

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of)	
Jeffrey Pitzer,)	
)	
Complainant,)	
)	
v.)	Case No. 15-298-GE-CSS
)	
Duke Energy Ohio, Inc.)	
)	
Respondent.)	
)	
)	

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA
COMPLAINANT'S MOTION FOR CONTINUANCE AND
REQUEST FOR EXPEDITED TREATMENT**

Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and for its memorandum contra Complainant's Motion for Continuance, states as follows.

Complainant seeks an undefined delay in the October 7, 2015, hearing of the captioned matter, alleging that he has been unable to prepare for said hearing because of the dilatory conduct of Duke Energy Ohio.¹ But as demonstrated below, these conclusions are incorrect and the blame misdirected.

As an initial matter, Duke Energy Ohio observes that Complainant, as the movant, has the burden of demonstrating that good cause for a continuance exists. As a practical matter, good cause cannot be found where the purported reasons for additional time are a consequence of the actions – or inactions – of the movant.²

¹ Complainant's memorandum in support of motion for continuance, at pg. 2.

² See, e.g., *In the Matter of the Commission's Investigation into Interstate Carrier Access Reform Pursuant to Sub. S.B. 162*, Case No. 10-2387-TP-COI, Entry at ¶ 6 (June 16, 2011). See also, *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR, Entry, at ¶ 12 (March 2, 2012)(Denying intervenors' request for continuance where intervenors failed to demonstrate good cause for same).

Here, it is the actions – or inactions – of the Complainant that have placed him in the position in which he now finds himself. An accurate reflection of the procedural background of this proceeding confirms this conclusion and further demonstrates that there is no good cause for a continuance.

Complainant remains intent on reciting what are now closed discussions. Indeed, attempting to portray Duke Energy Ohio in an uncooperative light, Complainant revives initial procedural exchanges concerning discovery that had been issued by an admittedly incorrect party. Complainant's remedy – early on in the discovery phase – was rather simple. Complainant needed only file a motion to substitute parties, seeking expedited treatment of same. Such a motion was necessary so as to identify the proper litigants. But Complainant did not do this. Instead, Complainant, through counsel, chose to attack Duke Energy Ohio and accuse it of delay. But such allegations cannot be reconciled with that which ultimately occurred – Duke Energy Ohio *voluntarily* entered into an agreement that allowed for the substitution of parties and dates certain by which discovery would be exchanged.³

And Duke Energy Ohio responded to discovery by the agreed-upon date. After the passage of more time, Complainant, through counsel, docketed a motion to compel. Notably, Complainant unilaterally determined the date on which the motion would be docketed and whether it would be accompanied by a request for expedited treatment. The latter did not occur. But Duke Energy Ohio did respond promptly to the service copy of the motion to compel; having docketed its response *before* the motion was formally docketed and well in advance of the response period permitted under Public Utilities Commission of Ohio (Commission) regulation.⁴

³ Agreed Entry at ¶1 (June 25, 2015)(Pursuant to agreement of the Complainant and Duke Energy Ohio, the Company had until July 2, 2015, to respond to Complainant's discovery).

⁴ See Duke Energy Ohio, Inc.'s Memorandum in Opposition to Complainant Jeffrey Pitzer's Second Motion to Compel (August 27, 2015); See also, Complainant Jeffrey Pitzer's Second Motion to Compel (August 28, 2015).

As another, albeit inadequate, justification, Complainant suggests that Duke Energy Ohio has engaged in delay tactics by failing to produce documents under a confidentiality agreement between the two parties. Complainant misstates the facts here, which confirm that it is he (through counsel) who is responsible for any delays.

On August 27, 2015, counsel for Duke Energy Ohio provided Complainant's counsel with a confidentiality agreement.⁵ But counsel did not immediately execute the agreement, which would have enabled the production of confidential material. Rather, five days later, counsel curiously sought the input of the Office of the Ohio Consumers' Counsel (OCC) – an entity that was not designated as a signatory to the agreement.⁶ On this same date, counsel for Duke Energy Ohio shared with counsel the practice before the Commission insofar as it concerns confidentiality agreements and, specifically, the unique position of the OCC as a public agency.⁷ Counsel, however, did not sign the confidentiality agreement following this explanation. Rather, one week later, on September 8, counsel again solicited advice from the OCC.⁸ And, again, counsel for Duke Energy Ohio relayed the practice before the Commission.⁹ Complainant, through counsel, eventually signed the confidentiality agreement and the confidential documents have been produced.¹⁰ To the extent the circumstances surrounding the execution of a confidentiality agreement provide the alleged justification for a delay, they fall short. Complainant, through counsel, failed to draft such an agreement.¹¹ Complainant, through counsel, refused to accept the repeated and prompt explanations from Duke Energy Ohio as to the practice before the Commission. And, significantly, these shortcomings do not amount to

⁵ See Exhibit A, August 27, 2015 email correspondence between Bob McMahon and Don Lane.

⁶ See Exhibit B, September 1, 2015 email correspondence between Don Lane and Bob McMahon.

⁷ See Exhibit C, September 1, 2015 email correspondence between Bob McMahon and Don Lane.

⁸ See Exhibit D, September 8, 2015 email correspondence between Don Lane, Kimberly Bojko, and Bob McMahon.

⁹ See Exhibit E, September 9, 2015 email correspondence between Amy Spiller and Don Lane.

¹⁰ See Exhibit F, September 15, 2015, email corresponding from paralegal Minna Rolfes-Adkins to Don Lane.

¹¹ See Duke Energy Ohio's Memorandum Contra Complainant's Motion to Compel, at pg. 9 (August 27, 2015).

good cause for continuing the hearing and unfairly exposing Duke Energy Ohio to protracted litigation over a baseless complaint.

Seemingly unable or unwilling to separate himself from the OCC, counsel for Complainant finally bases his request for a continuance on discovery responses provided to this other party. But the OCC is certainly capable of engaging in discovery and related motion practice before the Commission. To the extent the OCC had a concern with discovery responses, it is undeniable that it would have expressed that concern already. Simply stated, unsubstantiated references to this other discovery cannot support Complainant's request.

Duke Energy Ohio has not exhibited dilatory conduct here. On the contrary, it has attempted to assist counsel through procedural stipulations, promptly responding to motions, and educating counsel on the common practice before the Commission. Duke Energy Ohio did not initiate this proceeding and it should not be exposed to further delay because Complainant's counsel has rejected such cooperative efforts.


As a final matter, Duke Energy Ohio respectfully requests that the Complainant's pending motion for continuance be addressed on an expedited basis. As the procedural schedule currently provides, this matter will proceed to hearing on October 7, 2015. And, as the applicable rules dictate, testimony is due seven days prior thereto. Duke Energy Ohio will be prepared for the hearing and, as indicated herein, opposes any continuance of said date. But absent an expedited decision on the motion to continue, the Company may be prejudiced by filing testimony, only to have the hearing postponed, the discovery period extended, and its employees, agents, and representatives exposed to irrelevant inquiries in respect of a complaint that involves events occurring over a very limited period of time. Further, absent an expedited decision, confusion and uncertainty as to scheduling may result in connection with the additional motion practice with regard to non-party witnesses. The Complainant, in his motion, has not established

good cause for the continuance and certainly has not demonstrated that imposing such prejudicial consequences upon Duke Energy Ohio is reasonable. The Company has not sought consent from the other parties regarding its request for expedited treatment as it is not movant herein.

For the reasons stated herein, Duke Energy Ohio respectfully requests that the Complainant's motion to continue the October 7, 2015, hearing be denied.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

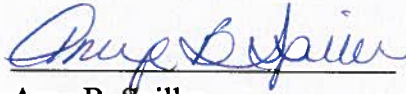


Amy B. Spiller
Deputy General Counsel
Jeanne W. Kingery
Associate General Counsel
Duke Energy Business Services, Inc.
139 Fourth Street, 1303-Main
P. O. Box 960
Cincinnati, Ohio 45202-0960
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
Amy.Spiller@duke-energy.com (e-mail)

Robert A. McMahon
Eberly McMahon Copetas LLC
2321 Kemper Lane, Suite 100
Cincinnati, Ohio 45206
(513) 533-3441 (telephone)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion for Subpoena was served on the following parties this 17th day of September, 2015 by regular U. S. Mail, overnight delivery or electronic delivery.



Amy B. Spiller

Donald A. Lane
Droder & Miller Co., LPA
125 West Central Parkway
Cincinnati, Ohio 45202-1006
dlane@drodermiller.com

Kimberly W. Bojko
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 N. High Street
Columbus, Ohio 43215
bojko@carpenterlipps.com

Terry L. Etter
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
terry.etter@occ.ohio.gov

Rolfes-Adkins, E Minna

From: Rolfes-Adkins, E Minna
Sent: Wednesday, September 16, 2015 9:37 AM
To: Rolfes-Adkins, E Minna
Subject: FW: Pitzer/Duke Energy Ohio: CA with Jeffrey Pitzer (0000587194)

From: Bob McMahon [<mailto:BMcMahon@emclawyers.com>]
Sent: Thursday, August 27, 2015 7:48 AM
To: Don Lane <dlane@drodermiller.com>
Cc: Spiller, Amy <amy.spiller@duke-energy.com>
Subject: Pitzer/Duke Energy Ohio: CA with Jeffrey Pitzer (0000587194)

Don,

Attached is the proposed confidentiality agreement. If you have proposed changes, please be sure to track them in the Word document.

Regards,

Bob

Robert A. McMahon
Eberly McMahon Copetas LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
(513) 533-3441 (direct)
(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bmcMahon@emclawyers.com

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Rolfes-Adkins, E Minna

From: Don Lane <dlane@drodermiller.com>
Sent: Tuesday, September 01, 2015 10:58 AM
To: Bob McMahon
Cc: Spiller, Amy B; terry.etter@occ.ohio.gov; Kimberly W. Bojko
Subject: RE: Pitzer/Duke Energy Ohio: CA with Jeffrey Pitzer (0000587194)

*** Exercise caution. This is an EXTERNAL email. DO NOT open attachments or click links from unknown senders or unexpected email. ***

Thanks, Bob.

- I have copied Attorneys Etter and Bojko with this email message. If we are going to formulate a confidentiality agreement in this case, then all parties should probably be signatories to it. In case you have forgotten, by order dates July 14, the Attorney Examiner permitted the Ohio Consumers Counsel to intervene.
- We assume that the order applies to documents produced in conjunction with Mr. Pitzer's Interrogatory 14 and Document Request 7, which are the only requests to which Duke responded with mention of a confidentiality agreement. As we have discussed, Mr. Pitzer will also agree to protect other customer information, so, should the Attorney Examiner agree that Duke is required to provide information in response to Mr. Pitzer's Interrogatories 19 and 20, so the agreement could apply to this information as well.
- The only change we would recommend, on behalf of Mr. Pitzer, is the inclusion of the phrase "or experts" in the top line of page 3, after the term "Representatives."

Best,

Donald A. Lane
Droder & Miller Co., LPA
125 West Central Parkway
Cincinnati, OH 45202
513/721-1504, ext. 304
dlane@drodermiller.com
www.drodermiller.com

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(513) 533-3441 (direct)
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(513) 533-3554 (fax)
bmcmahon@emclawyers.com

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Rolfes-Adkins, E Minna

From: Spiller, Amy B
Sent: Tuesday, September 15, 2015 7:05 PM
To: Rolfes-Adkins, E Minna
Subject: FW: Pitzer/Duke Energy Ohio: CA with Jeffrey Pitzer (0000587194)
Attachments: CA with Jeffrey Pitzer (0000587194) v2 (adding experts per Complainant).doc

Amy B. Spiller

Deputy General Counsel
Duke Energy Business Services
139 E. Fourth Street, 1303-Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)

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From: Bob McMahon [mailto:BMcMahon@emclawyers.com]
Sent: Tuesday, September 01, 2015 11:30 AM
To: Don Lane
Cc: Spiller, Amy B
Subject: RE: Pitzer/Duke Energy Ohio: CA with Jeffrey Pitzer (0000587194)

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Don,

Yes, I am well aware that the OCC has intervened as a party in this case. To my knowledge the OCC has not asked for the documents that your clients have requested in discovery. Therefore, there is no need to enter into a confidentiality agreement with the OCC. Also, the OCC uses a different form confidentiality agreement because it is a public agency and different rules apply. For that reason, historically Duke Energy Ohio has not entered the same confidentiality agreement that works for the OCC and other parties—hence, we responded to and provided you with a form confidentiality agreement to address your clients' discovery requests.

Your requested change is acceptable and incorporated into the attached, revised version.

Regards,

Bob

Robert A. McMahon
Eberly McMahon Copetas LLC
2321 Kemper Lane, Suite 100
Cincinnati, OH 45206
(513) 533-3441 (direct)
(513) 460-5490 (mobile)
(513) 533-3554 (fax)
bcmahon@emclawyers.com

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Cc: Spiller, Amy <amy.spiller@duke-energy.com>; terry.etter@occ.ohio.gov; Kimberly W. Bojko
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Best,

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125 West Central Parkway
Cincinnati, OH 45202
513/721-1504, ext. 304
dlane@drodermiller.com
www.drodermiller.com

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Sent: Thursday, August 27, 2015 7:48 AM
To: Don Lane <dlane@drodermiller.com>
Cc: Spiller, Amy <amy.spiller@duke-energy.com>
Subject: Pitzer/Duke Energy Ohio: CA with Jeffrey Pitzer (0000587194)

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bmcMahon@emclawyers.com

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Rolfes-Adkins, E Minna

From: Don Lane <dlane@drodermiller.com>
Sent: Tuesday, September 08, 2015 3:33 PM
To: Kimberly W. Bojko; Bob McMahon
Cc: terry.etter@occ.ohio.gov; Spiller, Amy B
Subject: Pitzer v Duke
Attachments: 20150827-Confidentiality Order, Version 2.-.doc

Importance: High

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Counsel:

Duke has not yet produced all of the specific account related documents relevant to this case, pending agreement on a confidentiality order. Attorney McMahon says that the order can be unilateral and proposes the attached, with one change recommended for Mr. Pitzer on behalf of our office. Insofar as the OCC may want copies of all the documents produced in this matter, we would like OCC's comments on whether it need be a signatory to the agreement or is fine with a bilateral agreement between Duke and Mr. Pitzer. Our concern is that OCC will need the documents for the October hearing. We would appreciate counsel's response as soon as possible.

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Droder & Miller Co., LPA
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dlane@drodermiller.com
www.drodermiller.com

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Rolfes-Adkins, E Minna

From: Spiller, Amy B
Sent: Tuesday, September 15, 2015 7:04 PM
To: Rolfes-Adkins, E Minna
Subject: FW: Pitzer v Duke

Amy B. Spiller

Deputy General Counsel
Duke Energy Business Services
139 E. Fourth Street, 1303-Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)

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From: Spiller, Amy B
Sent: Wednesday, September 09, 2015 3:15 AM
To: Don Lane
Cc: Kimberly W. Bojko; Bob McMahon; terry.etter@occ.ohio.gov
Subject: Re: Pitzer v Duke

Don

I appreciate the desire in wanting one agreement; however, that is not the practice before the PUCO. As Bob explained last week, any confidentiality agreement with the OCC includes terms unique to its status as a public agency. Further, it is not uncommon for some intervenors to forego entering into a confidentiality agreement and the attorney examiners (and parties) are well versed in the process to be followed when not all parties may have access to confidential information.

As we have indicated, Duke Energy remains ready to provide you with the confidential documents upon your execution of a confidentiality agreement. The OCC's consent is not necessary for this to occur.

Thank you.

Amy Spiller

Sent from my iPhone

On Sep 8, 2015, at 9:34 PM, Don Lane <dlane@drodermiller.com> wrote:

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Counsel:

Duke has not yet produced all of the specific account related documents relevant to this case, pending agreement on a confidentiality order. Attorney McMahon says that the order can be unilateral and proposes the attached, with one change recommended for Mr. Pitzer on behalf of our office. Insofar as the OCC may want copies of all the documents produced in this matter, we would like OCC's comments on whether it need be a signatory to the agreement or is fine with a bilateral agreement between Duke and Mr. Pitzer. Our concern is that OCC will need the documents for the October hearing. We would appreciate counsel's response as soon as possible.

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<20150827-Confidentiality Order, Version 2.-.doc.awsec>

Rolfes-Adkins, E Minna

From: Rolfes-Adkins, E Minna
Sent: Tuesday, September 15, 2015 2:47 PM
To: dlane@drodermiller.com
Cc: Spiller, Amy B; Bob McMahon (BMcMahon@emclawyers.com)
Subject: Pitzer v. DEO
Attachments: Pitzer CA w D. Lane.pdf; Pitzer-INT-01-014 Conf.pdf; Pitzer-POD-01-007 Conf.pdf; OCC-POD-01-002 Conf.pdf

Good Afternoon ~

Per the Confidentiality Agreement between Claimant, Jeffrey Pitzer, and Duke Energy Ohio, Inc. please see attached confidential discovery responses.

Please note that a Confidentiality Agreement has not yet been executed between Duke Energy and the OCC and the documents submitted herein cannot be produced to them.

Thank you.

**E. Minna Rolfes-Adkins**

Duke Energy Corporation

Sr Paralegal | Office of General Counsel

139 E. 4th Street | 1212-Main | P.O. Box 960 | Cincinnati, OH 45202

☎: 513.287.4356 | 📠: 513.287.4386 | ✉: E.Rolfes-Adkins@duke-energy.com

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9/17/2015 9:19:02 AM

in

Case No(s). 15-0298-GE-CSS

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Complainant's Motion for Continuance and Request for Expedited Treatment electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and McMahon, Robert