

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Citizens)	
Against Clear Cutting, <i>et al.</i> ,)	
)	
Complainants,)	
v.)	Case No. 17-2344-EL-CSS
)	
Duke Energy Ohio, Inc.,)	
)	
Respondent.)	

**DUKE ENERGY OHIO, INC.'S MOTION TO COMPEL COMPLAINANTS'
DEPOSITIONS AND TO CONTINUE HEARING,
AND REQUEST FOR EXPEDITED RULING
AFFIDAVIT OF ROBERT A. MCMAHON ATTACHED**

Pursuant to Rules 4901-1-13 and 4901-1-23(A)(3), Ohio Administrative Code (O.A.C.), Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) respectfully moves the Public Utilities Commission of Ohio (Commission) for an order compelling Complainants to appear for their depositions after March 20, 2018, and continuing the hearing scheduled to start on April 17, 2018, pending the completion of Complainants' depositions. In the alternative, every Complainant who refuses to be deposed should be dismissed from this case with prejudice.

Duke Energy Ohio further seeks an expedited ruling on this motion under O.A.C. 4901-1-12(C) because the parties need adequate time to complete discovery and prepare for hearing.

Respectfully submitted,

/s/ Elizabeth H. Watts

Rocco O. D'Ascenzo (0077651)

Deputy General Counsel

Elizabeth H. Watts (0031092)

Associate General Counsel

DUKE ENERGY OHIO, INC.

139 East Fourth Street

1303-Main

P.O. Box 960

Cincinnati, Ohio 45202

Telephone: (513) 287-4320

Rocco.D'Ascenzo@duke-energy.com

Elizabeth.Watts@duke-energy.com

Robert A. McMahon (0064319)

Eberly McMahon Copetas LLC

2321 Kemper Lane, Suite 100

Cincinnati, Ohio 45206

(513) 533-3441 (telephone)

(513) 533-3554 (fax)

bcmahon@emclawyers.com

Attorneys for Duke Energy Ohio, Inc.

MEMORANDUM IN SUPPORT

I. Introduction

On January 29, 2018, Duke Energy Ohio properly noticed the depositions of every Complainant in this case in order to ascertain the facts and evidence known to the Complainants, fully investigate all of their claims, and fully prepare for the hearing.¹ Thereafter, the Company tried in vain to schedule these numerous depositions in an expedited and efficient manner without adequate cooperation from Complainants and their counsel. Thus far Duke Energy Ohio has been able to depose a total of only fourteen (14) of the Complainants, with seven depositions taking place on both February 19 and March 2. After depositing a fraction of the Complainants, Complainants and their counsel have chosen to thwart Duke Energy Ohio's efforts to investigate their claims by simply refusing to have any other Complainants appear for a deposition. In short, Complainants are under the mistaken belief that they have the right to dictate Duke Energy Ohio's defense strategy, choose the witnesses who will testify for both sides at the hearing, and otherwise decide which of the Complainants may be deposed by the Company.

The Commission should not tolerate Complainants' unilateral attempt to limit Duke Energy Ohio's discovery. Nor should the Commission allow Complainants to blatantly disregard the Rules governing these proceedings, as well as Duke Energy Ohio's right to defend claims asserted by each and every Complainant in this case. Accordingly, the Commission must order all Complainants yet to be deposed to appear for their depositions without further delay. In addition, with the hearing currently scheduled to commence on April 17, 2018, Duke Energy Ohio requests a continuance and an expedited ruling on this motion because Complainants' recalcitrance will prevent the Company from being able to complete discovery and properly and

¹ Duke Energy Ohio filed the Notices of Deposition of each Complainant in the docket on January 29, 2018.

fully prepare for a hearing in only five weeks. Finally, if Complainants refuse to sit for their deposition, the Commission should promptly dismiss them and their claims from this case, with prejudice.

II. Discussion

A. Duke Energy Ohio has exhausted its efforts to resolve its discovery disputes with Complainants.

The facts surrounding the Company's discovery dispute with Complainants are set forth in the docket and attached Affidavit of Robert A. McMahon.

By Entry dated March 8, 2018, the Commission dismissed twenty-five Complainants from this case because those Complainants do not own property situated along Duke Energy Ohio's high-voltage transmission lines at issue in this case and the corresponding right of way below and near those transmission lines. As a result of that Entry, the remaining Complainants include the Symmes Township Board of Trustees and the owners of sixty-seven (67) properties along the Company's transmission lines, either individually or jointly as co-owners of their respective properties.

To date Duke Energy Ohio has deposed 13 of the remaining Complainants in this case.² The Company is scheduled to depose six additional Complainants on March 20. There is no dispute that Duke Energy Ohio has noticed the depositions of all Complainants, and that Complainants did not object to those deposition notices for more than one month. Nonetheless, fifty-five of the Complainants simply refuse to be deposed even though every one of them has asserted claims against the Company.

Duke Energy Ohio has exhausted its efforts to resolve this dispute. The parties' attorneys discussed the disputed issues following the second round of depositions on March 2, 2018, and

² The fourteenth deponent (Complainant Mark Thompson) was dismissed by the Entry dated March 8, 2018, because his property is not on the Company's transmission lines and right of way.

also have engaged in related email communications. While the parties were able to resolve the dispute regarding the telephonic deposition of Complainant Fred Vonderhaar, Complainants steadfastly refuse to make any additional Complainants available for deposition. To be clear, Duke Energy Ohio does not want to depose both people (whether husband and wife or otherwise) who jointly own their residential property. But the Company must depose every person who has asserted a claim against the Company in this case in order to understand their respective claims and to properly prepare for hearing.

As the parties have reached an impasse, Duke Energy Ohio is forced to seek the Commission's intervention to protect its rights and interests given Complainants' refusal to comply with the discovery rules.

B. Complainants' refusal to sit for their depositions violates the law and Duke Energy Ohio's rights as a party in this case.

This motion is straight-forward: Duke Energy Ohio must be allowed to depose every Complainant who has asserted a claim against the Company. It is that simple. Pursuant to Ohio Admin. Code 4901-1-16(A), the purpose of discovery is to "facilitate thorough and adequate preparation for participation in Commission proceedings." Complainants are not mere potential witnesses in this proceeding. Rather each Complainant bears a burden of proof and must be willing to prosecute the complaint, including participation in normal discovery proceedings.³

Complainants do not have the right to dictate Duke Energy Ohio's defense strategy, choose the witnesses who will testify for the Company, or otherwise decide which of the Complainants may be deposed by the Company. Duke Energy Ohio certainly did not choose to have more than 80 property owners and, in many instances, their spouses join in the Second Amended Complaint. Complainants and their attorneys chose to lump all of their claims

³ *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666, (1966).

together by filing the Second Amended Complaint against Duke Energy Ohio. As such, they must be willing to subject themselves to discovery so that the Company may fully investigate their claims, understand what they are asserting against the Company, and fully prepare for the hearing. Failure to appear for deposition must subject such Complainants to having their claims dismissed for failure to prosecute.⁴

Complainants and their counsel seem to think (in error) that this action is akin to a class action in state court. As such, Complainants' attorneys mistakenly believe that they may decide which of the Complainants may act as purported "class representatives" for purposes of discovery, thereby limiting Duke Energy Ohio's right to depose other Complainants. Complainants misunderstand the law in this regard. As the Commission has recognized, "Commission practice does not provide for class action complainants. In the event that a Complainant is successful, the Commission would apply its findings on a prospective basis to each customer similarly situated to the Complainant."⁵

Having chosen to proceed with a Second Amended Complaint involving numerous Complainants, Duke Energy Ohio has the right to depose every person who has asserted a claim against the Company regardless of whether Complainants intend to call that person at the hearing. After all, one or more of the Complainants may have knowledge and information relevant or useful to Duke Energy Ohio's defense of the Second Amended Complaint. But the Company would not be able to ascertain that relevant and potentially useful information until deposing every Complainant in this case.

⁴ See, *In the Matter of Shawn Anderson v. Duke Energy Ohio, Inc.*, Case No.16-1564-EL-CSS, Entry, July 26, 2017.

⁵ See, *Weiss v. Cleveland Electric Illuminating Company*, Case No. 97-876-EL-CSS, (November 6, 1997, Entry); see also, *In the Matter of the Complaint of the City of Solon, Ohio on behalf of itself, and Certain Named Residential and Commercial Residents of the City of Solon v. The Cleveland Electric Illuminating Company*, Case No. 03-1407-EL-CSS (December 17, 2003, Entry).

Contrary to Complainants' false accusations, Duke Energy Ohio does not seek to depose Complainants "to harass Complainants [or] drain their resources," as their attorney has claimed. Nor is the Company being unreasonable in seeking to depose Complainants. Again, Complainants and their attorneys, not Duke Energy Ohio, chose to file the Second Amended Complaint and join all of these Complainants as parties to this action. Many of the Complainants had individual cases that were dismissed when they joined this case. While Duke Energy Ohio certainly would agree that there is no need to keep sixty-eight Complainants in this case, as the Company previously explained at the initial pre-hearing conference and separately to Complainants' counsel, that decision has been made and sixty-eight Complainants remain in this case. Duke Energy Ohio undoubtedly must be entitled to conduct discovery regarding their claims in accordance with the rules, which necessarily includes deposing every Complainant who has asserted a claim against the Company and intends to take their claims to hearing. The Company takes their accusations very seriously and, therefore, must be allowed to develop its defense without further interference by Complainants and their counsel.

- C. The Commission should continue the hearing because Complainants' refusal to schedule and appear for depositions is interfering with the Company's ability to complete discovery and prepare for the hearing scheduled to start on April 17, 2018.

This matter is scheduled for hearing in only 5 weeks. In light of Complainants' unreasonable posture toward discovery, it has become clear that the existing hearing schedule is no longer tenable. Duke Energy Ohio has been trying to depose Complainants since the end of January, but to no avail. As of March 13th, the parties have completed a mere two days of depositions of Complainants, with the third (and final, per Complainants' counsel) day scheduled for March 20.

The time remaining for Duke Energy Ohio to get ready for hearing is wholly insufficient. For the reasons previously stated, Duke Energy Ohio must be allowed to depose all Complainants who have asserted claims against the Company, complete discovery, and fully prepare its defense for the hearing. Duke Energy Ohio respectfully requests that the Commission direct Complainants to appear for deposition and continue the hearing accordingly, or to have their claims dismissed.

Respectfully submitted,

/s/ Elizabeth H. Watts

Rocco O. D'Ascenzo (0077651)

Deputy General Counsel

Elizabeth H. Watts (0031092)

Associate General Counsel

DUKE ENERGY OHIO, INC.

139 East Fourth Street

1303-Main

P.O. Box 960

Cincinnati, Ohio 45202

Telephone: (513) 287-4320

Rocco.D'Ascenzo@duke-energy.com

Elizabeth.Watts@duke-energy.com

Robert A. McMahon (0064319)

Eberly McMahon Copetas LLC

2321 Kemper Lane, Suite 100

Cincinnati, Ohio 45206

(513) 533-3441 (telephone)

(513) 533-3554 (fax)

bcmahon@emclawyers.com

Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was served on the following parties of record by electronic service on this 13th day of March, 2018.

Kimberly W. Bojko
Stephen E. Dutton
Brian W. Dressel
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
bojko@carpenterlipps.com
Dutton@carpenterlipps.com
dressel@carpenterlipps.com

Counsel for Complainants

Terry L. Etter
Zachary E. Woltz
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4313
terry.etter@occ.ohio.gov
Zachary.woltz@occ.ohio.gov

**Counsel for Office of the Ohio Consumers'
Counsel**

/s/ Elizabeth H. Watts
Elizabeth H. Watts

THE PUBLIC UTILITIES COMMISSION OF OHIO

**AFFIDAVIT OF ROBERT A. MCMAHON IN SUPPORT OF
DUKE ENERGY OHIO, INC.'S MOTION TO COMPEL**

3. Thereafter, I worked with Complainants' attorneys in an effort to schedule depositions. After multiple communications we finally were able to schedule the depositions of 7 Complainants on February 19, 2018.

4. By email on February 6th I provided 10 additional dates for Duke Energy Ohio to depose other Complainants, and tried two days later to confirm depositions for those dates. True and accurate copies of counsels' email exchange on February 6 and 8 are attached as Exhibit A.

5. On February 15th I emailed opposing counsel yet again because they had not responded to the multiple dates that we had offered for Complainants' depositions. The following day Complainants' attorney finally responded and confirmed only March 2nd as a date for Duke Energy Ohio to depose 7 additional Complainants. True and copies of my email exchange with Complainants' attorneys are attached as Exhibit B.

6. By email on March 1st Complainants offered one additional date (Saturday, March 10) for Duke Energy Ohio to depose 3-5 Complainants, objected to Duke Energy Ohio deposing any additional Complainants thereafter, and requested (for the first time) that the Company withdraw its remaining notices of deposition. A copy of counsel's email is attached as Exhibit C.


7. On March 2nd I personally spoke with Complainants' attorney Kimberly Bojko about the deposition schedule. I explained that Duke Energy Ohio objected to conducting depositions on a Saturday because it was not necessary. I further explained to Ms. Bojko that Duke Energy Ohio insisted on deposing every Complainant who has asserted claims against the Company in this case and that Complainants may not limit the Company's discovery or otherwise unilaterally decide which of the Complainants may testify at the hearing as part of the Company's defense of these claims. Ms. Bojko and I could not resolve the dispute about the depositions, but I agreed to get back to her about Mr. Vonderhaar's deposition.

8. By email on March 7th I notified Complainant's counsel that Duke Energy Ohio was willing to depose Complainant Fred Vonderhaar by telephone because his unique work situation prevents him from appearing for a deposition in Greater Cincinnati during weekdays

through the end of April. I further asked Complainants to confirm by close of business on March 8th that they would not make any additional Complainants available for deposition after March 20. A true and accurate copy of my email is attached as Exhibit D.

9. As of March 13th Complainants' attorneys have not responded or withdrawn their previously stated refusal that they will not produce any of the remaining Complainants for deposition after March 20.

FURTHER AFFIANT SAYETH NAUGHT.



Robert A. McMahon

Sworn to and subscribed to before me
this 13th day of March, 2016:



Notary Public

My commission expires: 7/17/2021



WENDY J. DORN
Notary Public, State of Ohio
My Commission Expires 07-17-2021

Bob McMahon

From: Bob McMahon
Sent: Thursday, February 08, 2018 8:10 AM
To: 'Brian Dressel'; Kimberly W. Bojko
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Brian,

We are confirmed for those 7 depositions in my office starting at 9 am on February 19. I do not believe that anyone else from Duke Energy Ohio will attend those depositions, but I will confirm and get back to you.

Are you working on the other offered dates? I know that process can take some time, but we need to start locking in deponents, dates and times ASAP.

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

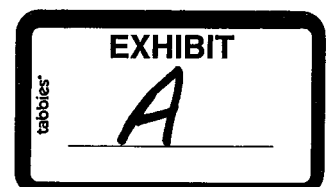
From: Brian Dressel [mailto:dressel@CarpenterLipps.com]
Sent: Wednesday, February 07, 2018 5:22 PM
To: Bob McMahon <bmcMahon@emclawyers.com>; Kimberly W. Bojko <bojko@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Bob,

We have 7 Complainants to be deposed on 2/19/2018. These seven are: Kim Wiethorn, Olga Staios, Barbara Casper, Jonathan Mackey, Mike Priessler, Paul Smith, and Melisa Kuhne. We will provide a schedule as to the order of the depositions prior to the 19th (i.e. who will go first, second, etc.).

You mentioned that your office has limited space. How many people do you anticipate having present on behalf of Duke?

Thank you,



Brian W. Dressel
CARPENTER LIPPS & LELAND LLP
Columbus ▪ New York ▪ Chicago
280 Plaza, Suite 1300
280 N. High Street
Columbus, OH 43215
(614) 365-4131
dressel@carpenterlipps.com

CONFIDENTIALITY NOTICE

The sender intends this message to be used exclusively by the addressee. This message may contain information that is privileged, confidential and exempt from disclosure under applicable law. Unauthorized disclosure or use of this information is strictly prohibited. If you received this communication in error please dispose of the message and reply to or contact Brian Dressel at (614) 365-4131.

From: Bob McMahon [<mailto:bmcmahon@emclawyers.com>]
Sent: Tuesday, February 06, 2018 11:40 AM
To: Kimberly W. Bojko
Cc: Brian Dressel; Watts, Elizabeth H; Olive, Emily A.
Subject: FW: 17-2344-EL-CSS Depositions

Kim,

I'm following up on your email to Elizabeth (below) and our discussions at the Commission.

I can depose complainants on February 19, but we need to get more than four done that day. Please identify which of the four complainants listed in your email will be available in person for their deposition on 2/19/18, and also identify 2-4 other complainants for deposition that day.

I suggest that we start at 9 am in my office. The depositions must take place in person, as we do not agree to conduct these depositions by telephone. I can host them at my office but we only have room for 6 people, including the court reporter, at any given time.

I also can be available to depose complainants on the following dates: February 21, 22, 23, 26, 28, and March 2, 5, 6, 8, 9. Please reach out to your clients ASAP and let's get these depositions lined up. As you can see, we are providing a lot of dates and flexibility to accommodate all of the complainants. While I understand that some of your clients may not want to take off work to be deposed, they voluntarily chose to file complaints against Duke Energy Ohio, thereby entitling my client to conduct discovery about their claims. We can work with them to a certain extent (hence providing 10 dates in addition to your suggested date of 2/19/18) but they need to work with us, too.

I look forward to hearing from you at the earliest convenience.

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

From: Kimberly W. Bojko [<mailto:bojko@CarpenterLipps.com>]
Sent: Monday, February 05, 2018 8:59 AM
To: Watts, Elizabeth H
Cc: Brian Dressel
Subject: 17-2344-EL-CSS Depositions

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

Liz,

Per our discussion and your request last week, we have selected 6 complainants for the initial round of depositions. Those complainants are: Kim Wiethorn, Joe Grossi, Jonathan Mackey, Fred Vonderhaar, Barbara Casper and Marc Wahlquist. Four of these complainants are available either in person or by phone on February 19, 2018 to be deposed. We are working on finding a time that is open for the other two.

Please let us know if this date works for you.

Thank you,
Kim

Kimberly W. Bojko
CARPENTER LIPPS & LELAND LLP
Columbus ▪ New York ▪ Chicago
280 Plaza, Suite 1300
280 N. High Street
Columbus, OH 43215
(614) 365-4124
bojko@carpenterlipps.com

CONFIDENTIALITY NOTICE

The sender intends this message to be used exclusively by the addressee. This message may contain information that is privileged, confidential and exempt from disclosure under applicable law. Unauthorized disclosure or use of this information is strictly prohibited. If you received this communication in error please dispose of the message and reply to or contact Kim Bojko at (614) 365-4124.

Bob McMahon

From: Brian Dressel <dressel@CarpenterLipps.com>
Sent: Friday, February 16, 2018 6:14 PM
To: Bob McMahon; Kimberly W. Bojko
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: 17-2344-EL-CSS Depositions

Bob,

After consulting with the Complainants, we agree to another date for depositions of March 2, 2018. You previously stated that this date is open for you. We will provide a schedule for the individual witnesses after coordinating schedules.

Have a nice weekend,

Brian W. Dressel
CARPENTER LIPPS & LELAND LLP
Columbus ▪ New York ▪ Chicago
280 Plaza, Suite 1300
280 N. High Street
Columbus, OH 43215
(614) 365-4131
dressel@carpenterlipps.com

CONFIDENTIALITY NOTICE

The sender intends this message to be used exclusively by the addressee. This message may contain information that is privileged, confidential and exempt from disclosure under applicable law. Unauthorized disclosure or use of this information is strictly prohibited. If you received this communication in error please dispose of the message and reply to or contact Brian Dressel at (614) 365-4131.

From: Bob McMahon [mailto:bmcMahon@emclawyers.com]
Sent: Thursday, February 15, 2018 11:36 AM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Thank you

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



From: Kimberly W. Bojko [<mailto:bojko@CarpenterLipps.com>]
Sent: Thursday, February 15, 2018 11:34 AM
To: Bob McMahon <bmcMahon@emclawyers.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: RE: 17-2344-EL-CSS Depositions

Yes, we are working on it and intended to get you a list today. As you can imagine, scheduling has been a bit difficult but I will assure you that we have no interest in delaying the case.

Kimberly W. Bojko
CARPENTER LIPPS & LELAND LLP
Columbus ▪ New York ▪ Chicago
280 Plaza, Suite 1300
280 N. High Street
Columbus, OH 43215
(614) 365-4124
bojko@carpenterlipps.com

CONFIDENTIALITY NOTICE

The sender intends this message to be used exclusively by the addressee. This message may contain information that is privileged, confidential and exempt from disclosure under applicable law. Unauthorized disclosure or use of this information is strictly prohibited. If you received this communication in error please dispose of the message and reply to or contact Kim Bojko at (614) 365-4124.

From: Bob McMahon [<mailto:bmcMahon@emclawyers.com>]
Sent: Thursday, February 15, 2018 10:41 AM
To: Kimberly W. Bojko <bojko@CarpenterLipps.com>; Brian Dressel <dressel@CarpenterLipps.com>
Cc: Watts, Elizabeth H <Elizabeth.Watts@duke-energy.com>; Olive, Emily A. <Emily.Olive@duke-energy.com>
Subject: FW: 17-2344-EL-CSS Depositions

Kim/Brian,

A week has gone by and you have not gotten back to us with dates for the depositions of other Complainants. If your clients do not want to prosecute their claims, which necessarily requires them to participate in discovery, then I suggest that you promptly dismiss them from the case. If not, we need dates for their depositions ASAP. We cannot wait any longer, nor will we allow Complainants to drag this process out in the hopes of justifying another continuance. If I don't hear from you by tomorrow with a list of some deponents and available dates, we will re-notice depositions for dates, times and locations convenient to us. I do not expect dates for everyone by tomorrow but we have to keep this process moving forward. Your immediate attention to this matter is both appreciated and anticipated.

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

Bob McMahon

From: Kimberly W. Bojko <bojko@CarpenterLipps.com>
Sent: Thursday, March 01, 2018 6:41 PM
To: Bob McMahon; Terry.Etter@occ.ohio.gov
Cc: Watts, Elizabeth H; Olive, Emily A.; Brian Dressel
Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Bob,

I am writing in response to a few of your emails and issues that you have raised in this case.

First, for tomorrow's depositions, we have a minor change in scheduling due to a work emergency of one complainant. We would like to switch the order of 2 depositions. Both Complainants have agreed to the switch. That change is John Gump would move up and be deposed from 4-5 pm and Marc Wahlquist would move back and be deposed from 5-6 pm. We hope that you are amenable to this minor change.

We have worked diligently to schedule the numerous depositions that you have requested and do not appreciate your comments otherwise. It is very difficult to work around the various schedules and conflicts.

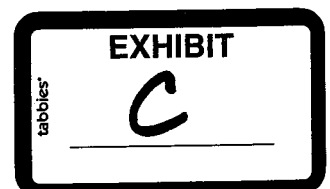
To that end, we have an additional date for depositions. Given that Duke has refused to conduct certain depositions by phone, we are proposing a date of Saturday, March 10, beginning at 11:00 a.m., to depose certain Complainants that cannot appear during the work day due to already scheduled business travel out of state and other work commitments. On that date, we would be prepared to proceed with the depositions of Fred Vonderhaar, Randall Fick, and Jim Wulker. Those Complainants have been confirmed for March 10th. We are also making efforts to coordinate with Amanda Sachs, who was another Complainant you had named in earlier correspondence, and Nicole Menkhaus, who we believe may be available that day as well. We hope to confirm these two individuals soon.

With that said, after the completion of the depositions on Saturday, March 10, 2018, that should bring us to a total of 19 depositions, deposing 19 Complainants. At this time, we do not agree to conduct further depositions beyond Saturday, March 10th. The Commission's rules limit discovery to that which is admissible at hearing or is reasonably calculated to lead to the discovery of admissible evidence (Ohio Adm. Code 4901-1-16(B)). While we have not made final determinations as to which Complainants will testify at hearing, by the conclusion of the depositions that we have agreed to, we can state that Duke will have deposed all Complainants currently under consideration. If that assessment changes unexpectedly, we would of course make any additional Complainants that will testify and have not been deposed available for depositions. Given those facts, proceeding with the depositions of additional Complainants serves no other purpose but to harass Complainants and drain their resources, which is not a permissible use of the discovery process. We are, therefore, requesting that you agree to withdraw your remaining notices of depositions.

Finally, we also do not agree with your response to Mr. Etter regarding the depositions of Duke's employees. The notices were proper under the Commission's rules. Additionally, parties have a right to notice depositions just as you did. There is no reason that those depositions cannot be scheduled concurrently and in coordination with the Complainants' depositions.

Thank you,

Kim Bojko



Bob McMahon

From: Bob McMahon
Sent: Wednesday, March 07, 2018 8:16 PM
To: Brian Dressel; Kimberly W. Bojko; Terry.Etter@occ.ohio.gov
Cc: Watts, Elizabeth H; Olive, Emily A.
Subject: RE: Duke 17-2344-EL-CSS - OCC's Notices to Take Depositions

Brian/Kim,

I was meaning to email you earlier today but did not have a chance before having to leave for a day-long meeting, so thanks for following up and having a date available.

Regarding Fred Vonderhaar: based on your representations that Mr. Vonderhaar is on a long-term project out of state through the end of April and is not present in Ohio during the Mon-Friday work days, we are willing to make an exception for him and conduct his deposition telephonically. We need to know where Mr. Vonderhaar is working so that we can make arrangements for a court reporter, conference room, etc. in his location. As for the date of his deposition and the other depositions, we are willing to do all depositions on March 20, assuming we can make arrangements wherever Mr. Vonderhaar is located. While I don't think it is appropriate to delay the depositions another two weeks, we are not inclined to argue about that issue.

As for the other Complainants, you previously indicated by email and when we spoke on Friday that you will not make any other Complainants available for deposition even though Duke Energy Ohio previously noticed all Complainants' depositions without objection. While you may want to characterize this joint complaint as being similar to a class action, "Commission practice does not provide for class action complainants. In the event that a Complainant is successful, the Commission would apply its findings on a prospective basis to each customer similarly situated to the Complainant." *Weiss v. Cleveland Electric Illuminating Company*, Case No. 97-876-EL-CSS, (November 6, 1997, Entry); see also, *In the Matter of the Complaint of the City of Solon, Ohio on behalf of itself, and Certain Named Residential and Commercial Residents of the City of Solon v. The Cleveland Electric Illuminating Company*, Case No. 03-1407-EL-CSS (December 17, 2003, Entry). There simply is no need to keep more than 85 Complainants in this case, as we've explained in the past. But, if you choose to proceed with all named Complainants, Duke Energy Ohio has the right to depose every person who has asserted a claim against the company regardless of whether you intend to call them in your case. If you hold firm in your refusal to make all Complainants available for deposition, Duke Energy Ohio will move to dismiss them from this case. Therefore, please confirm in writing by close of business tomorrow whether you will produce all remaining Complainants for deposition.

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

