

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan.	)	Case No. 08-0920-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Approval to Amend Accounting Methods.	)	Case No. 08-0921-EL-AAM
In the Matter of the Application of Duke Energy Ohio for Approval of a Certificate of Public Convenience and Necessity to Establish an Unavoidable Capacity Charge.	)	Case No. 08-0922-EL-UNC
In the Matter of the Application of Duke Energy Ohio for Approval to Amend its Tariff.	)	Case No. 08-0923-EL-ATA

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**REPLY TO DUKE ENERGY OHIO'S MEMORANDUM IN OPPOSITION  
TO THE JOINT MOTION FOR CONTINUANCE  
OF THE HEARING AND EXTENSIONS OF TIME  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the electric utility customers of Duke Energy-Ohio ("Duke" or the "Company"), files this reply to Duke's Memorandum in Opposition filed on August 29, 2008. Duke opposed the Joint Motion for a continuance and extension of time that OCC, Ohio Partners for Affordable Energy and the Ohio Environmental Council filed on August 26, 2008. As will be

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explained, Duke itself has demonstrated it is not able to meet the case schedule and that the provisions of S.B. 221 support a continuance in this case.

Ohio Adm. Code 4901-1-13(A) provides for extensions and “continuances of public hearings” upon a showing of good cause. There is good cause for granting this continuance and extension of time, which is provided for under Ohio Adm. Code 4901-1-13(A).

As OCC pointed out in the Joint Motion for a Continuance, R.C. 4903.082 requires that “[a]ll parties and intervenors shall be granted ample rights of discovery.” That statute also requires the PUCO to regularly review its rules “to aid full and reasonable discovery by all parties.” With respect to the rules referenced in R.C. 4903.082, Ohio Adm. Code 4901-1-16(A) provides that the purpose of discovery rules in PUCO proceedings is to “facilitate thorough and adequate preparation for participation in commission proceedings.” Because the cases involve highly technical issues, OCC cannot adequately prepare for the hearing without extensive discovery and without employing experts to address many of the issues that stem from Duke’s far reaching application.

The circumstances underlying this Joint Motion show good cause. Accordingly, the PUCO should extend the hearing date for sixty days until December 4, 2008, and similarly extend the filing of testimony and discovery deadlines by sixty days.

## II. ARGUMENT

### A. **Despite Duke's Memorandum In Opposition to a Continuance and Extensions of Time, Duke Has Been Unable to Meet the Schedule Itself And Has Undermined the Procedural Schedule Established by the Commission.**

Duke's inability or unwillingness to meet the Commission's discovery schedule in this case is far more instructive than Duke's arguments in its Memo in Opposition. So far Duke has been late in responding to every set of discovery OCC has sent. Duke was late a week in responding to the first set and has yet to send to OCC the responses to three of those discovery requests. Duke is currently late by two days in responding to the second and third sets, which include 137 discovery responses. And Duke has a fourth set due in four days, of 34 responses.

On the other hand, OCC has been diligent in attempting to meet the Commission schedule by propounding discovery responses as quickly as possible, at the same time that OCC has been attempting to hire consultants. But Duke has been unable or unwilling to meet the response schedule. If Duke will not respond in sufficient time to maintain a schedule so that OCC can ask follow-up questions, the Commission cannot meet its requirements under R.C. 4903.082 that "[a]ll parties and intervenors shall be granted ample rights of discovery." Duke has already undermined the schedule and for that reason alone the Commission has good cause to grant a continuance.

Duke argued in its Memo in Opposition that OCC should have had sufficient time to research and engage experts after the time the Amended Sub. S.B. 221 was sent to the Governor on April 29, 2008. However, S.B. 221 provided each utility with flexibility in what they could file as a standard service offer, and it was necessary for OCC to know, before seeking consultant arrangements, what kinds of experts with what scope of work it

would need to employ which would more fully be known when the filings were made and reviewed. Duke's filing was thousands of pages long and involved numerous, diverse issues. OCC has still not been able to employ all the consultants needed to address significant issues.

Duke also argues that its two meetings with OCC, one involving its presentation of its filing and one discussing its "Save-A-Watt" proposal, provides easy access to information outside the normal discovery process. However, those presentations seemed more designed by Duke as general overviews and to promote their proposals and did not in any way provide sufficient discovery for OCC. Moreover, Duke's presentation at the technical conference provided an overview of the application, but it provided little (if any) information that was not already provided in the application.

On behalf of Ohio consumers, OCC must go beyond accepting Duke's word for the value of the electric security plan that Duke is promoting. OCC cannot sufficiently litigate this case without numerous discovery responses and follow-up responses to discovery. Duke is defeating the Commission's schedule by being tardy with its responses. It should be noted that the Commission's rule<sup>1</sup> for motions to compel answers to discovery contains various sanctions, among which is taking actions that are "appropriate." While OCC has not (yet) added to the administrative complexities of the cases by filing a motion to compel and seeking sanctions, the appropriate action here is to grant the continuance.

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<sup>1</sup> Ohio Adm. Code 4901-1-23(F).

**B. S.B. 221 Provides For Alternatives to Implementing the Electric Security Plan Before January 1, 2009 and Duke Submitted a Plan for the Contingency that the Company's SSO is Not Approved By January 1, 2009.**

R.C. 4928.143 provides for alternatives to implementing the electric security plan before January 1, 2008. First, the Commission is permitted under R.C. 4928.143(C)(1) to modify and approve an electric security plan rather than to just approve or disapprove an electric security plan. For example, instead of addressing all of the many complex issues Duke has proposed in its application, the Commission can modify the plan by deferring the resolution of many of the issues into the future. Or the Commission can disapprove the plan if it does not perceive that Duke has provided sufficient information in its application to meet the statutory requirement. OCC believes that Duke has not, which is one reason why it has been conducting discovery on Duke about the plan.

R.C. 4928.143(C)(2)(b) allows the Commission to disapprove an application and provides for alternative pricing after January 1, 2009, under these circumstances:

If the Commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent off is authorized pursuant to this section or section 4928.141 of the Revised Code.

Moreover, Duke has agreed to continue its rate stabilization plan if the Commission is unable to complete its review by January 1, 2009.<sup>2</sup>

In resolving the SSO applications set forth in S.B. 221, the Commission must meet many requirements. Most importantly, the Commission simply cannot approve an application without allowing for a hearing under R.C. 4928.141(B). In addition, the

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<sup>2</sup> Direct Testimony of Paul G. Smith at 19.

Commission cannot provide for a hearing without allowing “[a]ll parties and intervenors \* \* \* ample rights of discovery” under R.C. 4903.082.

On the other hand, the Commission must issue an order under this division for an initial application not later than one hundred fifty days after the application’s filing date under R.C. 4928.141(C)(1). Under that same section, the Commission may approve, may modify and approve an application or may disapprove an application. The Commission decision must be based on whether its finds that the electric security plan is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 and if any surcharges are reserved and made available to those that bear the cost of the surcharge.

Duke’s current plan involves any number of programs and complex significant issues that traditionally have been dealt with in multiple cases over time with extensive opportunity for discovery. These complex issues include: the legitimacy of a long-term forecast; the prudence of transferring generation assets from the regulated Duke to an unregulated affiliate; the prudence of a very controversial approach to fuel, emission allowance and purchased power portfolio management; two new unavoidable capacity riders; a significant change in rate design; the review of the prudence and equity of advanced metering infrastructure, along with the charges associated with them; the review of Duke’s highly controversial “Save-a-Watt” energy efficiency program; the review of transmission cost recovery; the review of Duke’s distribution modernization, maintenance and operation rider; the review of the prudence and equity of Duke’s economic development program and the related rider; the review of Duke’s home energy and weatherization program; the review of Duke’s corporate separation plan, the

implementation of which has resulted in extensive litigation; the review of Duke's market price and excess earnings test; the review of Duke's aggregation policy and practices; and the consideration throughout all of these issues as to whether they meet the requirements of state policy set forth under R.C. 4928.02.

In order for the Commission to meet all of its hearing and due process requirements for each of the programs and issues presented by Duke's application, it seems that the Commission must either modify or disapprove Duke's application to separate all the components in the application to provide for further proceedings so that hearings can be had to determine whether the plan "its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." The Commission simply cannot meet all the requirements of S.B. 221 and R.C. 4903.082 without doing so.

For the reasons stated above the Commission should grant the Joint Motion for a continuance and extension of the hearing schedule for 60 days.

### **III. CONCLUSION**

The Commission should grant the Joint Motion for a continuance and extension of the procedural schedule as provided for under Ohio Adm. Code 4901-1-13(A) upon a showing of good cause. The Commission will be unable to meet its hearing requirements under R.C. 4928.143 and discovery requirement under R.C. 4903.082 if it does not grant this continuance and extension. Despite Duke's opposition to the extension, Duke has

itself undermined the Commission procedural schedule by not responding to discovery on time.

Moreover, the Commission has the flexibility under R.C. 4928.143 to continue other rates after January 1, 2009, if it is unable to finish the hearing before January 1, 2009. For those reasons, the PUCO should extend the hearing date for sixty days until December 4, 2008, and similarly extend the filing of testimony and discovery deadlines by sixty days. If the Joint Motion is granted, the discovery deadline will become November 21, 2008. The deadline for intervenor testimony will become November 17, 2008, consistent with the continuance of the hearing and Ohio Adm. Code 4901-1-29(A)(1)(h). The new testimony due date would meet the requirement under Ohio Adm. Code 4901-1-29(A)(1)(d) that all direct testimony by intervenors must be filed no later than seven days prior to the commencement of the hearing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the forgoing Reply has been served upon the following parties via electronic mail service and regular U.S. Mail delivery this 4<sup>th</sup> day of September, 2008.

  
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