

FILE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for an Increase in Electric Distribution Rates)))))	Case No. 08-709-EL-AIR
In the Matter of the Application of Duke Energy Ohio for Tariff Approval)))))	Case No. 08-710-EL-ATA
In the Matter of the Application of Duke Energy Ohio for Approval to Change Accounting Methods)))))	Case No. 08-711-EL-AAM

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DUKE ENERGY OHIO'S
MOTION TO STRIKE AND MOTION *IN LIMINE* TO LIMIT CROSS EXAMINATION
OF DUKE ENERGY OHIO'S WITNESS

Duke Energy Ohio hereby moves this honorable Commission to limit the impending cross examination of the unreasonable list witnesses identified by intervenor Mr. Albert Lane in his June 3, 2009 filing and Strike the same from the record. According to the Entry filed on May 29, 2009 the cross examination of the Duke Energy Ohio witness is to be limited to the subject matter of the Schedule A-1, which was filed on May 8, 2009 and which is also the subject matter of the letter filed on behalf of Commission Staff on May 29, 2009.

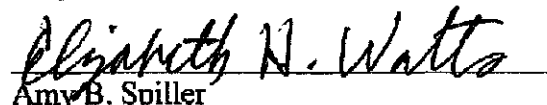
Mr. Lane has filed his request for a hearing as per the Attorney Examiner's June 3, 2009 Entry. Accordingly, Duke Energy will present an expert witness for Mr. Lane's cross-examination, and pre-file direct testimony to support both the Schedule A-1 and the Staff's May 29, 2009 Clarifying Letter (Clarifying Letter). However, the witness list included in Mr. Lane's June 3, 2009 filing is contrary to the Attorney Examiners' June 3, 2009 Entry, overbroad, is clearly designed to cause further delay and harassment to all parties. Mr. Lane's filing, including

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this overbroad list of witnesses he wishes to cross-examine, shows Mr. Lane's intent to seek information beyond the scope of the Schedule A-1 and the Clarifying Letter.

For these reasons as well as those set forth in the attached Memorandum in Support the Commission should strike Mr. Lane's list of witnesses and deny his request that all persons be made available for his cross examination. Cross examination must be limited and respectfully requests that the Attorney Examiner so order.

Respectfully submitted,


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MEMORANDUM IN SUPPORT

FACTS:

Duke Energy Ohio respectfully requests that the Public Utilities Commission of Ohio (Commission) grant its motion to strike and *in limine* to limit the cross examination of the witness called by intervenor Mr. Albert Lane.

The Application for this case was filed on July 25, 2008, seeking an approval of an increase in electric distribution rates. Following extensive discovery by all parties, including Commission Staff and the Office of the Ohio Consumers' Counsel, the filing of expert witness

testimony, and weeks of negotiations, A Stipulation and Recommendation (Stipulation) was submitted on March 31, 2009 resolving all issues in the case. All Parties, representing all customer classes, except Mr. Lane and twTelecom, Inc. agreed to that Stipulation.

On May 8, 2009, Duke Energy Ohio, with the support of all parties to the Stipulation, filed a motion for admission of a Schedule A-1 that had been omitted from the Stipulation. Mr. Lane filed an objection to that admission. On May 29, the Staff of the Commission filed its Clarifying Letter regarding the Schedule A-1. Thereafter, the Commission provided that any Party that wished to cross-examine a witness on the subject of the Schedule A-1 should file such a request by June 4, 2009. Thereafter, Mr. Lane filed correspondence requesting to extend the June 4, 2009 deadline. On June 2, 2009, Duke Energy Ohio filed a memorandum contra Mr. Lane's correspondence noting that Mr. Lane's correspondence was without merit. On June 3, 2009, the Attorney Examiner ordered that the deadline for requesting a hearing would remain on June 4, 2009 but that a subsequent hearing would be held on June 17, 2009. The June 3, 2009 Entry further clarified that if a hearing is held, at least one Stipulating Party shall make available at least one witness to testify in support of Schedule A-1 and Clarifying Letter, and subject to cross examination,

ARGUMENT:

The June 3, 2009 Entry explicitly limits the subject of cross-examination to the Schedule A-1 and the Clarifying Letter. On June 4, 2009, Mr. Lane filed correspondence that indicates his desire to proceed with the June 17, 2009 hearing. However, his correspondence does much more. Mr. Lane's correspondence states his continued desire to have a 3rd party auditor examine Company accounting records going back more than a decade and identifies a total of twenty-one names (20 actual individuals) that he wishes to cross examine. Clearly, Mr. Lane's

correspondence indicates his desire to cause further delays in this proceeding, ignore the Attorney Examiner's June 3, 2009 Entry, examine issues he already had an opportunity to inquire into, and otherwise reach beyond the intended scope of the June 17, 2009 proceeding. Mr. Lane's list of witnesses however, is overbroad, unduly burdensome, and is intended to cause further delay and harassment. Mr. Lane, like all Intervening Parties, had the opportunity to cross examine any of the Company's witnesses regarding its Application in this proceeding during the March 31, 2009 evidentiary hearing. He chose not to do so. Mr. Lane, specifically, was given a second opportunity to request a second hearing and cross examine witnesses, this time regarding the reasonableness of the Stipulation and Recommendation. Again, he chose not to do so. Now, Mr. Lane has a third opportunity to present his case. Nonetheless, despite the strong the interest in due process, Mr. Lane should not be permitted to abuse the process. His apparent intent to now hold a full evidentiary hearing should not be permitted.

Of the twenty individuals¹ identified by Mr. Lane for cross-examination, eight are listed as "Duke Energy of Ohio." Mr. Lane's list is not only unreasonable but borders harassment. One witness did not even submit testimony in the proceeding.² Two of the witnesses submitted direct testimony supporting the Company's SmartGrid proposal, which has already been approved in another case and therefore, is no longer an issue in the distribution rate case.³ One witness is a retained outside consultant who is out of the country.⁴ Moreover, the nine individuals identified as "PUCO Witnesses" were involved in the review of the Company's Application and the development of the Staff's Report. Mr. Lane's request to cross-examine these witnesses clearly

¹ Mr. Lane identified the name Todd W. Arnold twice.

² At the time of the filing of this case, Sandra P. Meyer was the president and submitted testimony. Julie Janson is now the President of Duke Energy Ohio.

³ Todd W. Arnold and Richard G. Stevie also submitted testimony supporting the Company's SmartGrid initiative in Case No. 08-920-EL-SSO et al, Duke Energy Ohio Electric Security Plan Case (ESP). The Commission approved this initiative on December 17, 2008 in the ESP.

⁴ Dr. Roger A. Morin.

shows his intent to go beyond the scope of Attorney Examiner's June 3 2009 Entry and inquire into issues other than the Schedule A-1 and Clarifying Letter. Accordingly, Mr. Lane's request for witnesses should be denied and the witness list should be stricken from the record.

Consistent with the June 3, 2009 Entry, Duke Energy Ohio will provide an expert witness to support both the A-1 Schedule and the Clarifying Letter. Duke Energy Ohio will pre-file the testimony at least two days before the hearing and make such witness available for cross-examination on June 17, 2009. In light of the nature of Mr. Lane's correspondence docketed on June 4, requesting a hearing, Duke Energy Ohio submits that it will be necessary to very clearly limit the scope of Mr. Lane's cross examination to that which was set forth in the June 3, 2009 Entry, i.e. the Schedule A-1 and Clarifying Letter only.

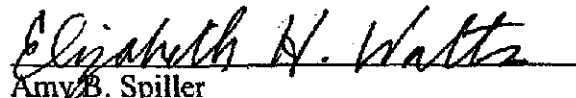
Duke Energy Ohio submits that this motion is necessary in order to ensure that Mr. Lane fully understands and adheres to the requirements of the hearing. It is anticipated that Mr. Lane will seek to inquire into areas not relevant to this proceeding. Such inquires should not be permitted. Mr. Lane has had ample opportunity to participate in this case. Mr. Lane did not offer any expert testimony, did not attend any of the settlement discussions that resulted in the aforementioned Stipulation and Recommendation, and did not submit any evidence, including cross-examination of witnesses, into the record at the March 31, 2009 evidentiary hearing. In fact, Mr. Lane chose not to even attend the publicly noticed evidentiary hearing. Now, having forgone any participation on the bulk of the issues in this case, Mr. Lane is unnecessarily delaying the proceeding and abusing his status as an intervenor merely to harass Duke Energy Ohio.

Mr. Lane should be required to comply with the Attorney Examiner's Entry filed on May 29, 2009, like the other Parties to the case. Mr. Lane must be limited only to asking questions

directly relevant to the Schedule A-1 and Clarifying Letter and cross examining the witness(es) who file direct testimony in support of those limited issues. And as noted in Duke Energy Ohio's memorandum contra correspondence of Mr. Lane, Mr. Lane should be required to verify that he will actually appear at the Commission's offices on June 17, 2009. Otherwise, such delay will be unjustified and administratively burdensome to all the Parties that have fully participated in this case since its inception.

WHEREFORE, Duke Energy Ohio respectfully requests that the Commission, pursuant to O.A.C. 4901-1-24(A), grant its Motion to Strike and In Limine to Limit the Cross Examination of Witnesses.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via ordinary mail, overnight delivery or electronic delivery on the following parties this 9th day of June, 2009.


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