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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

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE OHIO ENERGY GROUP, THE OHIO HOSPITAL ASSOCIATION, THE OHIO MANUFACTURERS' ASSOCIATION AND CITIZEN POWER INC.

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Michael E. Idzkowski, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
idzkowski@occ.state.oh.us
grady@occ.state.oh.us

Thomas J. O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
(614) 227-2335 (Telephone)
tobrien@bricker.com

Counsel For The Ohio Manufacturers' Association And Counsel For The Ohio Hospital Association

David F. Boehm
Michael L. Kurtz
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
(513) 421-2255 (Telephone)
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

Counsel For The Ohio Energy Group

Theodore S. Robinson
Staff Attorney
CITIZEN POWER, INC.
2121 Murray Avenue
Pittsburg, PA 15217
(412) 421-7029 (Telephone)
robinson@citizenpower.com

Counsel For Citizen Power

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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), collectively referred to as "Customer Parties," submit this Application for Rehearing[1] of the Public Utilities Commission of Ohio ("PUCO") Finding and Order dated June 30, 2010.

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Finding and Order was unjust, unreasonable, and unlawful as described below:

A. The Commission erred when it found that the treatment of off-system sales ("OSS") is more appropriately addressed in the context of individual significantly excessive earnings test ("SEET") proceedings than by issuing any applicable guideline.

[1] This application is filed in accordance with R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

Such a finding is unjust and unreasonable because an initial determination of applicable earnings is fundamental and necessary to all SEET proceedings. Such a finding is unlawful because it violates provisions of the Revised Code, including R.C. 4928.143(F).

B. The Commission erred when it failed to issue guidelines regarding interest on potential refunds of significantly excessive earnings. Such a failure to issue guidelines regarding interest on potential significantly excessive earnings is especially unjust and unlawful in light of the Commission's repeated extensions of SEET filing applications and the resulting effect of those extensions. It is also unjust and unreasonable in light of the Commission's practice of authorizing carrying costs related to revenue deferrals. Such a failure to issue guidelines regarding interest on potential refunds of significantly excessive earnings is unlawful because it violates R.C. 4909.15, R.C. 4909.151, and R.C. 4928.143.

An explanation of the basis for each ground for rehearing identified in this Application for Rehearing is included in the attached Memorandum in Support. Consistent with R.C. 4903.10 and the Customer Parties' claims of error, the PUCO should modify its Order.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Michael E. Idzkowski, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
idzkowski@occ.state.oh.us
grady@occ.state.oh.us

Thomas J. O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
(614) 227-2335 (Telephone)
tobrien@bricker.com

Counsel For The Ohio Manufacturers' Association And Counsel For The Ohio Hospital Association

David F. Boehm
Michael L. Kurtz
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
(513) 421-2255 (Telephone)
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

Counsel For The Ohio Energy Group

Theodore S. Robinson
Staff Attorney
CITIZEN POWER, INC.
2121 Murray Avenue
Pittsburg, PA 15217
(412) 421-7029 (Telephone)
robinson@citizenpower.com

Counsel For Citizen Power

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Amended Substitute Senate Bill No. 221 ("S.B. 221") was passed by a near unanimous vote of the General Assembly on April 23, 2008. It was signed into law by Governor Strickland on May 1, 2008, and became effective on July 31, 2008. The law was a historic change from the deregulation of generation service that existed previously. It provided that this Commission should once again regulate the full earnings (generation, transmission, and distribution) of the investor-owned electric utilities serving Ohio customers.

In particular, S.B. 221 changed the rate structure for Ohio's electric utilities and established requirements for reliability of electric service and for the use of alternative energy resources by electric utilities. Since the law became effective, all of Ohio's electric distribution utilities ("EDUs") have applied for and implemented electric security plans ("ESPs"). At least one EDU, FirstEnergy, is in its second round of ESP filings. The other Ohio EDUs have PUCO approved rate plans that are in place only through 2011. Consequently, filings are expected in the near term to implement the next round of ESPs to establish rates for 2012 and beyond.

Meanwhile, and now two years into this process, the Commission has yet to determine important details of a crucial consumer protection set forth in S.B. 221. Under R.C. 4928.143(F), the PUCO is to consider, following the end of each annual period of the electric security plan ("ESP"), if "adjustments" resulted in excessive earnings. If the Commission finds that the adjustments, in the aggregate, did result in significantly excessive earnings it "shall" require the Company to return to consumers the amount of the excess by prospective adjustments.[2]

In 2009, the Commission concluded that a methodology for determining whether an electric utility has significantly excessive earnings under an approved ESP should be examined within the framework of a workshop, which was held on October 5, 2009. The Customer Parties and each of the major, publicly-owned electric utilities in Ohio participated in that workshop. Subsequently, the Commission directed its Staff ("PUCO Staff") to develop and file recommendations for the significantly excessive earnings test ("SEET"). Staff filed those recommendations on November 18, 2009.

In its November 19, 2009 Entry, the Commission invited interested persons to file comments regarding the PUCO Staff's recommendations by December 14, 2009. Likewise, interested persons were allowed to file reply comments by January 11, 2010. The Customer Parties, as well as each of the major, publicly-owned electric utilities in Ohio, filed initial and reply comments.

On April 1, 2010, the Commission held a question and answer session for interested stakeholders who had filed comments or reply comments in the case. The Customer Parties, the PUCO Staff, and major, publicly-owned electric utilities in Ohio

[2] See R.C. 4928.143(F).

participated in the question and answer session. Customer Parties filed written responses as well on that date.

On June 30, 2010, the Commission issued an Order addressing the SEET guidelines.[3] To a large degree, the Commission deferred ruling on issues of importance including matters such as the treatment of off-system sales, and deferrals, indicating its preference to handle these issues on a case by case basis.

While Electric Security Cases are dispensed with rapid speed, well in advance of the statutory timeline for case preparation and review, the SEET case which is designed to be the check against excess profits has been slow to be resolved. This creates an imbalanced situation where the utilities benefit at the expense of the customers. This needs to be changed. The Consumer Parties' Application for Rehearing and Memorandum in Support address the PUCO's Finding and Order.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[4]

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[3] See *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, Finding and Order (June 30, 2010) ("Order").

[4] R.C. 4903.10.

In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[5] Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same ***."[6]

Pursuant to R.C. 4903.221, OCC filed a motion to intervene on October 2, 2009. Other members of the Customer Parties moved to intervene on or around October 5, 2009. The Customer Parties have been actively involved in this proceeding, submitting comments and reply comments. Additionally, Customer Parties participated in the April 1, 2010 Commission discussion on SEET, and filed responses to the Commission questions on that date. The Customer Parties meet the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, Customer Parties respectively request that the Commission modify its Order as discussed below.

III. ARGUMENT

A. The Commission Erred When It Found That The Treatment Of Off-System Sales Is More Appropriately Addressed In The Context Of Individual SEET Proceedings Than By Issuing Any Applicable Guideline.

The Commission's Order was unjust, unreasonable and unlawful, and the Commission erred by finding that the treatment of off-system sales ("OSS") is more appropriately addressed in the context of individual SEET proceedings than by issuing an

[5] Id.

[6] Id.

applicable guideline.[7] Such a finding is unjust and unreasonable because the issue is fundamental to all SEET determinations. The first step in any SEET proceeding is to determine the electric utility's earnings. The Commission recognized the fundamental nature of this issue in the SEET Workshop, making it discussion Topic No. 1. The Commission provided the parties an opportunity to fully brief and discuss the issue on the record before the Commission, and cited the various arguments made by the parties in its Order, but then sidestepped the issue. It neither issued a guideline nor offered any indication of its position on this fundamental issue. Because the initial determination of what constitutes earnings is fundamental to every SEET case, it is unreasonable and unjust for the Commission to sidestep the issue of OSS, thereby providing the parties and utility customers no standard upon which to rely.

Such a finding is unlawful because it violates provisions of the Revised Code, including R.C. 4928.143(F). R.C. 4928.143(F) requires the Commission, in the SEET analysis, to evaluate whether earnings are excessive based on a comparison between the "earned return on common equity of the distribution utility" and the "return on common equity that was earned during the same period by [comparable] publicly traded companies." The "earned return on common equity of the distribution utility" necessarily includes profits from off-system sales. The statute does not permit the Commission the discretion to consider only a portion of the earned return of the distribution company. Thus, with no discretion, the Commission must apply the law as written. There can be no individual case by case determination, with analysis based on the factual record presented

[7] See Order at 9.

by each utility. The Commission's deferral of the issue, to be looked at based on an individual case basis is thus unreasonable and unlawful.

Moreover, in order to render an apples to apples comparison between the utility and the comparable publicly traded companies, it is necessary and reasonable to include all earnings, including off-system sales. Columbus Southern, Ohio Power and DP&L would have the PUCO compare only part of their utility earnings with 100% of the earnings of comparable companies.[8] This is asymmetrical and would bias the earnings comparison. It is unreasonable, and would undermine the SEET analysis.

Off-system sales are made from power plants whose costs are included in the ESP rates, in some shape or form. Additionally these power plants are financed by the capitalization (debt and equity) that is included in the ROE computation. In the past, the PUCO has required electric utilities to share profits of off-system sales between customers and utilities.[9] The sharing of the profits from off-system sales is an issue of fairness. Moreover, the sharing of off-system sales profits promotes the policy of the state to ensure the availability of reasonably priced retail electric service.

The utilities apparently would have consumers pay for the power plants and not receive credit for the profits from sales that are made from those plants. In 2007, profits from off-system sales were $146.7 million for Ohio Power and $124 million for Columbus Southern.[10] During the period of the AEP Ohio ESP, the projected profit from off-system sales is approximately $791 million.[11] Ignoring these huge margins would

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[8] See Columbus Southern Power Company's and Ohio Power Company's Initial Comments at 2-3.

[9] See for e.g. *In the Matter of the Application of the Cleveland Electric Illuminating Company for an Increase in Rates,* Case No. 84-188-EL-AIR, Opinion and Order at ¶ 61-65 (March 7, 1985).

[10] Kollen Direct Testimony at 14, Case No. 08-917-EL-SSO.

[11] OCC Ex. 6 at 7-8; OCC Ex. 7, Case No. 08-917-EL-SSO.

provide a windfall to the utilities and would be unfair to consumers. The power plants included in the ESP rates are responsible for large amounts of off-system sales. In 2008, 53.8% of Ohio Power's sales (MWh) were off-system (sales for resale) and for Columbus Southern the number was 29.9%.[12] Thus, most of the output from Ohio Power's power plants was sold off-system.

In the AEP Ohio's ESP proceeding, Case No. 08-917-EL-SSO,[13] OEG witness Kollen testified that in each of the jurisdictions that AEP operates, profits from off-system sales are used by the state commissions to lower rates.[14] Therefore, AEP's position would discriminate against Ohio, compared to West Virginia, Virginia, Kentucky, Indiana, and Michigan. Similarly, Kroger's witness Higgins presented testimony recommending a credit to customers for profits for off-system sales. A fuel adjustment charge without such a credit is "asymmetrical and fundamentally unreasonable," he opined.[15]

The utilities' position is inconsistent with the energy efficiency mandates of SB 221. As consumers pay for the costs of energy efficiency, the power that is conserved is available to be sold in the off-system sales market. For example, in 2009 AEP Ohio's energy efficiency programs saved 303,410 MWH, which freed up a like amount of power for resale in the wholesale market.[16] If off-system sales margins are included in the SEET, they can serve as a form of off-set to the energy efficiency costs, especially when consumers are compensating utilities for lost distribution revenues associated with

[12] See Attachment 1 to Customer Parties Reply Comments.

[13] Notice of Appeal (November 5, 2009), Ohio Supreme Court Case No. 09-2002.

[14] Kollen Direct Testimony at 14.

[15] Higgins Direct Testimony at 9.

[16] See Attachment 2 to Customer Parties Reply Comments.

reduces sales. But under AEP's position,[17] consumers would pay the full energy efficiency costs and AEP would keep the added off-system sales profits that are made available by reduced consumption in Ohio.

Finally, there is no public policy reason to support inconsistent treatment among utilities with respect to off-system sales. They should be treated uniformly and should be considered in the SEET. The Commission's failure to require off-system sales to be included in the SEET calculation thus violates R.C. 4928.143(F) and is therefore unlawful.

B. The Commission Erred When It Failed To Issue Guidelines Regarding Interest On Potential Refunds Of Significantly Excessive Earnings.

Additionally, the Commission's Order was unjust, unreasonable and unlawful, and the Commission erred by failing to issue guidelines requiring interest on potential refunds of significantly excessive earnings. Such a failure is unjust and unreasonable especially in light of the Commission's approval of undue delays in filing the SEET applications. The Commission granted a two month waiver for the filing of SEET applications in May, 2010, and subsequently extended that waiver until September 1, 2010. This is all despite the fact that the PUCO's rules (Ohio Adm. Code 4901:1-35-10) set a May 15, 2010 deadline for SEET filings. A delay in the SEET filings will result ultimately in a delay of refunds to customers. Money stays in the hands of utilities, at the expense of customers.

Having ordered the application of carrying costs to deferrals numerous times in prior cases, the Commission has demonstrated its understanding of the relationship

[17] See Columbus Southern Power Company's and Ohio Power Company's Initial Comments at 2-3.

between time and money. Thus, the Commission must have appreciated the effect delayed filings would have on refunds due customers under R.C. 4928.143. Further, the Commission must have anticipated that electric utilities would find it in their interest to delay filings and the SEET review. In addition, the Commission should recognize that the lack of any guidelines regarding interest on refunds operates as an incentive for electric utilities to delay SEET filings and review.

Predictably, Duke Energy Ohio's July 6, 2010 motion to extend the July 15, 2010 deadline sought a new deadline "twenty-one days after final resolution of all issues raised in any applications for rehearing filed in response to the Commission's Findings and Orders issued in this docket on June 30, 2010."[18] If the Commission had granted the extension requested by Duke Energy Ohio (and with the potential for Supreme Court appeals of the issues in any applications for rehearing) the final resolution of all issues related to the administration of SEET could have occurred well into 2011. Any refunds due customers under the statute would have been similarly delayed, which would have been inherently unjust and unreasonable. With the Customer Parties arguing against further extensions, the Commission limited its extension of the SEET filing deadlines to September 1, 2010.[19] This second extension of time only further highlights the need for a guideline regarding interest on refunds under R.C. 4928.143. If the Commission is to allow repeated extensions on SEET filing deadlines, which the Customer Parties oppose, it is only just and reasonable for the Commission to provide for interest on refunds due customers. It is just and reasonable for customers to receive the time-related benefit of

[18] Duke Energy Ohio's July 6, 2010 Motion to Extend Deadline and Request for Expedited Treatment, at 1.

[19] See the Commission's July 14, 2010 Entry at paragraph 10.

their money. It is unjust and unreasonable for utilities to benefit from holding onto those refunds due customers.

The Commission's failure to issue any guidelines requiring interest on SEET refunds is unlawful because it violates R.C. 4909.15, which provides that the Commission shall fix just and reasonable rates and charges for service.[20] Allowing electric utilities to delay SEET filings, and as a result, delay SEET refunds due customers while allowing utilities to avoid the payment of interest on those refunds, amounts to authorizing rates and charges that are unjust and unreasonable.

R.C. 4909.15(D) and R.C. 4909.151 each provide that utilities may charge rates that are compensatory for service rendered.[21] No aspect of a refund due customers constitutes compensation for service rendered. Thus, the effect of not providing interest on delayed customer refunds violates the spirit of R.C. 4909.15 and 4909.151.

In addition, the Commission's failure to issue any guidelines requiring interest on SEET refunds is unlawful because it nullifies, in part, the purpose of R.C. 4928.143(D), (E) and (F). That purpose is to provide protections for Ohio customers from unreasonable rates for electric service. The purpose is accomplished by preventing utilities from earning significantly excessive profits. If the Commission finds that the electric security plan provisions resulted in excessive earnings it "shall" require the EDU to return the excess to customers.

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[20] R.C. 4909.151.

[21] See R.C. 4909.15(D) ("When the public utilities commission is of the opinion * * * that any rate, fore , charge * * * is * * * unreasonable, unjustly discriminatory, unjustly preferential or in violation of law, or * * * will be inadequate, or that the maximum rates, charges * * * are insufficient to yield reasonable compensation for the service rendered * * * ."). See also 4909.151 ("In fixing the just, reasonable, and compensatory rates, * * * charged for service by any public utility, the public utilities commission may consider the costs attributable to such service.")

The SEET review under R.C. 4928.143(F) is an annual review that is to occur "following the end of each annual period of the plan." The first SEET review is to determine if the earnings for 2009 were significantly excessive for each one of the electric distribution utilities operating in Ohio. The rules established by the Commission set a reasonable filing date of May 15 for the SEET filings.[22] This deadline was consistent with the notion that 2009 earnings would be available by first quarter 2010 and allowed additional time for the utilities to file an application demonstrating whether or not the rate adjustments resulted in significantly excess earnings during the review period.

Notwithstanding its established May 15 deadline, the Commission has twice allowed utilities to delay filing their SEET applications.[23] Most recently the PUCO granted an extension of its previous waiver, allowing electric utilities until September 1, 2010 to make their SEET filings. These delays in the SEET filings further postpone the review of SEET applications, which delays decisions on whether the utilities' earnings were significantly excessive in 2009. A delay in rulings upon 2009 earnings under the SEET applications delays refunds to customers. As a result, excessive earnings of utilities owed to customers under R.C. 4928.143 remain in the hands of utilities longer than is just. Without interest being awarded to customers on refunds owed to them but held unjustly by utilities, the consumer protection meant to be extended to customers by the Legislature in R.C. 4928.143 is eroded, simply with the passage of time.

The Customer Parties urge the Commission, in the interest of fairness to customers and consistent with the legislative intent to protect customers from funding

[22] See Ohio Admin. Code 4901:1-35-10.

[23] See the Commission's June 30, 2010 Order at 32 and July 14, 2010 Entry at paragraph 10.

significantly excessive earnings, to modify its ruling by issuing guidelines regarding the imposition of interest on refunds resulting from significantly excessive earnings. Such interest should be based on a utility's weighted cost of capital.

While there is no provision in the law mandating interest on SEET prospective adjustments,[24] the concept and reasoning for such can be found in analogous statutes and decisions of the PUCO. For example, R.C. 4909.42 is a statute that provides for interest on refunds to consumers. This statute addresses what happens if no order is issued within 275 days of the filing of an application for a rate increase. While the utility is entitled to put the rates it has requested into effect, it must submit an undertaking and promise to refund any amounts collected over the amount awarded by the PUCO in its final order. All refunds are to include interest at the rate specified under R.C. 1343.03.

In prior case law precedent, where the Commission has ordered refunds for over-collecting fuel costs under the fuel cost recovery rider, the Commission imposed interest on the over-recovery at the utility's embedded cost of long-term debt.[25] Similarly, where the Ohio Supreme Court ordered refunds to customers for the construction work in progress allowance they funded for the Zimmer nuclear plant, the Court imposed interest on the refunds by requiring the funds to be placed in an interest-bearing account, consistent with R.C. 4903.13.[26] In other cases, the Commission has ruled that customers who have paid charges in excess of the amounts authorized under tariff should be entitled

[24] Neither is there limiting language in this section of the statute that evinces an intent to preclude interest.

[25] See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals,* Case No. 07-1003-EL-ATA; Case No. 07-1004-EL-AAM, Entry (March 24, 2010).

[26] *Columbus & Southern Ohio Electric Co. v. Public Utilities Comm.* (1984), 10 Ohio St.3d 12 (appeal of PUCO Case No. 81-1058-EL-AIR).

to refunds with a reasonable interest rate.[27] In gas cost recovery proceedings, the PUCO has insisted that interest be applied to supplier refunds.[28] The PUCO has also determined that in granting emergency rate relief under R.C. 4909.16, if temporary rates authorized exceed rates ultimately determined to be reasonable, refunds shall include interest.[29]

Thus, there is support in both case law and statute for the position that interest should accrue on prospective SEET adjustments. These prospective adjustments made for prior years' earnings have been specifically required by the General Assembly; adding interest to the prospective adjustments will discourage delays in the filing of SEET applications and further enhance the consumer protection intended by the Legislature in R.C. 4928.413(F).

IV. CONCLUSION

In the interest of fairness to consumers who may have funded significantly excessive earnings of electric distribution utilities in Ohio in 2009, the Customer Parties seek rehearing on the Commission's June 20, 2010 Finding and Order. The Commission should grant this Application for Rehearing of the Customer Parties and: 1) modify the

[27] See for e.g. OCC, on Behalf of Jim and Helen Heaton et. al. v. Columbus and Southern Ohio Electric Company, No. 83-1279-EL-CSS, Opinion and Order at 20 (April 16, 1985).

[28] See e.g. *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Pike Natural Gas Company and Related Matters*, Case No. 91-18-GA-GCR, Opinion and Order at 7 (September 26, 1991); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of the Pike Natural Gas Company and Related Matters*, Case No. 83-3-GA-GCR, Opinion and Order at 4-5 (July 13, 1983); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause contained within the Rate Schedules of The East Ohio Gas Company and Related Matters*, Case No. 82-87-GA-GCR, Opinion and Order at 5 (April 13, 1983).

[29] *In the Matter of the Application of the Dayton Power and Light Company for authority to modify and increase its rates for electric service to jurisdictional* consumers, 80-826-EL-AEM, Opinion and Order at 10 (November 26, 1980).

Commission's ruling by issuing guidelines requiring the utilities to include off-system sales in their earnings and 2) impose interest based on the cost of capital on prospective customer refunds ordered for 2009 and in the future. Finally, the Commission should move swiftly to resolve the SEET proceedings so that customers can get the refunds of excess profits to which they are entitled.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Michael E. Idzkowski, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (Telephone)
idzkowski@occ.state.oh.us
grady@occ.state.oh.us

Thomas J. O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
(614) 227-2335 (Telephone)
tobrien@bricker.com

Counsel For The Ohio Manufacturers' Association And Counsel For The Ohio Hospital Association

David F. Boehm
Michael L. Kurtz
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
(513) 421-2255 (Telephone)
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

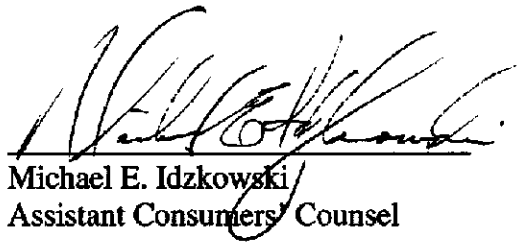
Counsel For The Ohio Energy Group

Theodore S. Robinson
Staff Attorney
CITIZEN POWER, INC.
2121 Murray Avenue
Pittsburg, PA 15217
(412) 421-7029 (Telephone)
robinson@citizenpower.com

Counsel For Citizen Power

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Application for Rehearing and Memorandum in Support* was served by regular U.S. Mail service, postage prepaid, to all parties this 30th day of July, 2010.



Michael E. Idzkowski
Assistant Consumers' Counsel

PARTIES OF RECORD

William Wright
Assistant Attorney General
Chief, Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793

Arthur Korkosz
Cleveland Electric Illuminating Company
76 South Main Street
Akron, OH 44308

Steven T. Nourse
American Electric Power Service Corp
1 riverside Plaza 29th Floor
Columbus, OH 43215

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 W. Lima Street
P.O. Box 1793
Findlay, OH 45839-1793

Dona Seger-Lawson
Jodi L. Sobecki
Dayton Power & Light Company
1065 Woodman Drive
Dayton, OH 45432

Amy B. Spiller
Elizabeth H. Watts
Duke Energy Ohio
155 East Broad Street, Suite 2100
Columbus, OH 43215