

BEFORE

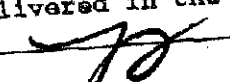
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan.)	Case No. 08-920-EL-SSO
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Accounting Methods.)	Case No. 08-921-EL-AAM
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Certificate of Public Convenience and Necessity to Establish an Unavoidable Capacity Charge(s).)	Case No. 08-922-EL-UNC
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend its Tariff.)	Case No. 08-923-EL-ATA
)	

ENTRY

The attorney examiner finds:

- (1) On July 31, 2008, Duke Energy Ohio, Inc., (Duke) filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. This application is for an electric security plan in accordance with Section 4928.143, Revised Code. Together with that application, Duke also filed three other related applications, captioned above.
- (2) By entry issued August 5, 2008, the attorney examiner established a procedural schedule for these proceedings. On September 5, 2008, following a motion by the office of the Ohio Consumers' Counsel (OCC) for an extension of 60 days or, in the alternative, 15 days, the examiner ordered a two-week extension of the evidentiary hearing date.
- (3) Also, by entry dated September 17, 2008, the attorney examiner issued an entry scheduling two local hearings in this matter, to occur on October 7, 2008.

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- (4) On September 19, 2008, OCC filed a second motion to extend the schedule. This motion requests a 30-day continuance of the hearing and a corresponding extension of the schedule. In the alternative, OCC asks for an order compelling Duke to respond to outstanding discovery requests issued by OCC. OCC sets forth three rationales for its request for a continuance. First, it contends that the Commission established "unprecedented short timelines" in these proceedings, opining that the Commission does not have to approve an SSO until 150 days after Duke filed its application. OCC goes on to reason that the Commission must provide parties with due process in its consideration of the applications. Second, OCC points out that Duke has failed to meet various discovery deadlines. To avoid prejudicing intervenors, OCC asserts that an extension is necessary. OCC's third rationale is that the massive power outages in Duke's territory, resulting from the recent windstorm, caused Duke to fail to respond to OCC's discovery requests. As a result, OCC contends, its preparation for the hearing will be jeopardized. Alternatively, OCC asks that the Commission compel Duke's discovery responses. OCC explains that it has repeatedly reminded Duke of the late responses and has contacted Duke's counsel repeatedly.
- (5) In response to OCC's motion, Duke filed a memorandum contra, on September 24, 2008. In that memorandum, Duke claims that it has provided answers to all discovery requests and that, thus, there is no outstanding discovery to be compelled. It points out that the only discovery questions included in OCC's motion to compel were OCC's fifth and sixth sets of interrogatories, the answers to which, it states, were not due yet by the time of the last communication from OCC to Duke. Duke asserts that it provided responses to those sets of interrogatories, on a timely basis, on September 19, 2008. Duke also postulates that this motion was filed in an attempt to support a further delay of the schedule.
- (6) OCC filed its reply on September 29, 2008, disagreeing with Duke's contention that there are no outstanding discovery requests to be answered. OCC also asserts that new problems with Duke's discovery responses have arisen. OCC therefore contends that the Commission should extend the hearing date and procedural schedule for 30 days.

- (7) As stated by OCC, the Commission is required to issue its decision on an application for an SSO within 150 days after it is filed. The applications in these proceedings were filed on July 31, 2008, making the Commission's decision due by December 28, 2008. Following the examiner's two-week continuance of the hearing date in response to OCC's first motion to delay the process, the hearing is now scheduled to commence on November 3, 2008. OCC's proposal in this motion would delay the hearing until December 3, 2008. OCC's requested continuance is unreasonable and shall be denied because it would leave only 25 days for the Commission to complete the hearing, for the parties to review the evidence and write two sets of briefs, and for the Commission to draft, consider, and approve an opinion and order in these cases. Therefore, the examiner finds that the motion to extend the schedule should be denied.
- (8) With regard to the alternative motion to compel, OCC contends, in its reply, that discovery issues remain. OCC reiterates that the Commission's rules require ample discovery, in order to facilitate thorough preparation for Commission proceedings. OCC's contentions can be grouped, for discussion purposes, into three areas.
- (a) OCC's first three concerns all relate to Duke's use of the response, "will supplement." According to OCC, Duke responded with only a statement that it would subsequently supplement its answer, to questions regarding its interpretation of various provisions of the law governing its application, the amount of money it has committed to home energy and weatherization contracts, and whether it knows who will serve as the prime contractor on a particular project.

The Commission's rules are designed to allow broad discovery of material that is relevant to the proceeding in question and to allow the parties to prepare thoroughly and adequately for hearing. Under certain circumstances, a party is required to supplement its answers with new information, as it is obtained. Rule 4901-1-16(D), Ohio

Administrative Code (O.A.C.). However, the rules do not authorize a party to rely on a promise of subsequent supplementation in place of providing a current answer. The examiner finds that these three areas of inquiry are ones that Duke could answer to the best of its current knowledge and could supplement later, as further information may be developed. Therefore, Duke shall respond, to the best of its current knowledge, to OCC Int. 05-213, OCC Int-05-215, OCC Int-05-216, OCC Int-06-232, and OCC Int-06-233 by noon on October 6, 2008.

- (b) OCC's second topic relates to Duke's response to inquiries concerning contracts between Duke's affiliates and parties to these proceedings, consumers, electric service companies, or political subdivisions in relation to charges in these proceedings. This dispute revolves around Duke's responsibility to determine whether such contracts exist, now or in the future. OCC asks that Duke make such a determination. Duke denies that any such contracts exist now and agrees that it will supplement its answer if it "becomes aware" of any such contracts.

Section 4928.145, Revised Code, requires an electric distribution utility to make available "every" such contract, not every such contract of which it is aware. Therefore, Duke is responsible to determine whether such contracts exist now or are entered into in the future and to make such contracts available in response to OCC's discovery request. With regard to any such contracts that now exist, Duke shall respond by noon on October 6, 2008.

- (c) OCC's final area of concern stems from a request for information concerning the identification of fuel, purchased power, and emission allowance procurement employees that are shared with any of its affiliates under its current corporate separation plan. Duke responded that the information is

irrelevant and the request is not calculated to lead to discovery of admissible evidence.

As noted by OCC, Duke's corporate separation plan is at issue, as are fuel procurement practices. Therefore, the examiner finds that this information is directly relevant or likely to lead to the discovery of admissible evidence. Therefore, Duke shall respond to this inquiry by noon on October 6, 2008.

- (9) On September 22, 2008, OCC, together with the Sierra Club, the Natural Resource Defense Council, and Communities United for Action (collectively, the appellants) filed a joint interlocutory appeal, asking that the examiner certify the examiner's public hearing scheduling entry to the Commission for its review. On September 26, 2008, Duke filed a memorandum contra the join interlocutory appeal.
- (10) The appellants claim that the entry causes undue prejudice to Ohio consumers and the appellants and presents a new or novel question of law or policy. With regard to prejudice, the appellants assert that the Commission must establish a schedule that allows for 30 days' notice of public hearings and that the notice must include the summary of the major issues that was previously proposed by OCC, the Ohio Environmental Council, and Ohio Partners for Affordable Energy. Without such notice, the appellants insist that the public's opportunity to learn of the hearings, to prepare for testifying and to adjust their schedules will be limited. The appellants propose that the Commission's summary of the application will leave the public not knowing what issues they should address in their testimony. With regard to a new or novel question, the appellants point to the need for transparency in the regulatory process and the new elements of Ohio policy that were recently adopted as part of Section 4928.02, Revised Code. They also note that the applications in these proceedings result in the consideration of Duke's first electric security plan. In support of their appeal, the appellants cite to a 1991 electric fuel component proceeding in which the Commission recognized that notice must not only meet any applicable legal requirements but also must reach as many customers as possible. *In the Matter of the Regulation of the*

Electric Fuel Component Contained within the Rate Schedules of Ohio Power Company, Case No. 91-101-EL-EFC, Opinion and Order (May 16, 1991). The appellants contend that an immediate determination is needed in order to prevent undue prejudice in the event the Commission ultimately reverses the ruling.

- (11) In its memorandum contra, Duke contends that the request to certify and application for review fails to set forth any new or novel question or interpretation of law or policy and does not allege a departure from past precedent. Duke points out that the entry provides 20 days' notice and two opportunities to testify. Duke opines that the notice explains the issues in the proceedings sufficiently to give the public information necessary to form the basis of any comments they may have. Duke states that the appellants failed to demonstrate how the schedule is unreasonable or unlawful. Duke explains that it is irrelevant that this is a proceeding to consider Duke's first ESP. The provision of adequate notice of a public hearing is, according to Duke, neither new nor novel. Duke notes that the schedule is particularly reasonable in light of the statutory requirement that the Commission approve or deny the application within 150 days. Duke also suggests that the list of issues that the appellants seek to include in the notice is unnecessary, inflammatory, and self-serving. Duke indicates that, in its opinion, the language in the legal notice required by the examiner's entry clearly describes the issues that are in fact pending in this proceeding.
- (12) Rule 4901-1-15(B), Ohio Administrative Code (O.A.C.), sets forth the substantive standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission pursuant to paragraph (B) of the rule. The ruling that is the subject of the joint interlocutory appeal is not one of the four specific rulings enumerated in paragraph (A) of Rule 4901-1-15, O.A.C. Therefore, the joint interlocutory appeal should only be certified to the Commission if it meets the requirements of paragraph (B) of that rule.

- (13) Paragraph (B) of Rule 4901-15, O.A.C., specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy or is taken from a ruling that represents a departure from past precedent and that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the Commission ultimately reverse the ruling in question. In order to certify an interlocutory appeal to the Commission, both requirements need to be met. In this case, neither provision was satisfied.
- (14) With respect to the first provision, whether the appeal presents a new or novel question of law or policy or is taken from a ruling that represents a departure from past precedent, the attorney examiner finds that the joint appeal does not present a new or novel question of law or policy. Although this proceeding is one of the first cases under the statutory framework established by Am. Sub. Senate Bill 221, the Commission and its attorney examiners have had years of experience scheduling local public hearings in cases affecting rates; therefore, the appeal does not present a new or novel question of law. *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2.
- (15) Further, the attorney examiner finds that the joint interlocutory appeal is not taken from a ruling that represents a departure from past precedent. The cases at issue are similar to cases involving applications for an increase in rates filed pursuant to Section 4909.18, Revised Code. It has not been Commission practice in rate cases, where local public hearings are required by statute, to provide 30 days' notice. Section 4903.083, Revised Code, which governs local public hearings for rate cases, only requires that notice of local public hearings be published "once each week for two consecutive weeks," and Commission practice has adhered to that statutory requirement. See *In re Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 07-551-EL-AIR, Entry (February 2, 2008) (local public hearings scheduled with 20 days' notice); *In re Ohio American Water Company*, Case No. 07-1112-WS-AIR, Entry (July 27, 2008) (local public

hearings scheduled with 13 days' notice); *In re Duke energy Ohio, Inc.*, Case No. 07-589-GA-AIR, Entry (February 1, 2008) (local public hearings scheduled with 20 days' notice). Clearly, the notice provided in this case is consistent with Commission precedent.

- (16) In addition, the joint interlocutory appeal did not establish that an immediate determination by the Commission was needed to prevent the likelihood of undue prejudice or expense to one or more of the parties. The Commission would note, as discussed above, that Section 4928.143(C)(1), Revised Code, requires the Commission to issue a decision on Duke's application for approval of its ESP no later than December 28, 2008. The examiner cannot conclude that there is likely to be undue prejudice or expense to one or more of the parties as a result of an effort to comply with a statutory mandate. The Commission would also point out that the local hearings are not scheduled to commence until more than 30 days after OCC and other movants requested, on August 26, the scheduling of local hearings. Thus, to the extent that the appellants required 30 days to prepare their clients for the local hearings, such time was available. This is further support for the lack of undue prejudice or expense to one or more of the parties.
- (17) Accordingly, because the joint interlocutory appeal did not present a new or novel question of law or policy and is not taken from a ruling which represents a departure from past precedent and because an immediate determination by the Commission is not needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, the attorney examiner finds that the joint interlocutory appeal should not be certified to the Commission for review.
- (18) The examiner also finds that, in order to expand the opportunities for customer input, it is appropriate to schedule an additional local public hearing. Therefore, a public hearing will be scheduled for Wednesday, October 15, 2008, at 6:00 pm, at Lakota East High School, 6840 Lakota Lane, Middletown, OH 45044-9578.
- (19) Accordingly, Duke should modify the notice of local public hearings to incorporate this additional hearing. Duke shall

publish notice of the local public hearings one time in a newspaper of general circulation in each county in its certified territory. The notice should not appear in the legal notices section of the newspaper. The notice should read as follows:

LEGAL NOTICE

The Public Utilities Commission of Ohio has scheduled local hearings in Case No. 08-920-EL-SSO, *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan, et al.* In its application, Duke Energy Ohio, Inc., seeks Commission approval of an electric security plan filed pursuant to Am. Sub. Senate Bill 221, which was signed into law on May 1, 2008. The bill requires electric utilities to establish a standard service offer and, as part of that process, to file an application for approval of an electric security plan. According to the application, the electric security plan would result in increases in total customer rates, including generation, transmission, and distribution, averaging 6.2 percent in 2009 and 1.8 percent in 2010, and a reduction of 2.1 percent in 2011, excluding any adjustments to cost-based riders. In addition, the application proposes the transfer of generation assets, investment in capital improvements for the company's energy delivery system, and energy efficiency initiatives, as well as economic development, green energy, and job retention programs.

The local hearings are scheduled for the purpose of providing an opportunity for interested members of the public to testify in this proceeding. The local hearings will be held as follows:

- (a) Tuesday, October 7, 2008, at 12:30 p.m., at Cincinnati State Technical and Community College, Main Building, Room 344-346, 3520 Central Parkway, Cincinnati, Ohio 45223.
- (b) Tuesday, October 7, 2008, at 6:30 p.m., at Union Township Civic Center Hall, 4350 Aicholtz Road, Cincinnati, Ohio 45245.
- (c) Wednesday, October 15, 2008, at 6:00 p.m., at Lakota East High School, 6840 Lakota Lane, Middletown, Liberty Township, OH 45044-9578.

It is, therefore,

ORDERED, That OCC's motion for a continuance be denied. It is, further,

ORDERED, That OCC's motion to compel discovery be granted. It is, further,

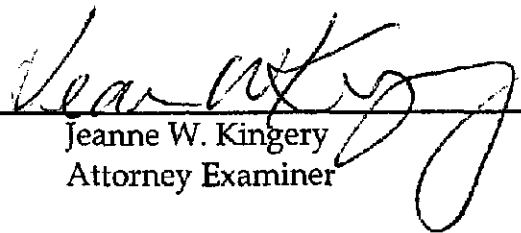
ORDERED, That the appellants' joint request for certification be denied. It is, further,

ORDERED, That an additional local public hearing be scheduled as set forth in finding 18. It is, further,

ORDERED, That Duke publish notice as required by finding 19. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

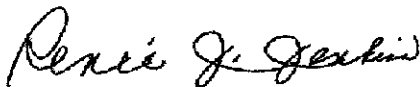
THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Jeanne W. Kingery
Attorney Examiner

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Entered in the Journal

OCT 01 2008



Renee J. Jenkins
Secretary