

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas 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
	)	

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**JOINT MOTION FOR CONTINUANCE OF THE EVIDENTIARY HEARING,  
EXTENSION OF THE DISCOVERY SCHEDULE TO PROVIDE  
FOR DISCOVERY AND DEPOSITIONS ON DUKE'S NEW TESTIMONY,  
PERMISSION TO FILE SUPPLEMENTAL TESTIMONY IN RESPONSE  
TO DUKE'S NEW TESTIMONY  
AND  
REQUEST FOR EXPEDITED RULING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND  
OHIO PARTNERS FOR AFFORDABLE ENERGY**

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The Office of the Ohio Consumers' Counsel, and Ohio Partners for Affordable Energy ("OPAE"),<sup>1</sup> move the Public Utilities Commission of Ohio ("PUCO" or "the Commission") to continue the evidentiary hearing scheduled for April 29, 2013 in these proceedings, grant OCC and OPAE permission to perform additional discovery and depositions on the testimony submitted by Duke Energy Ohio ("Duke," "Utility" or "Company") on April 22, 2013, and permit OCC to file supplemental testimony in

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<sup>1</sup> The Kroger Company does not oppose this Joint Motion for at least an eight day continuance.

response to such testimony. Good cause exists for the PUCO to grant the Joint Motion for a continuance. These motions are subordinate to OCC and OPAE's separately filed Joint Motion to Strike Duke's new testimony; the PUCO should strike Duke's new testimony to preserve a fair process.

On April 22, 2013, Duke filed additional expert testimony, which, as stated, is the subject of an OCC and OPAE Joint Motion to Strike. In the event, OCC's and OPAE's Joint Motion to Strike is denied, then OCC and OPAE hereby submit this Joint Motion<sup>2</sup> for at least an eight day continuance of the evidentiary hearing to allow Interested Parties to have sufficient time to conduct thorough depositions of Duke's witnesses<sup>3</sup> and to incorporate the resulting responses into their preparation for the evidentiary hearing. The short continuance will allow the Commission sufficient time to consider OCC's and OPAE's Joint Motion to Strike and, if it is denied, will provide at least some limited time for OCC and OPAE and other interested parties to address the unfairness resulting from Duke's last-minute testimony. In this regard, OCC will be conducting depositions of Duke's witnesses who filed testimony on April 22, 2013. The reasons for this request are set forth more fully in the accompanying memorandum in support. In addition, because the evidentiary hearing is currently scheduled to commence April 29, 2013, OCC and OPAE request an expedited ruling on this Motion, pursuant to Ohio Adm. Code 4901-1-12(C).

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<sup>2</sup> The Motion is filed pursuant to Ohio Adm. Code 4901-1-12 and Ohio Adm. Code 4901-1-13.

<sup>3</sup> It is noted that on April 24, 2013, given the current status of this matter, OCC sent Notices of Deposition to Duke to take the depositions of new witness Shawn Fiore and to depose Gary J. Hebbeler regarding his supplemental testimony, on April 25, 2013 and April 26, 2013. While this short period of time for preparation to depose these individuals leaves OCC little time to prepare for these depositions, OCC had no other option pending the Commission's actions on OCC's and OPAE's Joint Motion to Strike and this Motion for Continuance. OCC notes that Duke has been cooperative and is making such individuals available for deposition on April 25, 2013.

Respectfully submitted,

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/s/ Larry S. Sauer

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**MEMORANDUM IN SUPPORT**

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**I. CASE HISTORY**

On June 7, 2012, Duke filed its Prefiling Notice with regards to its request to increase its natural gas distribution rates. As part of the Company's Rate Case Application, subsequently filed on July 9, 2012, Duke sought the authority to collect from its customers \$65.3 million in investigation, remediation and carrying costs associated with the remediation of two manufactured gas plant sites ("MGP").<sup>4</sup> Duke's Direct Testimony was filed on July 20, 2012.

On January 4, 2013, the Staff Report of Investigation was filed. On February 4, 2013, OCC, as well as other interested parties, filed Objections to the Staff Report as

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<sup>4</sup> Duke Application at Schedule C-3.2 ( July 9, 2012).

required by R.C. 4909.19. Included within the 31 objections filed by OCC were five objections pertaining to Duke's request to collect MGP-related costs from Duke's customers.<sup>5</sup>

On January 18, 2013, the Attorney Examiner issued an Entry that established a procedural schedule for these proceedings. January 18, 2013, was also the date of the discovery cut-off under the Commission's rules.<sup>6</sup>

On February 25, 2013, OCC filed the testimony of a number of expert witnesses in support of its Objections. Included was the testimony of James Campbell, who filed testimony in support of OCC Objection No. 26.<sup>7</sup> Duke also filed testimony in support of its objections to the Staff report by witnesses Bednarcik (Supplemental), Middleton (Supplemental) Wathen (Supplemental) and Margolis (Direct).

On April 2, 2013, a Stipulation and Recommendation ("Stipulation") was entered into between Duke, the PUCO Staff, OCC and other interested parties. As part of the Stipulation, the signatory parties agreed that the issue of MGP-related cost recovery and collection would not be settled as part of the Stipulation, but instead would be litigated.<sup>8</sup> The parties agreed to litigate their positions.<sup>9</sup> OCC's position relative to the MGP issues to be litigated was as stated in its Objections to the Staff Report.<sup>10</sup>

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<sup>5</sup> OCC Objections to the PUCO Staff Report of Investigation, Objection Nos. 25-29 (February 4, 2013).

<sup>6</sup> Ohio Adm. Code 4901-1-17(B) provides that 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."

<sup>7</sup> Direct Testimony of James R. Campbell at 5 (February 25, 2013).

<sup>8</sup> Stipulation at 8 (April 2, 2013).

<sup>9</sup> Id.

<sup>10</sup> OCC Objections to the Staff Report at 11-14 (February 4, 2013).

On April 4, 2013, a procedural Entry was filed in these proceedings that established April 29, 2013 as the new date for the evidentiary hearing in these proceedings. In a procedural entry, which OCC and OPAE believe was designed to allow parties to address any change in their position resulting from the Stipulation, the Attorney Examiners' Entry provided that "Staff and all parties shall file any additional expert testimony by April 22, 2013."<sup>11</sup> On April 22, 2013 Duke filed three pieces of additional testimony on the MGP issue that is the focus of this case.

On April 24, 2013, OCC and OPAE filed a Motion to Strike the testimony filed by Duke on April 22, 2013. The extensive content of Duke's testimony creates an unfair process and is highly prejudicial to OCC, OPAE and other interested parties because OCC and other interested parties developed their positions and their testimony in response to the testimony filed and discovery performed previously in this proceeding. Without a continuance, OCC, OPAE and others will have limited opportunity to perform discovery, conduct thorough depositions of Duke's witnesses notwithstanding Duke's apparent cooperation in this regard as of this date, and provide testimony in response to Duke's testimony, with the evidentiary hearing scheduled to commence on April 29, 2013. Moreover, OCC already prepared and filed its case on the MGP issue, without any contemplation that one week before hearing and nearly a year into this case Duke would have a new witness and supplemental testimony.

If OCC's and OPAE's Motion to Strike is not granted, then OCC and OPAE request a continuance of the evidentiary hearing for at least eight days to May 7, 2013 to permit OCC, OPAE and other interested parties a reasonable opportunity to perform

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<sup>11</sup> Entry at (April 4, 2013).

discovery, conduct thorough depositions and to incorporate the information from those depositions into preparation for the hearing prior to the evidentiary hearing.

Additionally, OCC requests that it be permitted to present supplemental testimony prior to the hearing in response to Duke's new testimony.

## **II. ARGUMENT**

A continuance of a hearing may be granted for good cause, under Ohio Admin. Code 4901-1-13(A). Good cause exists for the Commission to grant OCC's and OPAE's Joint Motion to continue the evidentiary hearing in this case. The evidentiary hearing is scheduled to begin April 29, 2013. OCC and OPAE request at least an eight day continuance of the evidentiary hearing to May 7, 2013.

Duke's extensive testimony filed on April 22, 2013 consists of 49 pages of testimony plus exhibits and attempts to remedy a significant hole that Duke apparently believes exists in its *prima facie* case in this matter. It was unfair and unreasonable for the Company to submit this extensive revision of its case only one week before the start of the evidentiary hearing with significant testimony that ambushes all other interested parties. Duke's intended process is an unfair process for a PUCO rate case, and not intended by law or rule. Further, because Duke's Testimony filed on April 22, 2013 does not support the Stipulation, or is not testimony that is advocating a change in a prior position caused by the adoption of the Stipulation, it is not consistent with the apparent intent of the Attorney Examiner's Entry to allow for testimony adjusting parties' positions because of the Stipulation that had just been filed.

Duke's Testimony was filed on April 22, 2013 without any notice prior to its filing, and without an adequate opportunity for OCC, OPAE and other interested parties to conduct discovery<sup>12</sup> depose the witnesses, or submit supplemental responsive testimony.<sup>13</sup> Absent a reasonable opportunity to conduct at least minimal discovery pertaining to the testimony filed on April 22, 2013, OCC, OPAE and other interested parties cannot adequately investigate the claims of the witnesses, OCC, OPAE and other interested parties cannot ascertain the credentials of the expert witnesses, and OCC, OPAE and other interested parties would be put at a significant disadvantage because they cannot adequately prepare for cross-examination of these witnesses.

But there is more. OCC's case is already prepared and filed. That status is as it should be under the law and the rules including the standard filing requirements. Duke's new testimony upends the process for intervenors to prepare and present their cases based upon the utility's advance filings.

Ohio law provides that parties in a case before the PUCO should be granted ample discovery rights.<sup>14</sup> R.C 4903.082 states:

All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the

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<sup>12</sup> Ohio Adm. Code 4901-1-16 Discovery Cut-off : 15 days after the issuance of the Staff Report of Investigation – in these cases January 19, 2013.

<sup>13</sup> Entry granting Duke's Motion to Compel established deadline of March 11, 2013 for issuing Notices of Deposition.

<sup>14</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, 2006-Ohio-5789 at ¶ 83. ("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, 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.")

commission's discretion the Rules of Civil Procedure should be used wherever practicable.

The late filing of three pieces of significant testimony, by Duke, that could have or should have been filed earlier in these proceedings as previously argued is prejudicial to OCC, OPAE and other interested parties because ample discovery rights do not exist in this limited time before the evidentiary hearing. Therefore, if OCC's and OPAE's Motion to Strike is not granted, then the OCC and OPAE' Motion for a Continuance of the evidentiary hearing, and for permission to perform discovery, take thorough depositions, and file supplemental testimony, should be granted. The evidentiary hearing should be continued for at least eight days to May 7, 2013 to allow the OCC, OPAE and other interested parties the opportunity to conduct discovery, file supplemental testimony, and to adequately prepare for the evidentiary hearing in light of this significant testimony that Duke filed on April 22, 2013.

Moreover, the Commission recently granted Duke the opportunity to depose an OCC witness, even though the Utility had admitted that it was filing its Notice of Deposition out of time.<sup>15</sup> In that Entry, the Commission ruled that:

the Commission notes that the process of deposing witnesses prior to a hearing has proven resourceful in proceedings because it enables parties cross-examining witnesses to focus their questions at the hearing to those issues relevant to the proceeding.<sup>16</sup>

The Entry also stated:

Moreover, the Commission believes that Duke's ability to depose OCC's witnesses will lead to a full and expeditious processing of these cases, despite any inconvenience, which is good cause for

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<sup>15</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Distribution Rates*, Case Nos. 12-1682, et al, Entry at 3 (March 20, 2013).

<sup>16</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Electric Distribution Rates*, Case Nos. 12-1682, et al, Entry at 6 (March 20, 2013).

extending the time period for discovery to allow for the taking of depositions.<sup>17</sup>

For these same reasons, it is reasonable for the PUCO to grant OCC and OPAE at least an eight-day continuance in order to permit parties to take thorough depositions of Duke's witnesses who filed testimony on April 22, 2013, file supplemental testimony, and incorporate this information into OCC's and OPAE's hearing presentation in this matter.

Because the evidentiary hearing is currently due to commence on April 29, 2013, the OCC and OPAE request expedited consideration of this Motion pursuant to Ohio Adm. Code 4901-1-12(C). OCC and OPAE are not able to certify that no party objects to an expedited ruling on this Motion.

### **III. CONCLUSION**

For all the reasons discussed above, OCC and OPAE have demonstrated good cause for the Commission to grant the Joint Motion to continue the evidentiary hearing, permit the performance of discovery and depositions, and allow supplemental testimony to be filed, if OCC's and OPAE's Joint Motion to Strike is not granted. The continuance will allow the Commission time to consider OCC's and OPAE's Joint Motion to Strike and if denied, will provide time for OCC, OPAE and other interested parties to conduct thorough depositions of Duke's witnesses who filed testimony on April 22, 2013. But the Joint Motion to Strike should be granted to prevent the unfair rate case process that Duke would impose.

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<sup>17</sup> Id.

Respectfully submitted,

BRUCE J. WESTON  
OHIO CONSUMERS' COUNSEL

/s/ Larry S. Sauer

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/s/ Colleen L. Mooney

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Joint Motion has been served upon the following parties via electronic mail this 25 day of April, 2013.

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Larry S. Sauer  
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Summary: Motion Joint Motion for Continuance of the Evidentiary Hearing, Extension of the Discovery Schedule to Provide for Discovery and Depositions on Duke's New Testimony, Permission to File Supplemental Testimony in Response to Duke's New Testimony and Request for Expedited Ruling by the Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.