

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

In the Matter of the Commission's Review and)	
Adjustment of the Fuel and Purchased Power and)	
System Reliability Tracker Components of Duke)	Case No. 07-723-EL-UNC
Energy Ohio, Inc. and Related Matters.)	
)	
In the Matter of the Application of Duke Energy)	
Ohio, Inc. to Adjust and Set the Annually Adjusted)	
Component of its Market Based Standard Service)	Case No. 07-973-EL-UNC
Offer.)	
)	
In the Matter of the Application of Duke Energy)	
Ohio, Inc. to Adjust and Set its 2008 System)	Case No. 07-975-EL-UNC
Reliability Tracker.)	

**MOTION FOR A CONTINUANCE OF THE HEARING SCHEDULE AND
MEMORANDUM CONTRA MOTION FOR PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers Counsel ("OCC") moves the Public Utilities Commission of Ohio ("Commission" or "PUCO") to grant a continuance of the hearing schedule, pursuant to Ohio Adm. Code 4901-1-13(A).¹ OCC moves the Commission for a two-week continuance of the hearing currently set for November 27, 2007,² whereby the hearing would commence on December 11, 2007.

OCC requests this continuance in order to afford a fair opportunity for it to advocate on behalf of all of Duke Energy of Ohio's ("Duke's") 607,000 residential consumers, all of whom are directly affected by issues related to an audit of Duke's Fuel

¹ Pursuant to Ohio Adm. Code 4901-1-17(A), the discovery deadline would move along with the continuance of the hearing.

² Entry at 1(November 7, 2007).

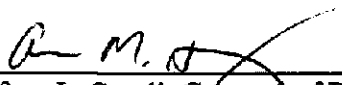
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and Purchased Power ("FPP") and System Reliability Tracker ("SRT") charges. This audit was initiated by the Commission on June 27, 2007, when the PUCO directed its staff ("Staff") to issue a request for proposal for conducting an audit of the FPP and SRT. These audits were authorized as part of Duke's rate stabilization plan ("RSP").³ The reasons for granting OCC's Motion for Continuance of the Hearing Schedule are further set forth in the attached Memorandum in Support.

OCC also submits its Memorandum Contra Duke Motion for Protective Order regarding a motion filed by Duke on October 31, 2007, for protection of information contained in the recently completed audit in the above-captioned case.⁴ Under the circumstances where OCC's discovery has been delayed and OCC has just today been provided the audit report, the ruling on the degree to which the contents of the audit report are withheld from the public should be deferred to the ruling on the merits of the case, after adequate time for review and presenting recommendations on the matter .

Respectfully submitted,

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³ Application at 4 (October 24, 2007).

⁴ The audit report was filed on November 1, 2007.

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**MEMORANDUM IN SUPPORT OF MOTION FOR CONTINUANCE
AND
MEMORANDUM CONTRA MOTION FOR PROTECTIVE ORDER**

I. INTRODUCTION

The timing of events in these cases demonstrates that the November 27, 2007 hearing date does not provide OCC with a real opportunity to participate in these cases. This timing is also the basis for OCC's request that the Commission defer ruling on Duke's Motion for Protective Order until its order on the merits of these cases.

For reasons beyond OCC's control, OCC has not been provided access to the audit report until today, November 8, 2007. On July 11, 2007, OCC moved to intervene in Case No. 07-723 and served its first set of discovery on Duke one week later on July 19, 2007. The responses to that discovery were due no later than August 13, 2007. OCC inquired about the responses on August 14, 2007, and Duke related that it would not

provide responses to OCC until a protective agreement could be finalized because the responses were considered confidential.

Between July 25, 2007 and August 30, 2007, OCC negotiated with Duke to finalize a protective agreement that would be acceptable to both parties. On August 30, 2007, OCC filed a Motion to Compel Discovery and argued that the Commission-ordered protective agreement in the Embarq case was “more than adequate for meeting the reasonable information protection needs of DE-Ohio” and to order Duke to sign the agreement with OCC.⁵ On September 17, 2007, Duke filed a Memorandum Contra OCC’s Motion to Compel. On September 27, 2007, OCC filed its Reply.

On October 29, 2007 the Commission issued an Entry recommending that Duke and OCC enter into a protective agreement that is consistent with the agreement entered into between OCC and the utility in the Embarq proceeding.⁶ The Commission also granted OCC’s Motion to Compel.⁷ The OCC appreciates the Attorney Examiner’s resolution of the impasse in this discovery dispute.

On November 1, 2007, the auditor submitted the audit report, but only a redacted audit report was made available to OCC because of the absence of a protective agreement between Duke and OCC. OCC transmitted a protective agreement to Duke—consistent with the Entry dated October 29, 2007 that addressed such a protective agreement—on October 30, 2007. Thereafter, Duke declined to immediately sign the protective agreement and sought substantive changes to the draft protective agreement (including changes that were never a part of such agreements between the parties). OCC informed

⁵ Motion to Compel at 15.

⁶ *In re Embarq Alt-Reg.*, Case No. 07-760-TP-BLS, Entry at 2 (August 10, 2007).

⁷ Entry at 4.

Duke that the time for such negotiations was past, and Duke finally executed protective agreements with the OCC on November 6, 2007. With a protective agreement in place, Duke provided a hard copy of the audit report to OCC on November 8, 2007.

On November 7, 2007 the Commission issued an Entry stating that a hearing in the above-captioned case would be held on November 27, 2007. In that Entry, the Commission ordered that the September 4, 2007 application that Duke filed to establish its 2008 annually adjusted components and its 2008 SRT would also be considered at the November 27, 2007 hearing.

II. ARGUMENT

A. The Hearing Should Be Continued Until December 11, 2007.

The November 7, 2007 hearing date does not provide OCC with a reasonable opportunity to participate in these cases. Duke delayed providing OCC with data responses in this case for **three months**⁸ by refusing to sign a protective agreement that was very similar to the protective agreement that it had agreed to in other cases and that the Commission ultimately found to be reasonable to protect Duke's information. Duke's failure to enter into a reasonable protective agreement has also delayed OCC access to the audit report for one week. Unless the Commission continues the case and provides for a later hearing date, OCC will be unable to review discovery responses and follow-up on the responses from Duke. Thus the Commission should continue the hearing from November 27, 2007 until December 11, 2007.

⁸ The data responses were due no later than August 13, 2007, and OCC has still not received responses as of the date of this filing.

Ohio Adm. Code 4901-1-13(A) provides for extensions and “continuances of public hearings” upon a showing of good cause. R.C. 4903.082 requires that “[a]ll parties and intervenors shall be granted ample rights of discovery.” That statute also requires the PUCO to regularly review its rules “to aid full and reasonable discovery by all parties.” With respect to the rules referenced in R.C. 4903.082, Ohio Adm. Code 4901-1-16(A) provides that the purpose of discovery rules in PUCO proceedings is to “facilitate thorough and adequate preparation for participation in commission proceedings.” The circumstances of this Motion for a Continuance show good cause based upon the delay that resulted from Duke’s unwillingness to enter into a reasonable protective agreement.

To assure that the rights under law and as granted by the Attorney Examiner for OCC and other intervening parties are exercisable—the right to conduct pre-hearing discovery, the right to present testimony, and the right to cross-examine witnesses called to support the Application—a continuance is needed.⁹ An additional two weeks, while still minimal for preparation in a case of this significance and complexity, would provide OCC critical additional time needed to advocate on behalf of more than 600,000 consumers. It is also possible that the continuance would afford time to pursue a potential negotiated resolution of the case.

Given the significance to the public and the complexity of the issues in this case, Ohio law cannot possibly be satisfied by the limited opportunity for discovery and preparation that remains prior to a hearing on November 27, 2007. As is typical for

⁹ The Supreme Court of Ohio recently noted OCC’s discovery rights that are set out in Ohio Adm. Code 4901-1-16. *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d. 300 at ¶ 83. The General Assembly codified discovery rights in R.C. 4903.082.

utility applications, most of the information to be discovered in this case is held by the utility, and it is the public that suffers detriment through lack of process.

Finally, the Commission has not yet issued an order resolving the issues that were presented in the previous SRT and FPP cases, 05-724-EL-UNC and 05-725-EL-UNC. Without the resolution of those cases, parties will continue to litigate issues that the Commission will resolve in those previous cases. Therefore, the Commission should not schedule a hearing before the PUCO issues decisions in the previous FPP and SRT cases.

B. A Ruling On The Motion For Protective Order Should Be Deferred To The Decision On The Merits Of These Cases.

The Commission should refrain from ruling upon Duke's Motion for Protective Order, filed on October 31, 2007, until it issues its final order on the merits in these cases. Under such circumstances, OCC will have a real opportunity to both review the audit report that is the subject of Duke's Motion for Protective Order and submit arguments regarding Duke's proposed treatment of confidentiality. Such a real opportunity is not presented if, due to Duke's delay in entering into a reasonable protective agreement, OCC receives the audit report on Thursday November 8 and must respond to Duke's Motion for Protective Order on Tuesday November 13 after the Veteran's Day holiday.¹⁰

Time is short for OCC to pursue its issues in these cases, even in the event that OCC's Motion for Continuance is granted. OCC must already address, during this same holiday period, issues presented by Duke's earlier motion for protection regarding unredacted documents that OCC anticipates will be provided now that a protective agreement has been executed. OCC's compressed time to understand the content of

¹⁰ OCC's counsel of record does expect to take case information with him while out of the State visiting family during the holiday weekend, for case preparation.

Duke's documents is better spent on their substance, including the important audit report, rather than on matters presented by Duke's choice of redactions.

OCC previously asked the Commission, regarding Duke's earlier motion to protect information contained in testimony, for a real opportunity to review the Company's unredacted documents in order to prepare an appropriate response to Duke's claims of confidentiality. OCC again asks the Commission hold that "it is reasonable that OCC be permitted to review the information in question in order to prepare a response to Duke's motion for a protective order."¹¹ These circumstances present OCC with a problem regarding the formulation of a substantive response to Duke's latest Motion for Protective Order even though OCC has a holiday weekend—instead of zero days in the case of Duke's earlier motion to protect information to respond to Duke's motion.

No harm is caused by a later determination on Duke's Motion for Protective Order, and the Commission will be better informed at the end of the hearing process, including briefing by the parties, regarding the merits of Duke's argument for protection of information. The Commission should not rule on Duke's Motion for Protective Order regarding information contained in the audit report until the PUCO issues an order on the merits of these cases.

III. CONCLUSION

These cases impact residential customers through, *inter alia*, proposed increases in generation charges. For the reasons stated above, the PUCO should grant OCC's Motion for Continuance under Ohio Adm. Code 4901-1-13(A) on behalf of the more than 600,000 residential customers who have an interest in the outcome of this case. As set

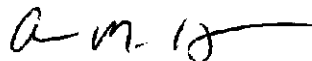
¹¹ Entry at 6, ¶(13) (October 29, 2007).

forth herein, OCC has shown good cause as required under R.C. 4901-1-13 for a two week continuance in this hearing schedule. OCC very much appreciates the Attorney Examiner's resolution of the impasse in this discovery dispute.

The Commission should defer ruling on Duke's Motion for Protective Order until it issues its final order on the merits in these cases. OCC has not had a fair opportunity to review the audit report that is the subject of Duke's Motion for Protective Order. No harm is caused by a later determination, and the Commission will be better informed at the end of the hearing process regarding the merits of Duke's argument for protection of information that is contained in the audit report.

Respectfully submitted,

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CONSUMERS' COUNSEL

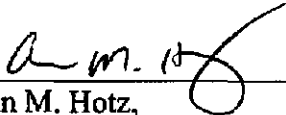


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's Motion to Intervene and Memorandum Contra Motion for Protective Order has been served upon the following parties via first class U.S. Mail, postage prepaid, this 8th day of November, 2007.


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