

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**DUKE ENERGY OHIO, INC.’S MEMORANDUM IN OPPOSITION TO
MOTION FOR A CONTINUANCE OF THE HEARING AND
MOTION FOR A DISCOVERY CONFERENCE
FILED BY THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Commission should deny this last-minute ploy from The Office of the Ohio Consumers’ Counsel (OCC). There is no legitimate reason to delay the hearing scheduled to start on January 14, 2016; nor is there any reason to conduct a discovery conference in this case. This case, already having been continued twice, should proceed to hearing on January 14 in order that the Commission may consider and dispose of Complainant’s baseless complaint against Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company).

The OCC Has Not Substantiated the Claim that It Has Been Deprived Discovery.

As its first reason for the motion, the OCC claims to be “encountering difficulties receiving discovery responses from Duke.” It suggests that, solely because of the conduct of Duke Energy Ohio, it cannot adequately prepare for hearing. However, the OCC fails to substantiate this claim or identify the purported discovery responses at issue. Indeed, the OCC fails to identify even a single discovery request that Duke Energy Ohio has not fully answered or otherwise objected to on legal grounds.

Such an accusation would be false, in any event as Duke Energy Ohio has complied with the obligations imposed upon it under O.A.C. 4901-1-16. Significantly, the OCC also has not filed a motion to compel, much less provided the Commission with the mandatory affidavit of counsel setting forth the efforts which have been made to resolve the discovery dispute, as expressly required by O.A.C. 4901-1-23(C). Presumably, the OCC is basing its motion for a continuance on the mistaken belief that Duke Energy Ohio failed to properly respond to notices of deposition *duces tecum*. Although the OCC only makes passing reference to these notices, they merit further discussion as they confirm the Company's adherence to the rules and its good faith effort in engaging in the discovery process as well as the OCC's inaccurate assertions here.

Duke Energy Ohio timely identified its witnesses on December 23, 2015, after having identified two of such witnesses as persons with knowledge months ago. The OCC first requested the deposition of Duke Energy Ohio witness Mitchell Carmosino on December 31, 2015, and the Company agreed to produce him for deposition on January 8, 2016. The OCC then tendered a notice of deposition *duces tecum* on January 5, 2016, just three days prior to this scheduled deposition date.¹ The OCC also sought to depose Duke Energy Ohio witness Melissa Porter, first inquiring into her availability on January 5, 2016. The Company promptly responded and indicated that Ms. Porter was available on January 7, 2016. The OCC filed a notice of deposition *duces tecum* on January 6, 2016.²

As O.A.C. 4901-1-21(E) unambiguously provides, a notice to a party deponent that includes a document request must comply with O.A.C. 4901-1-20. Here, the OCC did not allow Duke Energy Ohio the required time period to respond to either notice of deposition and it is inappropriate for the OCC to now contend that this matter must be continued due to Duke

¹ See, Notice to Take Deposition and Request for Production of Documents, January 5, 2016.

² See, Notice to Take Deposition and Request for Production of Documents, January 6, 2016.

Energy Ohio's failure to engage in discovery. Any deficiencies in respect of the notices of deposition are not a result of Duke Energy Ohio's conduct.

The OCC further contends, albeit every so casually in a footnote and without identifying a single request at issue, that Duke Energy Ohio has failed to supplement discovery as required Commission regulation. This unsubstantiated allegation is inaccurate. The Company has properly answered discovery and has satisfied its obligations to supplement. Further, it has exceeded those obligations by providing supplemental responses, under O.A.C. 4901-1-16(D)(5), one business day after OCC counsel demanded supplemental answers and notwithstanding the fact that relevant information was previously provided to the parties.

Making false and unsubstantiated claims against Duke Energy Ohio does not qualify as a legitimate basis for a motion for a continuance of this nature.

Pending Motions Do Not Warrant a Continuance.

The second reason for the OCC's motion is equally deficient as the OCC claims now, as of January 11, 2016, to need a continuance based on a motion to compel filed by another party (Complainant, not the OCC) on December 23, 2015.³ The OCC has no standing to assert any rights with respect to discovery requests propounded by another party. Moreover, Duke Energy Ohio fully responded to Complainant's meritless motion to compel on December 30 and explained why that motion should be denied. The OCC may not use a baseless motion to compel filed by another party to justify what appears to be the OCC's failure to prepare for a hearing that has been scheduled since the Commission's Entry dated November 30, 2016.

The OCC further contends here that pending motions for protective order must be decided prior to the commencement of hearing for the sake of efficiency. This suggestion, if

³ Significantly, of the motions to compel filed in this proceeding and referenced by the OCC, not one was filed by the OCC.

adopted, would not yield any efficiencies and instead would reflect a departure of Commission practice.

One of the motions for which the OCC presumably seeks pre-hearing disposition concerns the confidential deposition transcript of Marion Byndon, Duke Energy Ohio's corporate designate. It is likely, however, that this transcript will not be offered into evidence in this proceeding as Complainant has issued a subpoena to Ms. Byndon.⁴ As such, there is no reason for the Attorney Examiner to spend time on a motion that is probably moot.

As for the one piece of direct testimony offered by Duke Energy Ohio that does contain confidential information, it is noted that such references are brief and their classification as confidential can readily be dispensed with, during the hearing but prior to the time such testimony is offered into the record. And this practice of addressing motions for protective order during the hearing is consistent with that used in other contested Commission proceedings, including those that concern a wealth of confidential documents and/or testimony.⁵

There is No Ambiguity with Regard to the Deposition of James Williams.

The third and final basis for the OCC's motion is particularly egregious and quite frankly, a bit offensive. On December 14, 2015, Duke Energy Ohio properly noticed the deposition of the OCC witness(es) in this proceeding and also requested documents in the possession of the OCC and its witness(es).⁶ Through agreement of the parties, the deposition was rescheduled to January 8, 2016. When the OCC notified Duke Energy Ohio on January 6, 2016, that Mr. Williams' mother was ill and in hospice, the Company agreed not to go forward with his deposition on the

⁴ See, Complainant's Request to Issue Subpoena, December 31, 2015.

⁵ See, generally, *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO.

⁶ See, Duke Energy Ohio, Inc.'s Notice of Deposition Duces Tecum of the Office of the Ohio Consumers' Counsel, filed December 14, 2015.

noticed date⁷ so that Mr. Williams could attend to his personal matters. The following day, the OCC notified Duke Energy Ohio that Mr. Williams' mother had passed away and that he would be out of the office through Wednesday, January 13, the full time allotted under the applicable bereavement policy for state employees. When the Company's attorney Amy Spiller spoke with the OCC's attorney Terry Etter, Mr. Etter expressly advised Ms. Spiller that the OCC would not seek a continuance based on Mr. Williams' mother's situation.⁸ Subsequently, out of respect for Mr. Williams and despite having noticed his deposition in a timely manner, Duke Energy Ohio advised the OCC that it would forego deposing him. In other words, in light of Mr. Williams' circumstances, the Company agreed to proceed with the January 14 hearing without having deposed the OCC's expert.

Now, as a true example of "no good deed goes unpunished," the OCC is using Duke Energy Ohio's graciousness as a means to seek a continuance. There is nothing "unclear" in Duke Energy Ohio's agreement conveyed over a weekend not to depose the OCC's expert. That the noticed deposition date has come and gone does not change that fact. Further, if something was somehow unclear, all one of the OCC's two attorneys had to do was pick up the phone and call one of Duke Energy Ohio's two attorneys on this case, and the non-existent confusion would be put to rest. Alternatively, one of the attorneys could have sent an email to all counsel of record, as counsel have done on numerous occasions in this case. Instead, the OCC reneged on its attorney's commitment not to seek a continuance and filed that very motion.

A "Modest" Continuance Unreasonably Prejudices Duke Energy Ohio.

The OCC fails to recognize that a "modest continuance" to February 1, 2016, is not so easy. Duke Energy Ohio has been working diligently to prepare for hearing on January 14-15 per

⁷ Actually, the original, noticed date for the OCC's witnesses was January 5, but the parties later agreed to conduct Mr. Williams' deposition on January 8.

⁸ See Affidavit of Amy B. Spiller, attached hereto as Attachment A.

the Commission's Entry. Its four witnesses and two counsel have arranged their schedules accordingly and planned to travel from Cincinnati and Charlotte to Columbus for the hearing less than three days from now. Moreover, one of those witnesses (Marion Byndon) has been subpoenaed by Complainant, which subpoena has not been withdrawn. In contrast to Duke Energy Ohio, the OCC has one staff witness who works for the OCC in Columbus, and Complainant intends to provide testimony from himself and Gail Lykins, his wife and original, named complainant. Therefore, while a continuance may not impact the OCC or Complainant, it is a major inconvenience for Duke Energy Ohio's witnesses and its attorneys, both of whom have scheduled absences (including international travel) beginning February 11. Accordingly, unless the hearing goes forward on January 14 as planned, a so-called "modest continuance" to February 1 will not be feasible for purposes of allowing the parties to prepare and file post-hearing argument in a timely manner.

Duke Energy Ohio notes that it – the named respondent in this proceeding – has a right to proceed to hearing in a timely fashion. Since the filing of this complaint eleven months ago, the parties have engaged in substantial discovery and, through that process, it is readily apparent that the Complainant will not be able to demonstrate that the Company violated a Commission regulation or order. The Company should not be prejudiced by a delay because an intervening party's counsel may be involved in multiple proceedings⁹ or because of an unsubstantiated motion to continue.

⁹ See, *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Entry, at pg. 4 (December 9, 2015)(setting hearing date of January 14, 2016). See also, *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Purchase Power Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Transcript of Proceedings, Vol. XXII (Setting deadline of February 1, 2016, for initial post-hearing briefs).

WHEREFORE, Respondent Duke Energy Ohio, Inc., requests that the Commission deny the Motion for a Continuance of the Hearing and Motion for a Discovery Conference; enter an appropriate protective order under O.A.C. 4901-1-23(D) providing that the OCC is not entitled to any additional information and documents beyond that already provided by Duke Energy Ohio, Inc.

Respectfully submitted,

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Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email on this 12th day of January, 2015, upon the following counsel of record:

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/s/ Robert A. McMahon

State of Ohio }
 } SS
County of Hamilton }

AFFIDAVIT OF AMY B. SPILLER

Comes now Affiant, Amy B. Spiller, after having been duly cautioned and sworn, and states as follows.

1. I am an attorney of record for Duke Energy Ohio, Inc., relative to the captioned matter.
2. On December 14, 2015, I caused to be filed with the Commission a notice of deposition *duces tecum*, directed to the Office of Consumers' Counsel's (OCC) witnesses in this proceeding. Said deposition was to proceed on January 5, 2016.
3. On December 29, 2015, I communicated with OCC counsel Terry Etter for purposes of confirming the scheduled deposition date of January 5, 2016. Mr. Etter informed me that Mr. Williams had a conflict due to his involvement in another proceeding before the Commission and proposed the deposition proceed on January 8. The date was agreeable and, as such, an amended notice of deposition issued.
4. On January 6, 2016, Mr. Etter informed me of the unfortunate circumstances involving OCC witness Williams and indicated that his deposition could not proceed on January 8. I specifically asked Mr. Etter at that time if the OCC was intending to seek a continuance of the January 14 hearing and Mr. Etter answered in the negative.
5. On January 7, 2016, Mr. Etter shared that Mr. Williams' mother had passed and that he would be on bereavement leave through January 13. Mr. Etter further relayed that Mr. Williams would not be available for deposition until January 14.

6. On January 9, 2016, I informed counsel that we would forego deposing Mr. Williams in respect of the January 14 hearing date and his bereavement leave.
7. At no time after the January 9, 2016, communication did OCC counsel contact me for purposes of clarifying any uncertainty with regard to my intentions.

FURTHER AFFIANT SAYETH NAUGHT.


Amy B. Spiller

Sworn to and subscribed before me, a Notary Public for the state of Ohio, on this the 12th day of January 2016.


Notary Public

ADELE M. FRISCH
Notary Public, State of Ohio
My Commission Expires 01-05-2019

My commission expires: 1/5/2019

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1/12/2016 8:40:22 AM

in

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

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum in Opposition to Motion for Continuance of the Hearing and Motion for a Discovery Conference Filed by the Office of the Ohio Consumers' Counsel electronically filed by Ms. E Minna Rolfes on behalf of Amy B. Spiller and McMahon, Robert A. and Duke Energy Ohio, Inc.