it may affect the other EDU's SEET applications. While Duke is in a somewhat unique situation,[7] it is not far-fetched to think that other electric utilities may adopt Duke's arguments and urge for the same delay in filing their SEET applications. Thus, if Duke's motion is granted, there is an increased likelihood that the other EDUs, such as Columbus Southern Power,[8] would conceivably be permitted to delay their SEET filings. Such a result would be unjust and unreasonable, and should not be sanctioned by the Public Utilities Commission.

Currently, all of the electric distribution utilities, including Duke, are required to file their SEET applications on or before July 15, 2010[9] to initiate the 2009 annual review. The July 15, 2010 deadline for the filing of SEET applications was created after

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[7] Duke filed its application on May 14, 2010, unlike the other EDUs which have yet to file their applications. A review of Duke's SEET application, under the terms of the stipulation reached in its ESP case, will focus in large part on whether Duke has calculated the SEET in compliance with the stipulation. OEG and OHA, construing Duke's request as being limited specifically to Duke, indicated they do not oppose the company's request. However, if Duke's request is construed as applying to all SEET applications, OEG and OHA object, and for that reason join OCC in filing this Memorandum Contra.

[8] Columbus Southern Power's return on equity, as reported in the 2009 10K financial statements, was 20.86%. See Joint Response to Commission Questions by The Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association, The Hospital Association, The Ohio Energy Group, and Citizen Power, Inc. (Apr. 1, 2010). Such a return, under proper application of SEET, amounts to significantly excessive earnings, and would require a refund.

[9] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for a Limited Waiver Pursuant to Section 4901:1-35-02(B),* Case No. 10-517-EL-WVR , Entry at ¶7 (May 5, 2010).

the Commission, in response to a utility's request,[10] *sua sponte*, extended the May 15, 2010 deadline[11] for all the SEET applications. The Commission extended the filing date by two months, despite the opposition of the Customer Parties. The Commission based its ruling in part upon the fact that it had yet to rule upon the SEET guidelines.[12]

Now enter Duke that comes forward on the heels of AEP's extension to tag-team consumers with even further delay of the consideration of potential refunds. Duke seeks to extend the filing deadline for its "amended" SEET application because it anticipates that it will seek rehearing of the Commission's June 30, 2010 SEET Finding and Order.[13] Duke complains that if it does not receive an extension, it will be required to respond to the Commission's June 30, 2010 Finding and Order, by submitting an amended application "addressing matters that, in its opinion, warrant further consideration and perhaps, revision or clarification."[14] Duke proposes that its amended application be filed no later than twenty-one days after "final resolution" of all applications for rehearing.[15]

Duke's motion is of great concern to the Customer Parties. Tying the SEET filing to twenty one days following the "final resolution" of all applications for rehearing is problematic. Waiting for an entry on rehearing can be endless, and the time to wait is not limited by the provision in Ohio Rev. Code 4903.10 that the PUCO has 30 days to issue an entry on rehearing. As provided in ***State ex rel Consumers' Counsel v. Public Utilities***

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[10] *In the Matter of the Application of Columbus Southern Power Company And Ohio Power Company for a Limited Waiver Pursuant to Section 4901:1-35-02(B),* Case No. 10-517-EL-WVR, Application (Apr. 16, 2010).

[11] Under Ohio Admin. Code 4901-1-35-10, the SEET applications were to be filed at the PUCO on May 15, 2010.

[12] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for a Limited Waiver Pursuant to Section 4901:1-35-02(B),* Case No. 10-517-EL-WVR , Entry at ¶7 (May 5, 2010).

[13] Duke does not fully explain the basis for its "to be filed" application for rehearing, which makes it difficult to understand the impact of its application on its SEET filing.

[14] Duke Motion to Extend Deadline at 3 (July 6, 2010).

[15] Duke Motion To Extend Deadline at 4 (July 6, 2010).

Comm.,[16] R.C. 4903.10 does not prevent the PUCO from "grant[ing] the applications***for the limited purpose of allowing additional time to consider them."[17]

For example, in Case No. 08-1338-El-UNC, despite granting rehearing to give itself more time to consider OCC's February 6, 2009 application for rehearing, a year and four months have passed with no "final resolution."[18] Moreover, what happens if parties dissatisfied with the Entry on Rehearing take an appeal from the Commission's order? Duke may next argue that its referenced "final resolution" of the applications for rehearing includes allowing for appeals from the PUCO's decision to be filed, argued, and resolved.

Such delay in reaching final resolution of the SEET applications cannot be tolerated and especially should not be tolerated here in light of the public policy and purpose of the SEET earnings test of S.B.221—which is to protect consumers, not to provide a safe harbor for windfall utility profits. The SEET is the primary mechanism in S.B. 221 for protecting Ohio customers from unreasonable rates for electric service, which is accomplished by preventing utilities from earning significantly excessive profits. If the Commission finds that the provisions of the electric security plan (ESP) resulted in excessive earnings it "shall" require the electric utility to return the excess to customers.

Duke's proposal to delay the filing of the SEET application means delaying the SEET review. Delaying the SEET review can mean delaying refunds that must be

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[16] *State ex rel. Consumers' Counsel v. Public Utilities Comm.,* 102 Ohio St.3d 301, 2004-Ohio-2894.

[17] Id. at ¶19.

[18] See also *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval, pursuant to Revised Code Section 4929.11 of a Tariff to Recover Conservation Expenses and Decoupling Revenues pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as may be Required to Defer such Expenses and Revenues for Future Recovery through such Adjustment Mechanisms,* Case No 05-1444-EL-UNC, where the PUCO granted rehearing to consider matters raised by OCC in its application for rehearing on August 22, 2007 and did not issue a substantive Entry on Rehearing giving final resolution until February 4, 2009.

ordered by the PUCO if a utility fails to demonstrate that excessive earnings did not occur. Further delay is unwarranted. Duke and the other EDUs must file their SEET applications, consistent with the directives of the PUCO in the SEET Order. Duke, and others, can at the same time pursue rehearing of the PUCO's order, if desired. If the Commission, upon rehearing, modifies or abrogates its Order, then parties may file amended or supplemental information to address such changes.

The filing of SEET applications on July 15, 2010 is essential for parties to move forward with reviewing the utilities' earnings and will assist the Commission in securing an expeditious return to customers of excess earnings through prospective adjustments or refunds, if warranted. Duke's motion should be denied. There is no need to further delay the SEET review.

Respectfully submitted,

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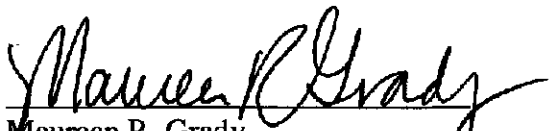
CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra was served by regular U.S. Mail service, postage prepaid, to all parties this 12th day of July, 2010.



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