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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan)))	Case No. 08-920-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Approval to Amend Accounting Methods)))	Case No. 08-921-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. 08-922-EL-UNC
In the Matter of the Application of Duke Energy Ohio for Approval to Amend its Tariffs)))	Case No. 08-923-EL-ATA

DUKE ENERGY OHIO'S MEMORANDUM IN
OPPOSITION TO THE MOTION FOR A CONTINUANCE
AND EXTENSIONS OF TIME, OR IN THE ALTERNATIVE,
MOTION TO COMPEL
BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

Governor Ted Strickland signed Amended Substitute Senate Bill 221 (SB 221) and enacted new state energy policy for the State of Ohio on May 1, 2008. Upon the effective date of the legislation, three of the electric utilities in Ohio promptly filed Electric Security Plans (ESP) for the Commission's consideration. At the same time, the Commission commenced rulemaking to facilitate and implement these ESPs. The parties have been moving steadily toward their respective hearings and much has been accomplished to date to complete discovery and to prepare for hearing.

Notwithstanding this progress toward hearing, the Office of Consumers' Counsel (OCC) seeks for a second time to delay the proceedings. This is not the first time the OCC or Duke Energy Ohio, Inc. (DE-Ohio) has experienced this kind of policy change in Ohio. OCC and DE-Ohio, which was then The Cincinnati Gas & Electric Company, both participated in a similar regulatory shift in 1999 after Senate Bill 3 was passed and signed into law. Despite the advantage of having seasoned and experienced utility counsel and despite past experience with regulatory changes, OCC asserts that it simply cannot keep pace with the rest of the legal and regulatory communities. This latest motion represents the second time OCC has requested that the procedural schedule be extended. OCC was partially successful in its last motion since the Attorney Examiner did delay the hearing schedule by two weeks.¹ This additional motion seeks to further delay the proceedings and to compel responses to discovery that have, in fact, already been provided to OCC. The motion is duplicative, the time schedule has already been carefully considered and the discovery has already been submitted. OCC's Motion must be denied.

II. ARGUMENT

A. There is no outstanding discovery to compel.

Turning first to OCC's motion to compel discovery, DE-Ohio states that OCC's request is both procedurally and substantively deficient. Pursuant to 4901-1-23(C)(1), O.A.C., a party seeking to compel discovery must identify the *specific* discovery at issue. The movant is also required to demonstrate the extra-judicial means undertaken by it to secure the outstanding information.

¹ *In re DE-Ohio's Application for an SSO*, Case No. 08-920-EL-SSO, Entry (Sept. 5, 2008).

Here, the only discovery at issue is OCC's Fifth and Sixth Sets of Interrogatories and Requests for Production of Documents². These requests were initially served on September 8, 2008.³ In attempting to confirm the extra-judicial means undertaken by OCC to obtain the answers to this allegedly overdue discovery, its counsel attests *only* to a conversation with DE-Ohio's counsel on September 16, 2008. But as of September 16, 2008, the responses to the Fifth and Sixth Sets of Interrogatories and Requests for Production of Documents were not overdue. And as evident from the affidavit submitted in support of OCC's motion to compel, there was no effort on OCC's behalf to communicate with DE-Ohio about the Fifth and Sixth Sets of Interrogatories and Document Requests *after* the answers to those requests were due. As discussed more fully below, this lack of communication likely resulted from the fact that the responses had been timely served by DE-Ohio.

Assuming, *arguendo*, that a discovery dispute existed on September 16, 2008, it is disingenuous to characterize OCC's counsel's communication on that day as a reasonable attempt to exhaust all other means of resolving differences with the party from whom discovery is sought. Counsel for OCC contacted counsel for DE-Ohio on one occasion to discuss the possible filing of a motion. Significantly, when that contact was made, only seven responses were past due. OCC's counsel did not discuss any attempts to resolve an alleged discovery dispute. She merely asked that the responses be provided and stated that a motion would be filed. Prior to the time OCC filed its motion to compel, DE-Ohio submitted answers to the seven outstanding questions. Therefore, when OCC filed its

² See Attachment 1 to OCC's Motion.

³ See Attachment 1 (e-mail dated September 8, 2008 at 5:38p.m.).

motion to compel, there was nothing to compel. DE-Ohio had not failed to provide discovery responses in a timely manner.

Given OCC's non-compliance with 4901-1-23, O.A.C., it is fair to characterize its motion to compel as a pretextual excuse used in precipitous fashion and in contravention of the Commission's Rules of Practice. On this basis alone, the motion must be denied. But should this Commission consider the substantive history of this matter, it would find further support to deny OCC's motion.

To date, OCC has propounded six sets of discovery requests, which include 252 interrogatories and 52 requests for production of documents. Many of these interrogatories and data requests are duplicative of prior requests and seek information already in the possession of OCC. Nonetheless, DE-Ohio has diligently worked to provide OCC with responses in a timely fashion.

More troubling is the fact that OCC has chosen to compel discovery during a time when DE-Ohio, as well as other Ohio utilities, were experiencing the worst storm outages in the history of their companies. At the peak of the outage, DE-Ohio had more than 500,000 without power in its service territory. In fact, all employees were called upon to lend a hand to the storm recovery efforts. Legal department support, including paralegal support, was enlisted to assist with answering phones and in responding to customer inquiries, etc. One would ordinarily expect the OCC to be supportive of these efforts to get its customers online quickly and safely. To the contrary, OCC chose this week to file its motion to compel when in fact, DE-Ohio has significantly complied with all of OCC's requests anyway. OCC electronically served its Fifth and Sixth Sets of Interrogatories and Document Requests on DE-Ohio at 5:38 p.m. (after business hours) on September 8,

2008.⁴ OCC then served a revised Fifth Set of Interrogatories and Document Requests on September 9, 2008, at 4:34 p.m., with this discovery serving to correct errors in the version sent the day before.⁵ OCC prematurely filed its Motion on September 19, 2008, at 1:11 p.m. DE-Ohio timely served OCC with the responses to OCC's Fifth and Sixth Sets of Discovery (60 requests in total) on September 19, 2008 at 4:42 p.m. OCC served these requests after hours on September 8, 2008 and DE-Ohio could not begin to respond until the next business day, September 9, 2008. DE-Ohio did provide a timely response to OCC's discovery ten days later in full compliance with the Commission's procedural order.⁶ Considering the circumstances, OCC should be appreciative of the efforts DE-Ohio has undergone to respond to OCC. There is nothing left for the Commission to compel, and OCC's motion to compel must be denied.

B. OCC's Motion is a thinly veiled attempt to request an additional delay.

Because OCC sought herein to compel discovery and because it did so in a case where they actually had most of the discovery requests, it appears that the ultimate cause for OCC's Motion is to create a basis to support the request for yet another delay of the schedule. An alleged lack of discovery certainly doesn't provide the support OCC seeks.

Having gained two weeks with its first Motion to extend the procedural schedule, OCC now seeks to impose further delay by creating out of whole cloth a reason for the extension. DE-Ohio set forth the reasons why it is important that the Commission maintain its schedule and the parties stay on track in its earlier Memorandum in Opposition to the Joint Motion for Continuance of the Hearing and Extension of Time of the Office of Consumers' Counsel, et al. These reasons include the fact that changes to

⁴ *Id.*

⁵ See attachment 2 (e-mail dated September 9, 2008 at 4:34pm).

⁶ See attachment 3 (e-mail dated September 19, 2008-serving responses to OCC 5th & 6th sets).

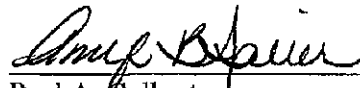
the detailed schedule already in place would derail the Commission's carefully established schedule and cause undue delay in the implementation of the ESP for DE-Ohio and possibly for other companies as well. DE-Ohio will not re-state those same arguments here, but does incorporate them by reference as if fully having done so.⁷ And for these reasons, OCC's Motion must be denied.

III. CONCLUSION

For the reasons set forth above, DE-Ohio respectfully requests that the Commission deny the OCC's Motion for a Continuance and Extension of Time of in the Alternative, Motion to Compel and that the Commission schedule local public hearings with appropriate notice provisions.

Respectfully submitted,

DUKE ENERGY OHIO, INC.



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⁷ See Memorandum in Opposition at page 3-6 (filed August 29, 2008).

Schafer, Anita M

From: MARY EDWARDS [EDWARDS@occ.state.oh.us]
Sent: Monday, September 08, 2008 5:38 PM
To: Barth Royer; David Rinebolt; David F. Boehm; Michael Kurtz; Thomas O'Brien; Colleen Mooney; Mary Christensen; Cynthia Fonner; John Bentine; Matthew White; Mark Yurick; Colbert, Paul; D'Ascenzo, Rocco O; Daniel Neilsen; Joseph Clark; Lisa McAlister; Sam Randazzo; Thomas McNamee; William Wright; M. Petricoff; Stephen Howard
Cc: Schafer, Anita M; KAREN HARDIE; ANN HOTZ
Subject: OCC Discovey to Duke (Case No. 08-920-EL-SSO)
Attachments: OCC Discovery Set 5 to Duke.9-8-08.pdf; OCC Discovery Set 6 to Duke.9-8-08.pdf



OCC Discovery OCC Discovery
 Set 5 to Duke.9-..Set 6 to Duke.9-..

Please find attached an electronic copy of the Office of the Ohio Consumers' Counsel's Interrogatories & Requests for Production of Documents Propounded Upon Duke-Energy Ohio, Fifth & Sixth Sets.

Please feel free to contact Ann Hotz should you have any questions or concerns at 614-466-8574 or via email at hotz@occ.state.oh.us

Thanks.

Mary V. Edwards
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Schafer, Anita M

From: MARY EDWARDS [EDWARDS@occ.state.oh.us]
Sent: Tuesday, September 09, 2008 4:34 PM
To: Barth Royer; David Rinebolt; David F. Boehm; Michael Kurtz; Thomas O'Brien; Colleen Mooney; Mary Christensen; Cynthia Fonner; John Bentine; Matthew White; Mark Yurick; Colbert, Paul; D'Ascenzo, Rocco O; Daniel Neilsen; Joseph Clark; Lisa McAlister; Sam Randazzo; Thomas McNamee; William Wright; M. Petricoff; Stephen Howard
Cc: Schafer, Anita M; ANN HOTZ
Subject: OCC Discovery to Duke Set 5 Revised
Attachments: OCC Discovery Set 5 to Duke.9-8-08-REVISED.pdf



OCC Discovery
 Set 5 to Duke.9-..

Please find attached an electronic REVISED copy of the Office of the Ohio Consumers' Counsel's Interrogatories & Requests for Production of Documents Propounded Upon Duke-Energy Ohio, Fifth Set.

Please feel free to contact Ann Hotz should you have any questions or concerns at 614-466-8574 or via email at hotz@occ.state.oh.us

Thanks.

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Schafer, Anita M

From: Schafer, Anita M
Sent: Wednesday, September 24, 2008 2:50 PM
To: Schafer, Anita M
Subject: RE: OCC 5th and 6th Set

Send to print.

From: Schafer, Anita M
Sent: Friday, September 19, 2008 4:41 PM
To: 'ANN HOTZ'; 'DRinebolt@aol.com'; 'jbentine@cwslaw.com'; 'cmooney2@columbus.rr.com'; 'nmorgan@lascinti.org'; 'bill.wright@puc.state.oh.us'; 'Turkenton, Tammy'; 'TOBrien@bricker.com'; 'dboehm@bklawfirm.com'; 'BarthRoyer@aol.com'; 'bsingh@integrysenergy.com'; 'dhart@douglasshart.com'; 'sam@mwncmh.com'; 'MHPetricoff@vssp.com'; 'mchristensen@columbuslaw.org'; 'henryeckhart@aol.com'; 'cgoodman@energymarketers.com'; 'sbaron@jkenn.com'; 'lkollen@jkenn.com'; 'nmoser@theOEC.org'; 'rpmalley@woodlamping.com'; 'lgearhardt@qfbf.org'; 'dan.johnson@puc.state.oh.us'; 'Joe Clark'; 'murraykm@mwncmh.com'; 'MARY EDWARDS'; 'Thomas.McNamee@puc.state.oh.us'; 'Howard, Steve'; 'david.fein@constellation.com'; 'cynthia.a.fonner@constellation.com'; 'dmancino@mwe.com'; 'sbloomfield@bricker.com'; 'todonnell@bricker.com'
Cc: Colbert, Paul; D'Ascenzo, Rocco O; Watts, Elizabeth H; Spiller, Amy B; Kuhnell, Dianne B
Subject: OCC 5th and 6th Set

Attached are DE-Ohio responses to OCC interrogatories and production of documents, sets 5 and 6.

9/24/2008

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Contra of Duke Energy Ohio was served on the following parties this 24th day of September, 2008 by regular U. S. Mail, overnight delivery or electronic delivery.


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