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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Duke)
Energy Ohio, Inc., for an Increase in) Case No. 12-1682-EL-AIR
Electric Distribution Rates.)
)
In the Matter of the Application of Duke) Case No. 12-1683-EL-ATA
Energy Ohio, Inc., for Tariff Approval.)
)
In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval to) Case No. 12-1684-EL-AAM
Change Accounting Methods.)

PUCO

**MOTION OF DUKE ENERGY OHIO, INC., TO EXTEND THE DISCOVERY
DEADLINE, COMPEL THE OFFICE OF OHIO CONSUMERS' COUNSEL
TO PRODUCE WITNESSES FOR DEPOSITION,
AND ACCOMPANYING REQUEST FOR EXPEDITED RULING**

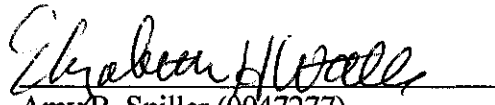
Now comes Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) in accordance with Rule 4901-1-23, Ohio Administrative Code (O.A.C.) and hereby submits to the Public Utilities Commission of Ohio (Commission) its Motions to Extend the Discovery Deadline for the Purpose of Noticing Depositions and to Compel the Office of Ohio Consumers' Counsel (OCC) to produce the witnesses on March 11, 2013, that the Company noticed for deposition in the above-captioned cases. The Company further requests an expedited ruling from the Commission on these issues. The broad policies behind discovery in Commission proceedings include allowing the parties to thoroughly prepare their cases and expediting the administration of Commission proceedings. The Commission's discovery rules are intended to assure full and reasonable discovery, consistent with the statutory discovery rights of parties under Section 4903.082, Ohio

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Revised Code (R.C.). OCC's decision not to produce its witnesses for deposition, set forth in its March 1, 2013 letter to the Company, contravenes the policy considerations guiding discovery in Commission proceedings and unfairly prejudices Duke Energy Ohio in the development of its case. Further, the discovery deadline for noticing depositions is administratively ineffective and, as implemented, prevents parties from issuing decisive notices of deposition to opposing parties. For these reasons, and those set forth in the accompanying memorandum in support, Duke Energy Ohio requests that the Commission grant its Motions to Extend the Discovery Deadline for the Purpose of Noticing Depositions and to Compel OCC to produce its witnesses for deposition in an expedited fashion.

Respectfully submitted,

DUKE ENERGY OHIO, INC.


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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.)	Case No. 12-1682-EL-AIR
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)	Case No. 12-1683-EL-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)	Case No. 12-1684-EL-AAM

**MEMORANDUM IN SUPPORT OF DUKE ENERGY OHIO, INC.'S
MOTION TO EXTEND DISCOVERY DEADLINE,
COMPEL THE OFFICE OF OHIO CONSUMERS' COUNSEL
TO PRODUCE WITNESSES FOR DEPOSITION, AND
REQUEST FOR EXPEDITED RULING**

On February 28, 2013, Duke Energy Ohio filed with the Commission and served upon all parties in the above-captioned proceedings a notice of deposition (Notice) for a number of OCC witnesses.¹ The testimony of each of these witnesses had been neither filed nor available until February 25, 2013.

On March 1, 2013, OCC sent a letter to Duke Energy Ohio, claiming that the Company sent its Notice "nearly six weeks after the PUCO's discovery period ended in this case (and during a time of considerable constraints on OCC's resources with cases that Duke and other utilities have filed to increase consumers' rates)." Under this

¹ By means of its Notice, Duke Energy Ohio notified OCC that it intended to depose the following witnesses: Bruce M. Hayes, James R. Campbell, James Gould, Steven B. Hines, Kathy L. Hagans, Scott J. Rubin, David J. Effen, Daniel J. Duann, Ph.D., and Ibrahim Soliman.

rationale, OCC alerted the Company that it would not make its witnesses available for deposition by the Company on March 11, 2013.

On March 5, 2013, the Company contacted the OCC in an attempt to resolve the discovery dispute.² Despite this conversation, the parties were unable to reach an agreement that would definitively resolve the issue. In view of these circumstances, the Company has filed the attached Motion to Compel OCC to Produce its Witnesses for Deposition.

Section 4903.082, R.C., states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” Under this broad framework, the Company is entitled to complete responses, whether in paper or in person, to its discovery inquiries. Additionally, Section 4903.082, R.C., directs the Commission to ensure that parties are allowed “full and reasonable discovery” under its rules.

Accordingly, the Commission has adopted Ohio Adm. Code 4901-1-16(B), which provides, in pertinent part:

[A]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Commission’s discovery rule is similar to Ohio 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

² See Affidavit of Elizabeth Watts, March 6, 2013 (attached).

broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.³

This scope of discovery is applicable to deposition testimony.

Rule 4901-1-23, O.A.C., concerning motions to compel, provides the procedure by which parties may obtain enforcement of their discovery rights. Rule 4901-1-23(A)(3), O.A.C., provides that a party may move for an order compelling discovery with respect to “[a]ny failure of a deponent to appear...[.]” Further, Rule 4901-1-23(C), O.A.C., details the technical requirements for a motion to compel, all of which are met in the Company’s motion and memorandum in support. Pursuant to this rule, a motion to compel is to be accompanied by a memorandum in support setting forth the basis of the motion and authorities relied upon, a brief explanation of how the information sought is relevant to the pending proceeding, and responses to any objections raised by the party from whom the discovery is sought. Copies of the discovery requests and the responses are to be attached. Rule 4901-1-23(C), O.A.C., further requires the party seeking discovery to file an affidavit explaining how it has exhausted all other reasonable means of resolving the differences with the party from whom the discovery is sought.

OCC contends that the Company failed to preserve its rights to depose OCC witnesses prior to the discovery cut-off, which, pursuant to Rule 4901-1-17(B), O.A.C., occurred on January 18, 2013, fourteen days after the filing and mailing of the Staff Report. At that point, OCC had not identified the experts that would testify on its behalf in these proceedings. Assuming *arguendo* that the Company had known the identity of OCC’s experts prior to the discovery cut-off, the Company would still not have been

³ *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, ¶83, citing *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661. and *Disciplinary Counsel v. O’Neill* (1996), 75 Ohio St. 3d 1479.

aware of the necessity of deposing these witnesses until their testimony was filed. As mentioned above, OCC's witness testimony was not filed until February 25, 2013. In the interests of administrative economy, therefore, the Company waited to serve and file its Notice until it was clear which of OCC's witnesses it needed to depose. Issuing a sweeping deposition request earlier in the proceeding would have been disingenuous, as the Company had no particular intention or rationale for noticing for deposition any/all OCC witnesses until their testimony, and thus, contentions, had been filed. In fact, although OCC served the Company with notices of deposition for the Company's witnesses who filed testimony on July 20th, 2012, OCC voluntarily agreed to hold their notices in abeyance and to this date, still have not identified which of the Company's witnesses they actually intend to depose, despite inquiries by the Company.

Under OCC's rigid interpretation of the discovery process and the Commission's rules, the Company was placed in the position of having to identify and notice depositions for witnesses when the Company did not have any indication of what issues the OCC intended to raise and who it intended to submit as a witness in support. Moreover, if the OCC is permitted to taking unfair advantage of the procedural schedule the Company will not be permitted to participate in thorough and adequate preparation for participation in the proceedings as provided for in Rule 4901-1-16, O.A.C.

Also, under Rule 4901-1-17, O.A.C., no party may serve a *discovery request* later than fourteen days after the filing of a staff report, unless otherwise ordered for good cause shown. A discovery request clearly includes written discovery such as interrogatories, request for production of documents and admissions. Here however, the

Company is seeking to take the testimony of another party's witness in accordance with 4901-1-12, O.A.C.

Therefore, the Company respectfully requests that the Commission take the following actions: (1) extend the discovery deadline for purposes of notifying parties of depositions until two weeks following the filing of testimony by all parties, i.e., to March 11, 2013; (2) grant the Company's Motion to Compel OCC to Produce its Witnesses for Deposition on March 11, 2013; and (3) rule upon the above actions on an expedited basis. The Commission has previously taken some combination of these actions.⁴ The opportunity presented here represents another proper occasion for utilizing this tactic.

Narrowly extending the discovery deadline will provide all parties with the broad opportunity for discovery, through deposition, of any matter relevant to these proceedings, as contemplated by the Ohio Revised Code and the Ohio Administrative Code. By means of its Motion to Compel, the Company seeks to discover, through deposition testimony, information relevant to presenting its case from each noticed OCC expert witness, in his/her field of expertise. Because the date noticed for deposition by Duke Energy Ohio is quickly approaching, and the number of days before the hearing on this matter is scheduled is rapidly diminishing, the Company requests that the Commission consider its motions on an expedited basis.

Consistent with Rule 4901-1-23(C)(3), O.A.C., the Company has detailed in the attached affidavit the efforts it has undertaken to resolve differences between OCC and itself regarding this discovery dispute. At this point it is clear that the parties cannot come to a resolution on this matter. The Company seeks a response to its discovery

⁴ See *In the Matter of the Complaint of Westside Cellular dba Cellnet of Ohio Inc. v. GTE Mobilnet, Inc.*, Case No. 93-1758-RC-CSS, 1999 Ohio PUC LEXIS 279, Entry (July 7, 1999).

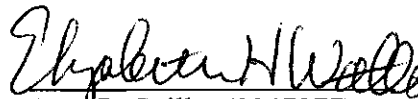
request, namely, the production of OCC's witnesses for deposition, and is unable to secure the witnesses' appearance without the Commission compelling such a result.

The OCC has failed to specifically show how the Company's request to depose its witnesses is unduly burdensome. OCC has merely noted that its time and resources are considerably constrained at the present. The Company submits that the docket maintained by the Commission and its subject utilities and companies has rendered the resources of all parties, as well as those Commission itself, currently considerably constrained. This claim alone by OCC does not demonstrate that the Company's request is unduly burdensome. Because the burden falls upon the party resisting discovery to clarify and explain its objections (to all forms of discovery) and to provide support, and OCC has failed to do so, the Commission should compel its witnesses to appear for deposition on March 11, 2013.

For the reasons stated above, Duke Energy Ohio respectfully requests that the Commission extend the discovery deadline for purposes of notifying parties of depositions until two weeks following the filing of testimony by all parties, i.e., to March 11, 2013; grant the Company's Motion to Compel OCC to Produce its Witnesses for Deposition on March 11, 2013; and consider the above actions on an expedited basis.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in black ink, appearing to read "Amy B. Spiller", is written over a horizontal line.

Amy B. Spiller (0047277)
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Jeanne Kingery (0012172)

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates.)	Case No. 12-1685-GA-AIR
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)	Case No. 12-1686-GA-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.)	Case No. 12-1687-GA-ALT
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)	Case No. 12-1688-GA-AAM
)	

AFFIDAVIT OF ELIZABETH WATTS

I, Elizabeth Watts, declare the following:

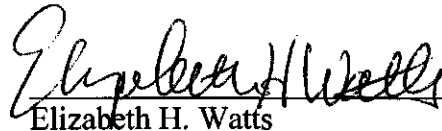
1. My name is Elizabeth Watts, and I am an Associate General Counsel for Duke Energy Business Services, LLC. I am one of the attorneys representing Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company), before the Public Utilities Commission of Ohio (Commission) in these matters.
2. On February 25, 2013, the Office of the Ohio Consumers' Counsel (OCC) filed expert witness testimony with the Commission and served said expert witness testimony upon Duke Energy Ohio, as well as other parties to the proceeding.
3. On February 28, 2013, Duke Energy Ohio filed a Notice of Deposition pertaining to several of OCC's expert witnesses with the Commission and served said Notice upon OCC, as well as other parties to the proceeding. The Notice of Deposition set forth a deposition date of March 11, 2013.
4. On March 4, 2013, I received a communication from Terry L. Etter, Assistant Consumers' Counsel, stating that OCC would not make its

witnesses available on March 11, 2013, in response to the Company's Notice of Deposition.

5. On March 7, 2013, I contacted Mr. Etter in order to explore solutions to the discovery dispute between the Company and OCC.
6. Despite our March 7, 2013 conversation, Mr. Sauer and I were unable to come to a resolution to the discovery dispute that was mutually agreeable to Duke Energy Ohio and OCC.
7. As a consequence of this divide, Duke Energy Ohio has elected to file a Motion to Extend the Discovery Deadline, Compel OCC to Produce its Witnesses for Deposition, and an Accompanying Motion for Expedited Treatment.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NAUGHT.


Elizabeth H. Watts

Sworn to and subscribed before me, a notary public for the state of Ohio, on this the 7th day of March 2013.

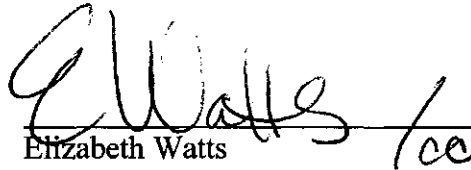

Notary Public

My commission expires: _____

JEANNE K. WOODRUFF
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION HAS NO EXPIRATION DATE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 7th day of March, 2013, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.


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March 4, 2013

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Re: *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 12-1685-GA-AIR, et al.

Dear Ms. Watts:

On February 28, 2013, Duke Energy Ohio, Inc. (Duke) served the Office of the Ohio Consumers' Counsel (OCC) with a Notice to Take Deposition (Notice) for OCC's witnesses in the above-captioned case. Duke sent its Notice nearly six weeks after the Public Utilities Commission of Ohio's (PUCO) discovery period ended in this case (and during a time of considerable constraints on OCC's resources with cases that Duke and other utilities have filed to increase consumers' rates). Consistent with the PUCO's rules, OCC will not make its witnesses available in response to Duke's deposition Notice.

In this regard, Ohio Adm. Code 4901-1-17(B) provides: "In general rate proceedings, no party may serve a discovery request later than fourteen days after the filing and mailing of the staff report of investigation required by section 4909.19 of the Revised Code." The PUCO Staff Report was filed on January 4, 2013, and thus the discovery cutoff, under the PUCO's Rule, was January 18, 2013. Duke's Notice to take depositions of OCC's witnesses is nearly six weeks past the discovery cutoff in this case, and therefore not allowed under the PUCO's rules.

Thank you.

Sincerely,

Terry L. Etter
Assistant Consumers' Counsel

cc: Parties of Record