

**FILE**

**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. 08-0922-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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**MOTION TO STAY NEGOTIATIONS BETWEEN THE  
COMPANY AND THE PARTIES**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO PARTNERS  
FOR AFFORDABLE ENERGY, COMMUNITIES UNITED FOR ACTION, THE  
SIERRA CLUB AND THE NATURAL RESOURCE DEFENSE COUNCIL**

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke"); Ohio Partners for Affordable Energy, on behalf of low-income and small commercial customers; Communities United for Action, on behalf of its members to promote the quality of working class neighborhood's life; the Sierra Club on behalf of its 17,000 members to promote responsible energy policy; the Natural Resource Defense Council on behalf of its members to promote energy efficiency and renewable energy to benefit the public (Together "Movants") pursuant to Ohio Adm. Code 4901-1-12, moves to stay the negotiation process between Duke and other parties regarding Duke's electric security

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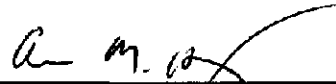
plan ("SSO") application that was filed in the above-captioned cases on July 31, 2008.

The stay is requested until October 27, 2008 after the filing of testimony by the Staff and one week before the scheduled hearing, November 3, 2008. Under the stay, negotiations should be held in abeyance and not be resumed until October 27, 2008.

In order to prevent irreparable harm to Duke's residential customers and low-income customers, the Movants request that the Commission grant the Motion for Stay. While irreparable harm would inure to Movants and the clients they represent, no such harm would occur to the negotiating parties. The reasons for granting the Movant's Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL



---

Ann M. Hotz, Counsel of Record  
Jeffrey L. Small  
Jacqueline Lake Roberts  
Michael E. Idzkowski  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Telephone: (614) 466-8574  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[roberts@occ.state.oh.us](mailto:roberts@occ.state.oh.us)  
[idzkowski@occ.state.oh.us](mailto:idzkowski@occ.state.oh.us)

Colleen L. Mooney AH

Colleen L. Mooney

David C. Rinebolt

**Ohio Partners for Affordable Energy**

231 West Lima Street

Findlay, OH 45839-1793

Telephone: (419) 425-8860

[drinebolt@aol.com](mailto:drinebolt@aol.com)

[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)

Noel M. Morgan AH

Noel M. Morgan

**Communities United for Action**

**Legal Aid Society of Southwest Ohio**

215 E. Ninth St.

Cincinnati, OH 45202

Telephone: (614) 362-2837

[nmorgan@lascinti.org](mailto:nmorgan@lascinti.org)

Henry W. Eckhart AH

Henry W. Eckhart

50 W. Broad St., Suite 1800

Columbus, OH 43215-3485

**Counsel of Record for the Sierra Club**

**Ohio Chapter**

Counsel for Record for Natural Resources

Defense Council

Telephone: (614) 461-0984

[henryeckhart@oal.com](mailto:henryeckhart@oal.com)

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**MEMORANDUM IN SUPPORT**

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**I. HISTORY OF THE CASE AND INTRODUCTION**

On July 31, 2008, Duke filed its Electric Security Plan in which it seeks to raise rates to its customers under its Standard Service Offer. Just a mere 28 days after filing a voluminous and complex application – the first of its kind, Duke proposed settlement negotiations. The precipitous call for negotiations came despite requests by several parties to wait until after they had a fair and reasonable opportunity to prepare. Without the opportunity to adequately prepare, parties cannot be reasonably expected to negotiate a settlement on behalf of their clients. It is only fair, just and reasonable that all parties be able to come to the negotiating table after having the opportunity to fully and adequately prepare. These requests went unheeded and Duke proceeded to schedule negotiations that have been taking place at the Commission.

The Movants file this motion for a stay of the negotiations between Duke and other parties in this case because the negotiations are premature. If a stipulation is reached and presented to the Commission before the parties have had an adequate opportunity to prepare – including receiving responses to discovery - the non-signatory parties will be unjustly prejudiced in the prosecution of this case. All the parties should be afforded a reasonable opportunity to fully prepare in accordance with the schedule set forth by the Commission. Typically when a stipulation is docketed with the Commission the proceeding revolves around the reasonableness of the Stipulation and not the presentation of evidence as to the Application itself. This will preclude the opportunity for parties to present their case.

Moreover, if numerous parties resolve the case with the Company before all the evidence is presented, the settling parties will be weakening the leverage that non-settling parties may gain from the evidence and their valid legal arguments. Typically, once the negotiating parties have reached a settlement, it is difficult for other parties to make substantial changes to the Stipulation. Because the Commission – and the Supreme Court - typically will accord substantial weight to a Stipulation, it makes it very difficult for non-stipulating parties to present evidence to rebut the Stipulation.

These cases establish the services electric customers will receive from Duke and the rates electric customers must pay Duke for three years beginning January 1, 2009. Duke filed an application for approval of an electric security plan (“ESP”) pursuant to R.C. 4928.143 along with other related applications on July 31, 2008.

On August 5, 2008, the Attorney Examiner issued an Entry establishing the schedule, which is very short compared to other cases involving so many complex issues.<sup>1</sup>

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<sup>1</sup> Entry (August 5, 2008) at 2-3.

In addition the Entry requires that discovery responses be completed and sent to the issuing parties within 10 days of electronic service.<sup>2</sup> On August 26, 2008 OCC, the Environmental Council, and OPAE filed a Joint Motion for Continuance of the Hearing, Extensions of Time and Memorandum in Support. On August 29, 2008 Duke filed a memorandum in Opposition.

On September 4, 2008, OCC filed a Reply and in that reply complained about Duke's failure to meet discovery deadlines.<sup>3</sup> While the Attorney Examiner later extended the schedule by 14 days, the Attorney Examiner did not extend the discovery deadline.<sup>4</sup>

In the meantime and despite the complexity and far-reaching consequences of Duke's application, Duke has been negotiating (in office space made available by the PUCO) with other parties to resolve this case through settlement discussions. These discussions began a mere 28 days after Duke filed its application.

## **II. ARGUMENT**

### **A. The Commission Has The Authority and an Obligation to Stay the Negotiations In this Case**

The Commission has authority to stay Duke's negotiations based upon its R.C. 4901.13 authority to govern proceedings as previously recognized by the Supreme Court.<sup>5</sup> Additionally, the Commission may order stays of negotiations under its general supervisory power as set forth under R.C. 4905.06 and under its jurisdiction as established under R.C. 4905.05. Finally, under R.C. 4903.082 the Commission has an obligation to stay the negotiations in this case because to allow them to continue would greatly prejudice the

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<sup>2</sup> Id at 3.

<sup>3</sup> OCC Reply (September 4, 2008) at 3-4.

<sup>4</sup> Entry (September 5, 2008).

<sup>5</sup> *Akron & Barberton v. Public Utilities Commission of Ohio*, 165 Ohio St. 316 (May 31, 1956).

parties who have not had a reasonable opportunity to complete their review including discovery of this complex case.

**B. The Company Has Not Been Timely in Providing Discovery In this Case**

The Company appears to be attempting to settle this case before adequate discovery can be completed. The Company has made several prepared presentations on matters but has neglected responding to formal discovery requests and has not provided a single discovery response to OCC on time. Additionally, Duke has objected to various discovery requests on dubious bases that have led to time consuming negotiations that OCC cannot afford with such a short schedule.

First, Duke refused to respond to questions about side agreement that its affiliate may have with parties, implying that it does not have knowledge as to the actions of the affiliate and still has not formally responded. This response is not reasonable because R.C. 4928.145 requires:

During a proceeding under sections 4928.141 to 4928.144 of the Revised Code and upon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or agreement that is between the utility or any of its affiliates an a party to the proceeding, consumer, electric service company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.

Second, Duke has refused to respond to reasonable discovery questions that are basic to the case, by objecting to interrogatories that were designed to further OCC's understanding of the case. This has prolonged OCC's efforts to prepare in order to participate in negotiations.

Most recently, Duke forwarded its responses to OCC's fifth and sixth sets of discovery and responded to five of the requests with only "will supplement."<sup>6</sup> Although the responses were late when received, OCC has still not received the answer to these five requests even five days later. For these reasons, Duke should be required to cease negotiating and to pay more attention to responding to discovery questions as required under due process.

**C. The Application Does Not Conform to the Rules**

None of the sets of rules establishing the requirements for a valid application under SB 221 have been finalized. Although the Commission issued a Finding and Order on the first set of rules<sup>7</sup> relating to ESP and Market Based Rate applications on September 17, 2008, parties still have the opportunity to file an application for rehearing by October 17, 2008. The Commission must address the applications for rehearing filed before forwarding the rules to the Joint Committee on Agency Rule Review ("JCARR").

Reply Comments were filed on August 29, 2008 regarding the second set of rules, relating to electric service and safety standards that the utilities must meet.<sup>8</sup> The Commission has not yet issued a Finding and Order and so it is possible that these rules will not be forwarded to JCARR before December.

Reply Comments are just being filed in the third set of rules, relating to alternative technology and renewable resources.<sup>9</sup> The Reply Comments are not due until today and are critical to the utilities' standard service offer plans. Therefore, it is not clear and will not be

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<sup>6</sup> OCC Int-06-232; OCC Int-06-233; OCC Int-05-215; OCC Int-05-216; OCC Int-05-213.

<sup>7</sup> Case No. 08-777-EL-ORD.

<sup>8</sup> Case No. 06-653-EL-ORD.

<sup>9</sup> 08-888-EL-ORD.



clear whether the Stipulation that comes out of Duke's premature negotiations will meet the requirements of the rules that will be adopted. Moreover, parties should not be negotiating with the Company before they know exactly where they stand with the rules and exactly what leverage they have from the final rules. For this reason, the Commission should grant the Movants' motion to stay the negotiations.

#### **D. Due Process Is Violated**

The Commission is required by R.C. 4928.141 to provide a hearing in this case. As such, the Commission is required to provide intervenors due process or as the Commission has previously defined it "a meaningful opportunity to be heard."<sup>10</sup> Under R.C. 4903.082, this includes "ample rights of discovery." The Commission recently emphasized this in its review of Ohio Administrative Code 4901-1-16:

The statute [R.C.4903.082] places an obligation on the Commission to ensure ample rights of discovery whereas the rule [O.A.C. 4901-1-16(A)] expresses the Commission's intent that discovery be conducted promptly and expeditiously.<sup>11</sup>

In allowing Duke to proceed with its premature negotiation process the Commission is undermining the first prong of the Commission's test of the reasonableness of stipulations because Duke' premature negotiation process is interfering with discovery and whether parties are sufficiently knowledgeable:

The reasonableness test considers whether the settlement was a product of serious bargaining among capable, knowledgeable parties, whether the settlement benefits ratepayers and the public interest, and

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<sup>10</sup> *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Gas Rates in Its Service Area; In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Rates in Its Service Area; In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Change Depreciation Accrual Rates for Gas Distribution Facilities*, Case No. 92-1463-GA-AIR, et al, Opinion and Order at 38 (August 26, 1993).

<sup>11</sup> *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at 48 (December 6, 2006).

whether the settlement package violates any important regulatory principle or practice.<sup>12</sup>

In *Ohio Consumers' Counsel v. PUC*, the Ohio Supreme Court ruled that the Commission's decision to limit discovery violated the first prong of the determination.<sup>13</sup> The PUCO did not allow OCC to discover the existence of possible side agreements between some of the signatory parties and the utility.<sup>14</sup> The Court reiterated the importance of the Commission's discovery rule, noting its similarity to the Ohio civil rule, and how the rule should be interpreted:

The text of Ohio Adm.Code 4901-1-16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 1994 Ohio 324, 635 N.E.2d 331 ("The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding"). See *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479, 664 N.E.2d 532 ("Pursuant to Civ.R. 26(B)(1), a party may obtain discovery regarding non-privileged information relevant to the claim or defense of a proceeding. This includes determining the existence of documents and the identity of persons having knowledge of any discoverable matter").<sup>15</sup>

The Court then related the discovery provision to the first prong of the reasonableness test by noting that, by not allowing "broad discovery" of "all relevant matters" the commission compromised its ability to ensure that the negotiation process was a product of "serious bargaining."<sup>16</sup> In order to satisfy the first prong, the Court stated that the PUCO was in error by not allowing the side agreements to be discovered.<sup>17</sup>

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<sup>12</sup> *Ohio Consumers' Counsel v. PUC* (2006), 111 Ohio St. 3d 300, 319.

<sup>13</sup> *Id.* at 319.

<sup>14</sup> *Consumers' Counsel* at 320.

<sup>15</sup> *Id.* at 320.

<sup>16</sup> *Id.* at 321.

<sup>17</sup> *Id.* at 321.

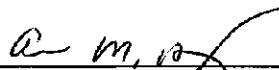
For those reasons, the Commission should require Duke to stay its negotiations and concentrate on providing sufficient discovery so that the Movants and other parties are sufficiently knowledgeable through the discovery process to enter into negotiations for a stipulation. The negotiations should be stayed until after the Staff has filed its testimony.

### **III. CONCLUSION**

The Commission should grant the Movants' motion to stay the negotiations in this case because they are interfering with the parties' rights to ample case preparation and discovery in this case, which is already on a very unreasonably short time line. Without a stay of negotiations and more appropriate responses from Duke to the Movants' discovery, the Movants' preparation cannot be sufficient and the Movants' clients will suffer irreparable harm through the lack of due process. Because the rules regulating Duke's plans in this case have not yet been adopted, parties should not continue negotiating until it is clear what the Commission intends from the standard service offer to guide the negotiations. Finally, not only will the Movants' clients suffer irreparable harm from lack of due process, but any premature stipulation arising from premature settlement negotiations cannot be judged to be reasonable because without sufficient discovery and time to prepare their cases the parties cannot be deemed to be sufficiently knowledgeable about the plan.

Respectfully submitted,


JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL



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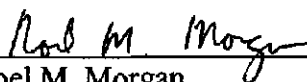
Ann M. Hotz, Counsel of Record  
Jeffrey L. Small  
Jacqueline Lake Roberts  
Michael E. Idzkowski  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Telephone: 614-466-8574  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[roberts@occ.state.oh.us](mailto:roberts@occ.state.oh.us)  
[idzkowski@occ.state.oh.us](mailto:idzkowski@occ.state.oh.us)

 AH

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Colleen L. Mooney  
David C. Rinebolt  
**Ohio Partners for Affordable Energy**  
231 West Lima Street  
Findlay, OH 45839-1793  
Telephone: (419) 425-8860  
[drinebolt@aol.com](mailto:drinebolt@aol.com)  
[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)

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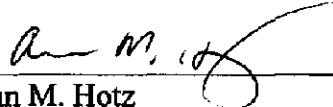
Noel M. Morgan  
**Communities United for Action**  
**Legal Aid Society of Southwest Ohio**  
215 E. Ninth St.  
Cincinnati, OH 45202  
Telephone: (614) 362-2837  
[nmorgan@lascinti.org](mailto:nmorgan@lascinti.org)

Henry W. Eckhart AMT  
Henry W. Eckhart  
50 W. Broad St., Suite 1800  
Columbus, OH 43215-3485

**Counsel of Record for the Sierra Club  
Ohio Chapter and Natural Resources  
Defense Council**  
Telephone: 614-461-0984  
[henryeckhart@oal.com](mailto:henryeckhart@oal.com)

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion for Stay has been served upon the below-named persons via electronic transmittal, as well as by U.S. Mail, this 29<sup>th</sup> day of September 2008.



Ann M. Hotz  
Assistant Consumers' Counsel

Paul A. Colbert  
Rocco D'Ascenzo  
Elizabeth H. Watts  
Amy Spiller  
Duke Energy Ohio, Inc.  
139 Fourth Street, Room 25 ATII  
Cincinnati, OH 45202

David F. Boehm, Esq.  
Michael L. Kurtz, Esq.  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202

*Attorneys for Ohio Energy Group*

Thomas J. O'Brien  
Sally W. Bloomfield  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291

*Attorneys for City of Cincinnati*

Barth Royer  
Bell & Royer Co. LPA  
33 S. Grant Ave.  
Columbus, OH 43215-3927

*Attorney for the Ohio Environmental  
Council*

Thomas McNamee  
William Wright  
Attorney General's Office  
Public Utilities Section  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, OH 43215

Dave Rinebolt  
Colleen Mooney  
Ohio Partners for Affordable Energy  
231 W. Lima St., P.O. 1793  
Findlay, OH 45839-1793

*Attorneys for Ohio Partners for Affordable  
Energy*

Sam Randazzo  
Lisa McAlister  
Daniel Neilsen  
Joseph Clark  
McNees, Wallace & Nurick LLC  
21 E. State St., 17<sup>th</sup> Fl.  
Columbus, OH 43215

John Bentine  
Mark Yurick  
Matthew S. White  
Chester, Willcox & Saxbe LLP  
65 E. State St., Ste. 1000  
Columbus, OH 43215-4213

*Attorneys for the Kroger Company, Inc.*

M. Howard Petricoff  
Stephen M. Howard  
Vorys, Sater, Seymour And Pease LLP  
52 East Gay S., P. O. Box 1008  
Columbus, OH 43216-1008

*Attorneys for Constellation NewEnergy,  
Inc. and Constellation Energy  
Commodities Group, Inc.*

[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[lmcalister@mwncmh.com](mailto:lmcalister@mwncmh.com)  
[dneilsen@mwncmh.com](mailto:dneilsen@mwncmh.com)  
[jclark@mwncmh.com](mailto:jclark@mwncmh.com)  
[Thomas.McNamee@puc.state.oh.us](mailto:Thomas.McNamee@puc.state.oh.us)  
[william.wright@puc.state.oh.us](mailto:william.wright@puc.state.oh.us)  
[drinebolt@aol.com](mailto:drinebolt@aol.com)  
[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)  
[dboehm@bkllawfirm.com](mailto:dboehm@bkllawfirm.com)  
[mkurtz@bkllawfirm.com](mailto:mkurtz@bkllawfirm.com)  
[BarthRoyer@aol.com](mailto:BarthRoyer@aol.com)  
[jbentine@cwsllaw.com](mailto:jbentine@cwsllaw.com)  
[myurick@cwsllaw.com](mailto:myurick@cwsllaw.com)  
[mwhite@cwsllaw.com](mailto:mwhite@cwsllaw.com)  
[Cynthia.A.Fonner@constellation.com](mailto:Cynthia.A.Fonner@constellation.com)  
[smhoward@vssp.com](mailto:smhoward@vssp.com)  
[mhpetricoff@vssp.com](mailto:mhpetricoff@vssp.com)  
[sbloomfield@bricker.com](mailto:sbloomfield@bricker.com)  
[tobrien@bricker.com](mailto:tobrien@bricker.com)  
[rocco.d'ascenzo@duke-energy.com](mailto:rocco.d'ascenzo@duke-energy.com)  
[paul.colbert@duke-energy.com](mailto:paul.colbert@duke-energy.com)

Cynthia A. Fonner  
Senior Counsel  
Constellation Energy Group, Inc.  
550 W. Washington St., Suite 300  
Chicago, IL 60661

*Attorneys for Constellation NewEnergy,  
Inc. and Constellation Energy  
Commodities Group, Inc.*